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NOTICE TO STAKEHOLDERS

WITHDRAWAL OF THE UNITED KINGDOM AND EU RULES IN THE FIELD OF RAIL TRANSPORT

Since 1 February 2020, the United Kingdom has withdrawn from the European Union and has become a “third country”.¹ The Withdrawal Agreement² provides for a transition period ending on 31 December 2020.³ Until that date, EU law in its entirety applies to and in the United Kingdom.⁴

During the transition period, the EU and the United Kingdom will negotiate an agreement on a new partnership, providing notably for a free trade area. However, it is not certain whether such an agreement will be concluded and will enter into force at the end of the transition period. In any event, such an agreement would create a relationship which in terms of market access conditions will be very different from the United Kingdom’s participation in the internal market,⁵ in the EU Customs Union, and in the VAT and excise duty area.

Therefore, all interested parties, and especially economic operators, are reminded of the legal situation applicable after the end of the transition period (Part A below). This notice also explains certain relevant separation provisions of the Withdrawal Agreement (Part B below), as well as the rules applicable in Northern Ireland after the end of the transition period (Part C below).

¹ A third country is a country not member of the EU.

² Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, OJ L 29, 31.1.2020, p. 7 (“Withdrawal Agreement”).

³ The transition period may, before 1 July 2020, be extended once for up to 1 or 2 years (Article 132(1) of the Withdrawal Agreement). The UK government has so far ruled out such an extension.

⁴ Subject to certain exceptions provided for in Article 127 of the Withdrawal Agreement, none of which is relevant in the context of this notice.

⁵ In particular, a free trade agreement does not provide for internal market concepts (in the area of goods and services) such as mutual recognition, the “country of origin principle”, and harmonisation. Nor does a free trade agreement remove customs formalities and controls, including those concerning the origin of goods and their input, as well as prohibitions and restrictions for imports and exports.

Advice to stakeholders:

To address the consequences set out in this notice, stakeholders are in particular advised to:

- ensure establishment in the EU, where this is necessary to hold relevant licences;
- ensure authorisation by the European Union Railway Agency or Member State authorities;⁶
- ensure certification by EU-based notified bodies and designated bodies.

Moreover, train drivers with a licence/certificate issued in the United Kingdom and working in a Member State should take the necessary steps in order to obtain certification documents valid in the EU as of the end of the transition period. Therefore, railway undertakings or infrastructure managers in the EU employing train drivers with certification documents issued in the United Kingdom are invited to inform these persons of the need to obtain new certification documents valid in the EU as of the end of the transition period.

Railway undertakings providing cross-border services between the United Kingdom and the EU and wishing to continue after the end of the transition period, will have to ensure that the drivers on the sections of such cross-border services which are located in the EU territory have the required licences/certificates issued in the EU.

A. LEGAL SITUATION APPLICABLE AFTER THE END OF THE TRANSITION PERIOD

After the end of the transition period, EU rules in the field of rail transport no longer apply to the United Kingdom.⁷ This has in particular the following consequences:

1. LICENCES OF RAILWAY UNDERTAKINGS

According to Chapter III of Directive 2012/34/EU establishing a single European railway area,⁸ in order to provide rail transport services, railway undertakings need a licence: they are entitled to apply for it in the EU Member State where they are established. The licence is valid throughout the territory of the Union, as long as the undertaking fulfils the obligations laid down in Chapter III of Directive 2012/34/EU. Licences issued by the United Kingdom will no longer be valid in the EU as of the end of the transition period. Railway undertakings holding such a licence and wishing to continue operating in the EU as of the end of the transition

⁶ For example, railway undertakings holding such a certificate and wanting to continue operating in the EU after the transition period will have to apply for a single safety certificate either to the Agency or in an EU Member State (if the area of operations is limited to that Member State) in accordance with Article 10 of Directive (EU) 2016/798.

⁷ Regarding the applicability of the EU on certain railway products to Northern Ireland, see Part C of this notice.

⁸ Directive 2012/34/EU of the European Parliament and of the Council of 21 November 2012 establishing a single European railway area, OJ L 343 14.12.2012, p. 32.

period will have to apply for a new licence in an EU Member State in accordance with Chapter III of Directive 2012/34/EU.

Railway undertakings providing cross-border services between the United Kingdom and the EU and wishing to continue after the end of the transition period will have to comply with the legal requirements applicable both in the EU and the United Kingdom. These undertakings will therefore have to ensure that they have a licence valid in the EU for the sections of the cross-border services located in the territory of the EU. It follows from Article 17(1) of Directive 2012/34/EU that establishment in one of the EU Member States is a precondition for acquiring an EU licence.

2. RAILWAY SAFETY AND RAILWAY INTEROPERABILITY

For the Union, provisions on railway safety and railway interoperability are provided for in Directive (EU) 2016/798 on railway safety⁹ and in Directive (EU) 2016/797 on the interoperability of the rail system within the European Union (recast)¹⁰ respectively. The Convention concerning international carriage by rail (COTIF), to which the Union and the Member States with a railway system¹¹ are parties, as is the United Kingdom, equally contains rules on these subjects. However, COTIF does not apply to traffic limited to the EU network (i.e. not coming from or going to a third country).¹²

2.1. Railway safety

According to Article 10 of Directive (EU) 2016/798 access to railway infrastructure in the Union by a railway undertaking is subject to having obtained a single safety certificate issued by the European Union Agency for Railways or by a Member State, the latter if the area of operation is limited to that Member State. Safety certificates delivered in the United Kingdom pursuant to Article 10 of the Directive will no longer be valid in the EU as of the end of the transition period.

According to Article 14(4) of Directive (EU) 2016/798, each entity in charge of maintenance (ECM) of freight wagons is subject to a certification requirement. Certificates issued by the United Kingdom will no longer be valid in the EU as of the end of the transition period.¹³ ECMs holding a

⁹ Directive (EU) 2016/798 of the European Parliament and of the Council of 11 May 2016 on railway safety (Railway Safety Directive), OJ L 138, 26.5.2016, p. 102.

¹⁰ OJ L 138, 26.5.2016, p. 44.

¹¹ Malta and Cyprus do not have a railway system.

¹² Article 2 of the Agreement between the intergovernmental organisation for international carriage by rail and the European Union on the accession of the European Union to the Convention concerning international carriage by rail (COTIF) of 9 May 1980, as amended by the Vilnius Protocol of 3 June 1999 (http://otif.org/fileadmin/user_upload/otif_verlinkte_files/04_recht/02_COTIF/AG_10-5_ad1_e.pdf).

¹³ This also holds for certificates by ECM certification bodies recognised by the United Kingdom or accredited by the United Kingdom accreditation body in accordance with Article 10 of Regulation

certificate delivered by the United Kingdom and wishing to continue their professional activities in the EU will have to apply for a certificate in an EU Member State.

In addition, as of the end of the transition period, ECMs may apply for a certificate according to the legal framework of COTIF.¹⁴

2.2. Railway interoperability

- Placing on the market of railway products covered by Directive (EU) 2016/797: For those products, the European Union's Technical Specifications for Interoperability set out the applicable conformity assessment procedures and whether, for each of them, a third party intervention (Notified Body or Designated Body) is required or not. In terms of the placing on the market of such products, this notice should be read in conjunction with the generic notice to economic operators subject to Union legislation in the field of industrial products,¹⁵ particularly its section 2 on conformity assessment procedures and Notified Bodies. The consequences of the withdrawal of the United Kingdom from the EU set out in the generic notice fully apply to certificates issued by bodies notified (in the case of Notified Bodies) or designated (in the case of Designated Bodies) by the United Kingdom (hereafter "Notified Bodies/Designated Bodies in the United Kingdom"). The following paragraphs deal with the specific cases concerning the placing on the market and use of interoperability constituents, vehicles and subsystems and the placing in service of fixed installations.
- Placing on the market and use of interoperability constituents: According to Articles 8 and 10(2) of Directive (EU) 2016/797, the placing on the market of an interoperability constituent may require an assessment of conformity/suitability for use established by a Notified Body. Where an assessment established by a Notified Body is required, the consequences of the withdrawal of the United Kingdom from the EU set out in the generic notice on industrial products referred to in the preceding paragraph fully apply.
- Placing in service of fixed installations: According to Article 18 of Directive (EU) 2016/797, fixed installations have to be authorised to be placed in service by the national safety authority of the Member State on which territory they are located or operated. Authorisations for placing in service pursuant to Article 18 of Directive (EU) 2016/797 as of the end of

(EU) No 445/2011 on a system of certification of entities in charge of maintenance for freight wagons and amending Regulation (EC) No 653/2007 (OJ L 122, 11.5.2011, p. 22).

¹⁴ See Article 15(2) of Appendix G to COTIF, and the Uniform Rules set out in accordance with that Article, in relation to the ECM certification in the COTIF framework. For the interaction between the ECM certifications pursuant to Directive 2004/49/EC and to the COTIF framework, see Article 3a(5) of the same Appendix.

¹⁵ https://ec.europa.eu/info/european-union-and-united-kingdom-forging-new-partnership/future-partnership/getting-ready-end-transition-period_en.

the transition period shall be based on certificates of verification issued by Notified Bodies/Designated Bodies in the EU.

- Placing on the market of vehicles and mobile subsystems: According to Article 21 of Directive (EU) 2016/797, before being used on a network, a railway vehicle has to be authorised to be placed on the market by the relevant authorising entity (the Agency or the competent national authority)¹⁶. Authorisations, as of the end of the transition period, for placing on the market pursuant to Articles 20, 21 and 24 of Directive (EU) 2016/797 shall be based on certificates of verification issued by Notified Bodies/Designated Bodies in the EU.

As of the end of the transition period, the admission to circulation or use of railway material authorised in the United Kingdom in international traffic in the EU will be governed by COTIF, and in particular the Appendices G¹⁷ and F¹⁸ thereto.¹⁹ As explained above, this does not include admission to circulation or use in international traffic limited to the EU network (i.e. not coming from or going to a third country), which is governed by EU law.

3. TRAIN DRIVER CERTIFICATION

Directive 2007/59/EC²⁰ lays down the conditions and procedures for the certification of train drivers operating locomotives and trains on the railway system in the Union. In particular, it requires that the train driver obtain a specific licence and a specific certificate. The licence is issued by a competent authority of a Member State while the certificate is issued by the railway undertakings and infrastructure managers. According to Article 7, a licence issued by a Member State is valid throughout the territory of the Union while the certificate is valid on those infrastructures and rolling stock identified on it.

¹⁶ Pursuant to Article 21(8) of Directive (EU) 2016/797, “Where the area of use is limited to a network or networks within one Member State only, the national safety authority of that Member State may, under its own responsibility and when the applicant so requests, issue the vehicle authorisation for placing on the market.” In all other cases, the authorising entity is the European Union Agency for Railways.

¹⁷ "Uniform rules concerning the technical admission of railway material used in international traffic". For the interaction between the vehicle authorisations pursuant to Directive 2008/57/EC and pursuant to the COTIF framework, see Article 3a of Appendix G to COTIF.

¹⁸ "Uniform rules concerning the validation of technical standards and the adoption of uniform technical prescriptions applicable to railway material intended to be used in international traffic".

¹⁹ In practice, the conditions listed in Article 3a(2) of Appendix G to COTIF are only fulfilled for so-called GE (‘go everywhere’) wagons. Application of the COTIF framework to other vehicles (such as locomotives and passenger rolling stock) does in practice not provide equivalence between admission according to the COTIF Uniform Rules and EU authorisation for placing in service.

²⁰ Directive 2007/59/EC of the 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, OJ L 315, 3.12.2007, p. 51.

Licenses issued by the United Kingdom will no longer be valid in the EU as of the end of the transition period.

According to Articles 11(2) and 20 of Directive 2007/59/EC, applicants for a licence have to provide confirmation of medical fitness by a medical doctor accredited by an EU accreditation body, or recognised by an EU Member State.

Licences issued after the end of the transition period by an EU Member State can no longer be based on a confirmation of a medical doctor accredited by the UK accreditation body or recognised by the UK national authority. Licences issued by an EU Member State before the end of the transition period on the basis of a confirmation of a medical doctor accredited by the UK accreditation body or recognised by the UK national authority remain valid.

Certificates issued by a railway undertaking established in the United Kingdom will no longer be valid in the EU as of the end of the transition period.

B. RELEVANT SEPARATION PROVISIONS OF THE WITHDRAWAL AGREEMENT

Article 41(1) of the Withdrawal Agreement provides that an existing and individually identifiable good lawfully placed on the market in the EU or the United Kingdom before the end of the transition period may be further made available on the market of the EU or of the United Kingdom and circulate between these two markets until it reaches its end-user.

The economic operator relying on that provision bears the burden of proof of demonstrating on the basis of any relevant document that the good was placed on the market in the EU or the United Kingdom before the end of the transition period.²¹

For the purposes of that provision, “placing on the market” means the first supply of a good for distribution, consumption or use on the market in the course of a commercial activity, whether in return for payment or free of charge.²² “Supply of a good for distribution, consumption or use” means that “an existing and individually identifiable good, after the stage of manufacturing has taken place, is the subject matter of a written or verbal agreement between two or more legal or natural persons for the transfer of ownership, any other property right, or possession concerning the good in question, or is the subject matter of an offer to a legal or natural person or persons to conclude such an agreement.”²³

Article 41(1)(b) of the Withdrawal Agreement provides that an existing and individually identifiable good lawfully placed on the market in the EU or the United Kingdom before the end of the transition period may be put into service in the EU or in the United Kingdom.

This means specifically in the railway sector the following:

²¹ Article 42 of the Withdrawal Agreement.

²² Article 40(a) and (b) of the Withdrawal Agreement.

²³ Article 40(c) of the Withdrawal Agreement.

- An interoperability constituent placed on the market before the end of the transition period with a certificate of conformity/suitability for use issued by a Notified Body in the United Kingdom can be used, during the duration of validity of the certificates of conformity/suitability for use, in vehicles or subsystems the placing in service of which has been authorised before the end of the transition period.
- Authorisations for placing in service of fixed installations placed on the market before the end of the transition period retain their validity after the end of the transition period even if they have been authorised based on certificates of verification issued by Notified Bodies/Designated Bodies in the United Kingdom.
- Authorisations for placing on the market of vehicles placed on the market before the end of the transition period retain their validity on their defined area of use within the EU after the end of the transition period even if they have been authorised based on certificates of verification issued by Notified Bodies/Designated Bodies in the United Kingdom. The same applies to authorisations for placing on the market of mobile subsystems.

C. APPLICABLE RULES IN NORTHERN IRELAND AFTER THE END OF THE TRANSITION PERIOD

After the end of the transition period, the Protocol on Ireland/Northern Ireland (“IE/Ni Protocol”) applies.²⁴ The IE/Ni Protocol is subject to periodic consent of the Northern Ireland Legislative Assembly, the initial period of application extending to 4 years after the end of the transition period.²⁵

The IE/Ni Protocol makes certain provisions of EU law applicable also to and in the United Kingdom in respect of Northern Ireland. In the IE/Ni Protocol, the EU and the United Kingdom have furthermore agreed that insofar as EU rules apply to and in the United Kingdom in respect of Northern Ireland, Northern Ireland is treated as if it were a Member State.²⁶

The IE/Ni Protocol provides that Directive (EU) 2016/797 applies to and in the United Kingdom in respect of Northern Ireland, insofar as conditions and technical specifications for the placing on the market, putting into service and free movement of railway products are concerned.²⁷

This means that references to the EU in Part A.2.2 and B of this Notice have to be understood as including Northern Ireland, whereas references to the United Kingdom have to be understood as referring only to Great Britain.

More specifically, this means *inter alia* the following:

²⁴ Article 185 of the Withdrawal Agreement.

²⁵ Article 18 of the IE/Ni Protocol.

²⁶ Article 7(1) of the Withdrawal Agreement in conjunction with Article 13(1) of the IE/Ni Protocol.

²⁷ Article 5(4) of the IE/Ni Protocol and section 28 of annex 2 to that Protocol.

- A railway product placed on the market or placed in service in Northern Ireland has to comply with Directive (EU) 2016/797.

However, the IE/Ni Protocol excludes the possibility for the United Kingdom in respect of Northern Ireland to:

- participate in the decision-making and decision-shaping of the Union;²⁸
- initiate objections, safeguard or arbitration procedures to the extent that they concern regulations, standards, assessments, registrations, certificates, approvals and authorisations issued or carried out by EU Member States;²⁹
- act as leading authority for assessments, examinations and authorisations;³⁰
- invoke the country of origin principle or mutual recognition for products placed legally on the market in Northern Ireland; or for certificates issued by bodies established in the United Kingdom.³¹

More specifically, this last point means *inter alia* the following:

- Authorisations issued after the end of the transition period by the United Kingdom in respect of Northern Ireland for placing into service of fixed installations or for placing on the market of vehicles will not be valid in the EU.
- Bodies established in Northern Ireland may certify products, but certificates issued by Notified Bodies in Northern Ireland are valid only in Northern Ireland. By contrast, these certificates are not valid in the EU.³²
- Where a product is certified by a Notified Body in Northern Ireland, the indication 'UK(NI)' must be affixed next to the CE marking or any other applicable conformity marking.³³ This distinct marking allows the identification of products which can be legally placed on the market in Northern Ireland, but not in the EU.

The website of the Commission on rail transport (https://ec.europa.eu/transport/modes/rail_en) provides for general information concerning the rules for rail transport in the Union. These pages will be updated with further information, where necessary.

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²⁸ Where an information exchange or mutual consultation is necessary, this will take place in the joint consultative working group established by Article 15 of the IE/Ni Protocol.

²⁹ Fifth subparagraph of Article 7(3) the IE/Ni Protocol.

³⁰ Article 13(6) of the IE/Ni Protocol.

³¹ First subparagraph of Article 7(3) of the IE/Ni Protocol.

³² Fourth subparagraph of Article 7(3) of the IE/Ni Protocol.

³³ Fourth subparagraph of Article 7(3) of the IE/Ni Protocol.