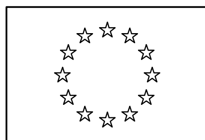


COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 13.12.2006
SEC(2006) 1640

COMMISSION STAFF WORKING DOCUMENT

Annex to the

COMMUNICATION FROM THE COMMISSION TO THE COUNCIL AND THE EUROPEAN PARLIAMENT

"Facilitate free movement of locomotives across the EU"

PROPOSAL FOR A DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

amending Directive 2004/49/EC on safety of the Community's railways

PROPOSAL FOR A REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

amending Regulation (EC) No 881/2004 establishing a European Railway Agency

PROPOSAL FOR A DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

on the interoperability of the Community rail system

{COM(2006) 782 final}
{COM(2006) 784 final}
{COM(2006) 785 final}
{COM(2006) 783 final}
{SEC(2006) 1640}
{SEC(2006) 1641}

INTRODUCTION

This document accompanies the Communication of the Commission to the Council and the European Parliament "Facilitating interoperability of locomotives across the EU" aiming at improving the technical part of the Community regulatory framework in the railway area; namely the railway interoperability and safety directives as well as the regulation establishing the European Railway Agency (hereafter "Agency").

Firstly, the procedure of homologation of locomotives is one of the crucial aspects to be improved in order to facilitate free movement of trains. According to manufacturers and railway undertakings, these procedures remain often very long and costly and some of requests of competent authorities seem even hardly justifiable, as far as technical aspects are concerned.

Secondly, the Commission proposes to consolidate and to merge the directives on interoperability of railways (96/48/EC, 2001/16/EC, 2004/50/EC) according to the programme of simplification of the legislation.

Thirdly, drawing on the experience of ten years of implementing the interoperability directives, enriched by the contribution of Member States to the work of the Committee assisting the Commission, as well as the contribution of all stakeholders to the work of development of the TSIs, the Commission proposes various improvements to the technical part of the regulatory framework.

The present document reminds the principles related to railway interoperability directives (annex I), compares the placing in service procedures applicable to rolling stock (annex II), reminds the principles related to the railway safety directive (annex III) and to the mutual recognition (annex IV), lists the technical parameters (annex V) and presents the homologation guide proposed for existing rolling stock (annex VI).

ANNEX

List of annexes

Annex I : The Railway Interoperability Directives

Annex II : Placing in service procedures

Annex III : The Railway Safety Directive

Annex IV : The mutual recognition principle

Annex V : The list of parameters

Annex VI : The rolling stock homologation guide

ANNEX I

THE RAILWAY INTEROPERABILITY DIRECTIVES

The Interoperability Directives (2001/16/EC on Conventional Rail and 96/48/EC on High Speed Rail) require the railways to move towards harmonisation of systems and operations through the progressive adoption of Technical Specifications for Interoperability (TSIs).

The High Speed Directive provides for the interoperability of the European Community's high-speed network while the Conventional Rail Directive expands the scope of interoperability to include the trans-European conventional rail network as described in Commission Decision 1692/96/EC. Directive 2004/50/EC further extends its scope to the whole EU25 rail network.

The TSIs specify a target "interoperable" system, and describe the implementation steps needed for existing systems to migrate towards the target system. The TSIs apply to all new, renewed and upgraded railway systems and the Directives establish a common framework for the conformity assessment of systems against the TSIs.

As explained in Annex II, once a subsystem is certified to be in conformity with a TSI, the resulting certificate must be accepted by all Member States and the conformity assessment must not be repeated. Conformity assessment against the TSIs is carried out by Notified Bodies.

However, authorisation by the National Safety Authority for placing in service is still required by Article 14 of the Interoperability Directive, mainly for the following reasons:

– Due to the long life-cycle of railway systems (for example new rolling stock has a life of 30 years, which may be further extended through refurbishment and renewals), the migration towards the target system will take a number of years. During the migration period, and in some cases for the foreseeable future, existing national systems and characteristics must be respected in order to maintain safety and performance levels.

– There are cases where, even for a new line or new rolling stock, the "target interoperable system" cannot be implemented for local or economic reasons. These cases are described in the TSIs as "Specific Cases" or are the subject of derogations requested *a posteriori* by Member States. Member States are required to notify to the Commission and other Member States the conformity assessment procedures for Specific Cases and derogations, and the bodies that will carry out the assessment. Member States are encouraged to utilise Notified Bodies for the conformity assessment of Specific Cases, although this is not mandatory.

– The TSIs themselves are still evolving and it is acknowledged that over time they will be revised to comprehensively cover the entire railway system. Currently, where harmonised requirements have not yet been fully developed, 'gaps' exist in the TSI, known as "Open Points". For Open Points, national rules will apply and Member States are also required to notify these rules and the bodies that will carry out the conformity assessment.

It should be emphasised that it is not intended to enforce cross-acceptance of the conformity assessment of rolling stock for Specific Cases, as these assume specific national

characteristics that may not exist in other Member States, so any rolling stock has to demonstrate compatibility with these characteristics in order to operate on the network in question.

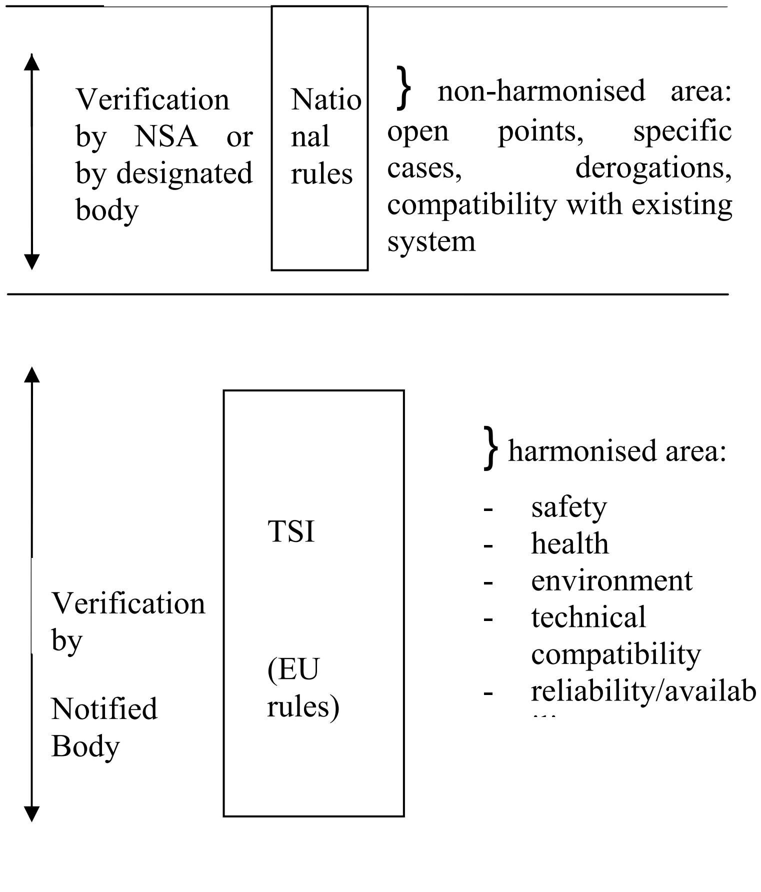
Annex II shows that all these aspects are subject to national rules "on top" of the TSIs, and it is the role of the NSA to check that these aspects are verified before delivering an authorisation.

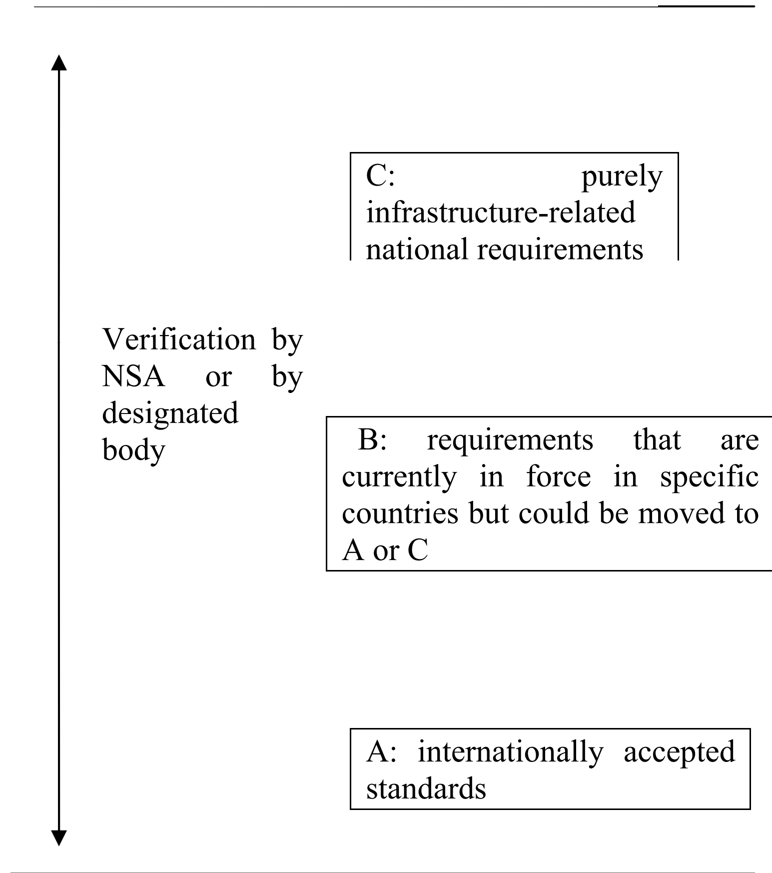
The TSI for high-speed rolling stock[1] was adopted in 2002; this is currently under revision and the new version is expected to be adopted by December 2006. A TSI for conventional freight wagons was adopted by the Commission in July 2006.

The TSI for all other conventional rolling stock (which will include specifications for locomotives, multiple units and passenger coaches) will be developed by the European Railway Agency, and a draft version is expected to be available in 2008.

[1] Commission Decision 2002/735/EC.

ANNEX II





ANNEX III

THE RAILWAY SAFETY DIRECTIVE

The Infrastructure Directive (2001/14/EC)[2] established the principles of harmonised safety certification and licensing of railway undertakings in order for a railway undertaking to enter into operational service, which are accepted by all Member States. The Railway Safety Directive (2004/49/EC)[3] further develops the principles of safety certification and creates a common framework for safety and its regulation. Under this Directive, each Member State must notify its safety rules to the Commission, and, after the adoption of harmonised Common Safety Targets, the future development of specific national safety rules will be monitored and effectively discouraged.

The Railway Safety Directive also requires Member States to create independent national safety authorities. Under Article 14 of the Directive, national safety authorities are responsible for the authorisation of in-use rolling stock not yet covered by a TSI.

The Railway Safety Directive must be transposed into national legislation by April 2006 and the railway safety authority must be fully established and in place by that date.

With regard to rolling stock cross-acceptance, a Task Force has been set up by the Commission to develop a methodology for the cross-acceptance of national rolling stock rules. The Task Force has developed guidelines and recommendations for the Commission, which form the basis for the options discussed in this Communication and in the Impact Assessment report.

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2 Directive 2001/14/EC on the allocation of railway infrastructure capacity and the levying of charges for the use of railway infrastructure and safety certification.

3 Part of the second package, adopted in 2004 and to be implemented in Member States by April 2006.

ANNEX IV

THE MUTUAL RECOGNITION PRINCIPLE

1. PRINCIPLES

There are two main types of instrument for eliminating regulatory non-fiscal barriers to the free movement of goods within the EU, namely approximation or harmonisation of national legislation and mutual recognition under Articles 28 and 30 of the EC Treaty[4].

Under the mutual recognition principle, Member States of destination cannot forbid the marketing or putting into service on their territories of products lawfully marketed or put into service in another Member State and which are not subject to Community harmonisation, even if the product in question was manufactured according to different technical and quality rules than those that must be met for their own products. The only exception to this principle are restrictions laid down by the Member State of destination, provided that these are justified on the grounds described in Article 30 of the EC Treaty, or on the basis of overriding requirements of general public importance recognised by the Court of Justice's case law, and that they are proportionate.

The mutual recognition principle for non-harmonised products consists of two pillars: the general rule that a product enjoys the basic right of free movement of products, guaranteed by the EC Treaty, and the exception that the product does not enjoy this right when the Member State of destination can prove that it is essential to apply its own technical rule5 to the product.

Hence, mutual recognition is a method for ensuring the free movement of goods within the EU for a specific category of products for which there is no harmonisation of laws at EU level or for aspects of products falling outside the scope of EU harmonisation measures. It remains the "lex generalis" unless a "lex specialis" (i.e. a harmonisation measure) organises intra-Community trade in a product differently.

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4 Articles 28 of the EC Treaty specifies that "quantitative restrictions on imports and all measures having equivalent effect shall be prohibited between Member States". According to Article 30 EC Treaty, the "provisions of Articles 28 and 29 shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value; or the protection of industrial and commercial property. Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States".

5 A national technical rule means a technical specification which defines the characteristics required of a product, such as its composition (quality level or fitness for use, performance, safety, dimensions, markings, symbols, etc.), its presentation (the name under which the product is sold, its packaging, its labelling), or the testing and test methods it is subject to as part of conformity assessment procedures, and which is obligatory, in fact or in law, in order to market or use the product in the Member State of destination.

2. APPLICABILITY TO CROSS-ACCEPTANCE OF RAIL ROLLING STOCK

For railway rolling stock, further investigation is needed to determine whether this principle can be applied, mainly for two reasons:

- There is Community legislation harmonising relevant rules in the areas of safety, heath, protection of the environment, technical compatibility, reliability and availability (hence there is a "*lex specialis*");
- The principle of mutual recognition applies to products placed on the market, while authorisation concerns the subsequent step of placing in service. The act of placing in service includes checking compatibility between an "interoperable" product and a possible non-interoperable infrastructure, and such a check seems to be justified on the grounds described in Article 30 of the EC Treaty.

However, it seems that the mutual recognition principle could be applied to existing rolling stock (not yet affected by the Interoperability Directives), at least for those characteristics not directly linked to specific infrastructures. This is what has been proposed by the Task Force mentioned above and also in the Commission proposal for modifying the Railway Safety Directive.

3. PROBLEMS

3.1. Lack of awareness

When there is no harmonised Community legislation for a specific type of product, Member States are entitled to keep their national rules provided, in theory, they comply with the principle of free movement of goods laid down in the EC Treaty. In practice, however, many national rules give the wrong impression that they always prevail or that they are the only applicable legislation[6].

Moreover, there is no express provision in the EC Treaty confirming the existence of the mutual recognition principle in the area of goods. The principle is a concept developed on the basis of the "Cassis de Dijon"-judgement[7], which concerned the interpretation of "measures of equivalent effect as quantitative restrictions on imports of goods" under Article 28 of the EC Treaty.

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6 According to settled case-law of the Court of Justice, the prohibition laid down in Article 28 of the EC Treaty does not only cover trading rules enacted by Member States which are capable of directly or actually hindering intra-Community trade, but also trading rules capable of indirectly or potentially hindering intra-Community trade. Article 28 applies therefore not only to the actual effects but also to the potential effects of national legislation: see in particular Judgment of the Court of 22 October 1998, Commission of the European Communities v. French Republic, ("Foie gras"-judgment), Case C-184/96, E.C.R. 1998, p. I-6197.

7 The mutual recognition principle in the area of goods finds its origin in the judgement of the Court of Justice of 20 February 1979 (Rewe-Zentral AG v. Bundesmonopolverwaltung für Branntwein), Case 120/78, European Court Reports 1979, p. 649. This judgement was the basis for the communication from the Commission concerning the consequences of the Judgment given by the Court of Justice on 20 February 1979 in Case 120/78 (Cassis de Dijon), OJ C 256, 3 February 1980.

The main effect of the lack of awareness is that enterprises and national administrations take national technical rules for granted[8].

The lack of awareness hits in the first place enterprises looking for business opportunities in another Member State, and in particular small and medium-sized enterprises[9]. In most cases, enterprises check and evaluate the technical rules of the Member State of destination before marketing their products on its territory. It is not surprising that very often they take the technical rules of the Member State of destination for granted, without being aware that Community law, and more precisely the jurisprudence of the Court of Justice, provides for the possibility of mutual recognition. When they are selling in their home state a product that differs from the technical rule in the Member State of destination, enterprises adapt their product to local requirements or get them retested or, in the worst case, refrain from entering the national market.

Moreover, familiarity with the principle does not necessarily imply that enterprises actually rely on it.

National administrations stick to, and strictly apply, these national rules although the provisions of Articles 28 to 30 of the EC Treaty take precedence over all contrary national measures[10]. The lack of awareness means that national authorities then consider their national rules as the only applicable and exhaustive legal tool to assess the conformity of products.

3.2. Legal uncertainty

It is often unclear to which categories of product mutual recognition applies. Mutual recognition is residual, i.e. it only applies if and when the national rules on such goods are not the transposition or the implementation of secondary Community legislation. Moreover, harmonisation or approximation of national laws does not always cover all products or all essential aspects of products[11]. There exists no list of products or aspects of products to which mutual recognition should apply. This means that, for every special aspect of a product, enterprises and national

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8 See the second biennial report COM(2002)419 on mutual recognition. According to the I.P.M. consultation, 47.7% of respondents – and 95% of responding enterprises - prefer to know the technical rules of the Member State of destination and to make an evaluation thereof before marketing their products in the recipient Member State. Only 3% of respondents (5% of responding enterprises) do not wish to know these rules before marketing their product in the Member State of destination. Almost 80% of respondents of the consultation of the European Business Test Panel would like to know (beforehand) about the technical rules in force in those Member States where they wish to market products.

9 See point 5.2 of the second biennial report COM(2002)419final. The lack of awareness is illustrated by the results from the European Business Test Panel Survey (annex 2) where more than half of the enterprises participating in the survey were not aware of the mutual recognition principle prior to the survey.

10 Judgment of the Court of Justice of 28 March 1995, The Queen v. Secretary of State for Home Department, ex parte Evans Medical Ltd and Macfarlan Smith Ltd., Case C-324/93, European Court Reports 1995, p. I-5.

11 Alarm systems, for example, are regulated by three EC Directives (73/23/CEE, 89/336/CEE and 1999/5/CE) but functionality testing, climatic tests and efficiency testing of these products nevertheless fall within the scope of the mutual recognition principle: judgment of the Court of Justice of 8 May 2003, ATRAL SA v Belgian State, Case C-14/02.

administrations should first examine whether it is formally regulated in secondary Community legislation before concluding whether mutual recognition applies or should apply. Obviously this requires a very profound knowledge of EC law.

Secondly, the text of Articles 28 and 30 EC Treaty is so concise that their interpretation is the subject of abundant jurisprudence of the Court of Justice. Roughly estimated 300 judgements of the Court of Justice relate to mutual recognition in the area of goods. The term "mutual recognition" has almost never been used in the jurisprudence of the Court, so that a profound knowledge of the Court's jurisprudence is also necessary to distinguish the case-law on mutual recognition from the other case-law on Articles 28 and 30 EC Treaty.

Thirdly, the most important problem is without any doubt the widespread legal uncertainty about the burden of proof. Some enterprises wrongly believe that if a product is lawfully marketed in another Member State, they should not provide any information to the market surveillance authorities of the receiving Member State. Some competent authorities wrongly believe that the enterprise must demonstrate that the product meets an equivalent protection level. Many national technical rules are not explicit on the burden of proof with respect to mutual recognition. For reasons of administrative facility, some national laws put the onus on enterprises to show that the product meets the requirements of the Member State of destination.

Besides the strict adherence to national rules, uncertainty results in a very cautious attitude of the national authorities towards products lawfully marketed in another Member State but which do not comply with the national technical rules of the Member State of destination.

The consequence is that few controlling officers would take the responsibility to disregard their national rules, however outdated or restrictive they may be. Since the national rules define the roles, functions and liability of controlling officers, few of them are likely to put their national rules aside and to let the EC Treaty prevail. For some authorities, not applying mutual recognition could be advantageous: there is no need for them to enter into discussion with enterprises considering selling products that do not comply with the national rules. In addition, the non-application of mutual recognition may create competitive advantages for local manufacturers[12].

[12] Klaus Wallner, "Mutual Recognition and the Strategic Use of International Standards", in S-WOPEC Scandinavian Working Papers in Economics, No 254 (1998).

ANNEX V

LIST OF PARAMETERS

(1) General information

- Information relating to the general architecture of the rules
- special national conditions
- maintenance book
- operation book

(2) Rules relating to infrastructure

- pantographs
- on-board energy / EMC
- vehicle gauge
- miscellaneous safety equipment, e.g. control command, train radio

(3) Rules relating to rolling stock

- vehicle dynamics
- vehicle superstructure
- draw and buffer gear
- bogie and running gear
- wheel set / wheel set bearing
- brake equipment
- technical systems requiring monitoring, e.g. compressed air system
- front / side windows
- doors
- devices for passing
- control systems (software)
- drinking water and waste water systems
- environmental protection
- fire protection

- occupational health and safety
- tank-wagon tank
- pressure-discharge freight container
- load securing
- marking
- joining technology

ANNEX VI

IN-USE ROLLING STOCK HOMOLOGATION GUIDE

1. STARTING WITH A JOINT PROCEDURE

For the development and approval of vehicles, it is strongly recommended that manufacturers, railway undertakings and contracting entities approach the approval bodies from all countries for which they intend to ask approval with a request for a joint procedure, involving them from the start and thereby allowing them to decide on the most efficient path for the approval process.

This procedure applies to the technical approval of vehicles that are not fully approved under TSIs or not fully approved under RIV/RIC agreements. Vehicles (or parts of them) approved under TSIs or RIC-RIV are mutually approved as a matter of principle.

Linking a vehicle to the entity in charge of maintenance and to the maintenance plan is not part of this procedure.

2. SETTING UP THE CROSS ACCEPTANCE TABLE

The use of the common checklist (Annex V) by all Member States for cross-acceptance projects is recommended. A cross-acceptance table should contain all relevant rules of all Member States, set out according to the common checklist.

The approval requirements should then be divided into three groups, A, B and C:

Group A: contains internationally accepted standards that, once checked by any Member State, do not need further checking for cross-acceptance.

Group B: contains requirements that are currently used in specific countries and that

- might be fit for cross acceptance
- might need further detailed discussion before being moved to A or C, now or later, in general or for a specific country
- are not undisputable but are undeniably linked to the technical characteristics of the infrastructure for safe and interoperable operation in the country in question.

A vehicle could still run if it does not fulfil the B requirements, just as it is already running elsewhere, if the applicant can prove that a standard equivalent to the relevant national requirements is ensured.

Group C: contains undisputable and undeniably essential and necessary requirements linked to the technical characteristics of the infrastructure of a specific country or network, which always need checking, e.g. loading gauge. These may be defined in the 'Specific Cases' of the TSIs and are also referred to in Article 14(2)(c) of the Railway Safety Directive.

Groups A/B/C do not include "rules" for purely local requirements and restrictions that apply only to (minor) parts of a country's infrastructure. Checking these rules forms part of the regular checks for route availability to be organised between railway undertakings and infrastructure managers.

3. DEALING WITH THE RESULTS OF CHECKS AGAINST THE COMMON CHECKLIST

The authority that handles "first/type approval" supplies, together with this approval, a "result list" of the Group-A reference documents that a vehicle (type) has been checked against. Where appropriate, it mentions the level of the check or the resulting measurement. It also mentions derogations from this document (e.g. within gauge G2, but cabin steps exceed gauge by 3 cm) and if thereby Group-A requirements are met for a specific parameter.

The authorities format the "result list" according to the checklist accompanying this procedure and as an official document (appropriately drafted and signed etc.). It may be a declaration of an EU or national notified body, countersigned by the authority. Authorities of other countries where approval of the vehicle is sought accept the "result list" as full proof of compliance with the Group-A documents referred to.

Similarly, the "result list" mentions — where practicable — whether and how Group B and C items were checked, and which documents these checks refer to.

For the Group C items, a check according to national practice is necessary, as specified by the national authority. Where possible, use is made of earlier tests and checks.

For the Group B items, a check according to national practice and against national requirements may be necessary. The applicant may deliver arguments that he can provide an alternative solution. The national authority has to provide adequate arguments as to why it cannot accept a positive verification against a different, foreign standard.

The authorities should work together to update the A/B/C grouping and to reduce the number of Group B items.

4. SUPPORTING THE PROCESS PENDING THE ADOPTION OF LEGISLATIVE PROPOSALS

Member States should fill in the table of requirements following the common checklist. Member States should agree to cross-accept approvals by other Member States for items in Group A. At the same time, each Member State should make efforts to move as many items as possible from Group B to Group A. The cross-acceptance table will be an important and useful tool for this purpose, accelerating the whole process.

Member States are also encouraged to use these guidelines together on a bi- or multilateral basis for actual projects.

The European cross-acceptance process should be permanently monitored by the Agency, which should extend and update the cross-acceptance table on the basis of Member State contributions. It could do this under its mandate for the development of TSIs[13], because an

[13] Mandate adopted …

analysis of the technical rules in a given subsystem should be the first step in developing a TSI; in addition, national rules notified to the Commission under Article 8 of the Railway Safety Directive are forwarded to the Agency for assessment and publication.

The aim is to ensure that:

– Member States are obliged to cross-accept items in Group A.

– Group B items are reduced in number or become unnecessary. Part of the evaluation by the Agency could be a permanent report to the EU Commission on the development of Groups A and B in each Member State.

– Group C items will remain necessary for some time. They can be expected to become "Special Cases" in the relevant TSIs.