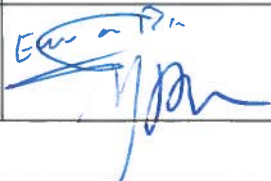

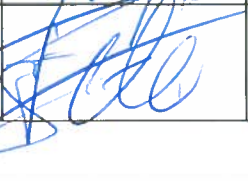
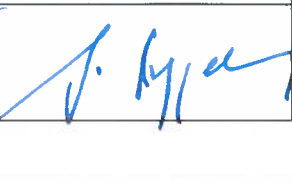


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Line to take

Clarification on recognition of vehicle authorisations issued by the Federal Office of Transport of Switzerland

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Document History

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1.0	17/10/2019	Initial version

The purpose of this document is to provide applicants and other external stakeholders of the vehicle authorisation business with information in regards to the specific topic referenced in the title. The clarifications contained in this document may be integrated in the next revision of the guidelines for the practical arrangements for the vehicle authorisation process, without prejudice of the formal process foreseen for updating the guideline.

The present document is a non-legally binding guidance of the European Union Agency for Railways. It 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. Description of the issue

The Agreement between the European Community and the Swiss Confederation on the carriage of goods and passengers by rail and road (hereinafter – LTA) refers to the Directive 2008/57/EC. The LTA also provides for mutual recognition of authorisations issued in accordance to the Directive 2008/57/EC.

The conjunction with the new legal framework set by the Directive (EU) 2016/797 creates legal complexity which needs to be addressed in order to define the possibility to accept vehicle type authorisations or vehicle authorisations for placing on the market issued by Swiss Federal Office of Transport (FOT) before 16 June 2020 and:

- for the Agency to deliver new authorisations and/or authorisations for an extension of area of use pursuant to Directive (EU) 2016/797 and Regulation (EU) 2018/545, and
- for the NSAs of EU Member States transposing the Directive (EU) 2016/797 on 16 June 2020 to deliver additional authorisations pursuant to Directive 2008/57/EC.

2. Line to take

The authorisations issued by FOT in accordance with Swiss national legislation before 16 June 2020 will be accepted by the Agency in the same way as the authorisations delivered by an EU Member State transposing the Directive (EU) 2016/797 on 16 June 2020 in order to issue authorisations for the following cases:

- an extension of area of use pursuant to Article 14(1)(c) of Regulation (EU) 2018/545;
- a combination of a new authorisation and an extension of the area of use pursuant to articles 14(1)(c), 14(1)(d) and 14(3) of Regulation (EU) 2018/545;
- a new authorisation (covering an area of use of several EU Member States) pursuant to Article 14(1)(d) of Regulation (EU) 2018/545, or
- an authorisation in conformity to an already authorised wagon type not limited to particular national networks, pursuant to Article 14(1)(e) of Regulation (EU) 2018/545, where the wagon type is conforming to point 7.1.2 of Annex to Regulation (EU) 321/2013 (as amended by Regulation (EU) 2019/776).

The Agency is currently not in the position to deliver authorisations with an area of use covering Switzerland. Similarly, between 16 June 2019 and 16 June 2020 the Agency is not in a position to deliver authorisations with an area of use covering EU Member States transposing the Directive (EU) 2016/797 on 16 June 2020. The only exception for this general principle is for vehicles pursuant to point 7.1.2 of Annex to Regulation (EU) 321/2013, for which the Agency can deliver an authorisation not limited to particular national networks.

Until 16 June 2020, EU Member States transposing the Directive (EU) 2016/797 on 16 June 2020 will be able to accept first authorisations issued by FOT and issue additional authorisations pursuant to articles 21 to 25 of Directive 2008/57/EC.

As a consequence:

1. For a vehicle or a vehicle type first authorised by FOT before June 2020 that needs to extend its area of use to EU Member States having transposed the Directive (EU) 2016/797 on 16 June 2019 and does not need any change in order to be compatible with the extended area of use, it is recommended that the applicant applies to the Agency for the authorisation case extension of the area of use.

The authorisation delivered by the Agency will make reference to the Swiss networks covered by the existing authorisation delivered by FOT and will cover the networks in the EU Member States of the extended area of use having transposed the Directive in June 2019.

If the vehicle or vehicle type has been already authorised in other EU Member States following the first authorisation granted by FOT, the authorisation delivered by the Agency will make reference to those Member States as well (based on the existing authorisations).

Between 16 June 2019 and 16 June 2020, the extension to EU Member States transposing (EU) 2016/797 on 16 June 2020 shall be managed between the applicant and the concerned NSAs for the area of use.

2. For a vehicle or a vehicle type first authorised by FOT before 16 June 2020 that needs to extend its area of use to EU Member States having transposed the Directive (EU) 2016/797 on 16 June 2019 that also needs to be changed in order to be compatible with the extended area of use, the applicant should:
 - 2.1. Apply to FOT for the authorisation in CH of the changed vehicle or vehicle type;
 - 2.2. Apply to the NSAs of the EU Member States that are part of the existing area of use and are transposing (EU) 2016/797 on 16 June 2020 (if any) for the authorisation of the changed vehicle or vehicle type; those Member States should take into account the authorisation issued by FOT for the changed vehicle or vehicle type;
 - 2.3. Apply to the Agency for the authorisation of the changed vehicle or vehicle type in the EU Member States having transposed (EU) 2016/797 on 16 June 2019 that were already part of the area of use (if any), for the case 'new authorisation' covering an area of use of several EU Member States.
 - 2.4. Apply to the Agency for the extension of the area of use of the changed vehicle or vehicle type to the EU Member States having transposed (EU) 2016/797 on 16 June 2019.
 - 2.5. As an alternative to point 2.2, apply to the Agency (see points 2.3 and 2.4) and, once the Agency has issued the authorisation for the changed vehicle and the extended area of use, apply to the NSAs of the EU Member States transposing (EU) 2016/797 on 16 June 2020 following Article 55(5) of Regulation (EU) 2018/545.

The authorisation case involving the Agency may be an extension of the area of use (if in the original area of use there are no EU Member States having transposed (EU) 2016/797 on 16 June 2019) or a combination of new authorisation and extension of the area of use (if the original area of use includes such EU Member States).

The authorisation delivered by the Agency will make reference to the Swiss networks covered by the existing authorisation delivered by FOT and will cover the networks in the EU Member States of the extended area of use having transposed (EU) 2016/797 on 16 June 2019.

If the authorisation is issued by the concerned NSAs of the EU Member States transposing (EU) 2016/797 on 16 June 2020 before the submission of the application to the Agency, the authorisation issued by the Agency will make reference to the networks in those Member States as well.

3. For a vehicle or vehicle type first authorised by FOT before 16 June 2020 that has been authorised as well in EU Member States that is changed and keeps its area of use, the applicant should:
 - 3.1. Apply to FOT for the authorisation in CH of the changed vehicle or vehicle type;
 - 3.2. Apply to the NSAs of the EU Member States transposing (EU) 2016/797 on 16 June 2020 (if any) for the authorisation of the changed vehicle or vehicle type; those Member States should take into account the authorisation issued by FOT;
 - 3.3. Apply to the Agency for the authorisation of the changed vehicle or vehicle type in the EU Member States having transposed (EU) 2016/797 on 16 June 2019 that were already part of the area of use (if any), for the case new authorisation covering an area of use of several EU Member States.

3.4. As an alternative to point 3.2, apply to the Agency (see point 3.3) and, once the Agency has issued the authorisation for the changed vehicle, apply to the NSAs of the EU Member States transposing (EU) 2016/797 on 16 June 2020 following Article 55(5) of Regulation (EU) 2018/545.

The authorisation delivered by the Agency will make reference to the Swiss networks covered by the existing authorisation delivered by FOT.

If the authorisation is issued by the concerned NSAs (where applicable) before the submission of the application to the Agency for the new authorisation covering several EU Member States, the authorisation issued by the Agency will make reference to those Member States as well.

4. For a wagon type first authorised by FOT before 16 June 2020, when the wagon conforms to point 7.1.2 of Annex to Regulation (EU) 321/2013, the applicant should apply to the Agency for an authorisation in conformity with an authorised type with an area of use covering the whole EU.

3. Legal background

3.1. Article 24(1) of the *Agreement between the European Community and the Swiss Confederation on the carriage of goods and passengers by rail and road* (hereinafter – LTA) provides that “railway undertakings and international groupings shall have the access and/or transit rights defined in the Community legislation referred to in Annex 1, section 4” (on the basis of reciprocity as required under Article 1(2) of LTA). Annex 1, section 4 (“ACCESS AND TRANSIT RIGHTS WITH REGARD TO RAILWAYS”) to the LTA lists in particular Directive 2008/57/EC and several Technical Specifications for Interoperability (TSIs), in particular the Regulation (EU) 321/2013 (WAG TSI).

This means that in accordance with the LTA Switzerland applies national legislation equivalent to Directive 2008/57/EC.

Annex 1 of the LTA has been amended by the “Community/Switzerland Inland Transport Committee” (hereafter the “Joint Committee”) in 2013, 2016, 2018 and 2019 while maintaining reference to Directive 2008/57/EC.

Article 3(1(d)) of the Decision No 1/2013 of the Joint Committee provides that for the purposes of Directive 2008/57/EC authorisations for placing in service of sub-systems and vehicles, including authorisations delivered before 19 July 2008, in particular according to RIC and RIV, as well as authorisations by type of vehicle delivered by a national safety authority according to Chapter V of Directive 2008/57/EC are recognised on the basis of reciprocity.

This means that the EU and its Member States and the Agency have to recognise FOT authorisations for placing in service of vehicles and types of vehicles as valid as if they were issued by an EU Member State in accordance with Chapter V of Directive 2008/57/EC.

Note should be taken that other provisions of Decision No 1/2013 of the Joint Committee are also important for the assessment by the Agency of CH safety certificates as well as declarations of conformity or suitability for use and certificates and declarations of verification.

In order to maintain the reciprocity after 16 June 2020 the Annex 1 to the LTA should be amended in order to update the list of applicable legislation, including therein the new Agency Regulation and the Directives (EU) 2016/797 and (EU) 2016/798 as well as TSIs and Common Safety Methods (CSMs). If not, then there would be an inconsistency between the EU legislation and the LTA which would negatively affect the reciprocity.

3.2. According to the Court of Justice of the EU (CJEU), Article 216(2) of Treaty on the Functioning of the European Union sets out the principle that the international agreements concluded by the European Union bind the institutions of the European Union and the Member States. It is clear from the settled case-law that the provisions of such agreements form an integral part of the legal order of the European Union as from their entry into force. On that basis, the CJEU has already stated that the primacy of international agreements concluded by the European Union over provisions of secondary EU legislation meant that such provisions must, so far as is possible, be interpreted in a manner that is consistent with those agreements. It is also clear

from the settled case-law that the provisions of such an agreement may have direct effect if they are unconditional and sufficiently precise (General Court, 13 July 2017, Case T 527/14, *Rosenich vs EUIPO*, § 52 ff, about the European Economic Area agreement).

This means that directives 2008/57/EC and (EU) 2016/797 need to be interpreted and applied (by the EU, the Member States and by the Agency) in the light of the LTA.

3.3. For vehicle authorisations delivered by FOT in accordance with Swiss legislation, the date of 15 June 2016 set forth in Article 54(2) of Directive (EU) 2016/797 should not be applicable due to primacy of LTA and any FOT authorisation issued before 16 June 2020 should be considered as valid in the same way as if it is delivered by an EU Member State transposing the Directive (EU) 2016/797 on 16 June 2020.

3.4. In accordance with Article 54(3) of the Directive (EU) 2016/797 vehicles authorised under Directive 2008/57/EC and vehicle authorisations granted prior to 15 June 2016 under international agreements, in particular RIC and RIV shall receive a new vehicle authorisation for placing on the market in order to operate on one or more networks which are not yet covered by their authorisation. The placing on the market on those additional networks shall be subject to Article 21 of (EU) 2016/797.

That should mean that vehicle authorisations delivered by FOT should be recognised by the Agency when delivering authorisation for EU Member States. Relevant authorisation case shall be chosen in accordance with Article 14 of Regulation (EU) 2018/545.

3.5. Article 2(32) of Directive (EU) 2016/797 defines the 'area of use of a vehicle' as a network or networks within a EU Member State or a group of Member States in which a vehicle is intended to be used.

In addition, provisions in Article 21(6) of Directive 2008/57/EC (implemented by Switzerland in accordance with LTA) provide FOT with exclusive competence to decide on vehicle authorisations in its jurisdiction same way as it applies to national safety authorities of EU Member States.

This means that from the point of view of the LTA and the Directive (EU) 2016/797, Switzerland currently cannot be considered as an area of use; therefore it is out of scope of authorisations to be delivered by the Agency until the LTA is amended as mentioned above.

3.6. Article 54(4) of Directive (EU) 2016/797 provides that at the latest from 16 June 2019 the Agency shall carry out the authorisation tasks in respect of areas of use in the Member States transposing the Directive (EU) 2016/797 on 16 June 2019. By way of derogation, national safety authorities of Member States transposing the Directive (EU) 2016/797 on 16 June 2020 may continue to issue authorisations in accordance with Directive 2008/57/EC until 16 June 2020.

Read together with provisions of the LTA (see § 3.1. above), that means that EU Member States transposing the Directive (EU) 2016/797 on 16 June 2020 are currently able to accept a first authorisation issued by FOT and to issue an additional authorisation in accordance with Chapter V of Directive 2008/57/EC.