



The certification body function for entities in charge of maintenance of freight wagons

A review of ORR's role

March 2017

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1. Introduction

Purpose of this document

- 1.1 This document sets out the conclusions from a review of the Office of Rail and Road's (ORR) role in relation to the certification body function for entities in charge of maintenance (ECM) of freight wagons under Commission Regulation (EU) 445/2011 (the ECM Regulation).
- 1.2 ORR has concluded from the review that there are now sufficient accredited bodies in the market to allow it to withdraw from performing the ECM certification body function. We are inviting industry stakeholders to provide any comments they may have on this conclusion and the proposals set out in Chapter 4.

Development and review of ORR's role

- 1.3 The ECM Regulation sets out a system of certification of ECMs for freight wagons and under Article 10 a certification body can be either an accredited body; a body recognised by the Member State; or a national safety authority (NSA). ORR is the NSA in Great Britain.
- 1.4 On 30 November 2011 the UK Representation to the EU (UK Rep) notified the European Commission that ORR, as well as accredited bodies, will deliver the ECM certification body function in accordance with the ECM Regulation. The letter said that ORR will perform this function during the initial introduction and implementation of the regime and that our involvement will then be reviewed after two years. This was to establish whether the market for accredited bodies would be sufficiently developed to enable us to step back from our role.
- 1.5 In July 2012 ORR's public consultation¹ on proposals to implement the ECM Regulation said that ORR will
 - act as a certification body for ECMs for an initial period of two years to ensure that the requirements in the Railway Safety Directive 2004/49/EC (as amended) and the ECM Regulation are met; and
 - review the certification body role in 2013/14 when the position on accredited certification bodies will be clearer.
- 1.6 After a review of the certification body function in early 2014 to determine whether, at that point, the market for accreditation bodies was sufficiently developed to enable ORR to step back from it, we wrote to a number of stakeholders in May 2014 informing them that we had decided to continue and that we would review this again

¹ http://orr.gov.uk/data/assets/pdf_file/0019/9118/rogs-amendments-consultation-july-2012.pdf

in 2016-17 when an accreditation scheme by the United Kingdom Accreditation Service (UKAS) should be in place.

- 1.7 UK Rep also wrote to the European Commission in June 2014 saying that ORR would continue in the role and keep this position under periodic review and then write to the Commission again should the situation change in future.
- 1.8 In October 2014 the Department for Transport provided funding to UKAS to develop an accreditation scheme for certification bodies under the ECM Regulation. UKAS notified ORR at the end of August 2016 that the following organisations had been accredited to perform the certification function:
 - Network Rail Certification Body Ltd (trading as Network Certification Body)
 - SGS United Kingdom Ltd
 - TUV Rheinland Ltd
- 1.9 In addition to these three certification bodies accredited by UKAS, there are a further 8 bodies accredited by other national accreditation bodies; and 7 bodies recognised by other Member States across the EU² potentially available to customers in the UK market. Details of all accredited or recognised certification bodies can be found on the European Railway Agency Database of Interoperability and Safety³.

² Plus Switzerland

³ https://pdb.era.europa.eu/safety_docs/ecm/certBodies/default.aspx

2. Development of the ECM certification market

2.1 In the light of an increased presence of accredited certification bodies in the UK, ORR has reviewed its position against the following objectives:

Any decision ORR takes must not increase pressure on its resources but should:

- provide advantages for its enforcement and supervision remit (for example, having a valuable insight into the ECM's activities)
- support the development of the market for ECMs by ensuring they can access fair and consistent certification at a reasonable price; and
- facilitate competition (and the associated benefits for cost and efficiency) between accredited certification bodies.

2.2 Against these objectives ORR considered three options:

- Option 1 – ORR continues the certification body function without charging
- Option 2 – ORR continues the certification body function and charges
- Option 3 – ORR discontinues the certification body function

2.3 Option 3 is the preferred option because it provides the best means for ORR to support the development of the market for ECMs and their certification bodies by allowing accredited certification bodies to compete on a level playing field. At the same time, this option limits the resource demands on ORR and provides opportunities to gain efficiencies in more proactive and targeted supervision of ECMs while ensuring the legal requirements for certification continue to be met.

2.4 Option 3 also supports the recommended direction of travel from the Cabinet Office's Regulatory Futures Review⁴ towards regulated businesses having greater freedom to self-assure either directly themselves or through the use of assurance bodies.

⁴ <https://www.gov.uk/government/publications/regulatory-futures-review>

3. Impact assessment

Evaluation of the options

Option 1 – ORR continues the certification body function without charging

Pros

- 3.1 ORR has never charged an ECM for its certification work and continuing to perform this function without charging ECMs does not change the current arrangements for ORR in terms of cost effectiveness and additional pressure on resources over the longer term. Maintaining the status quo will mean that costs for the ECM will be kept to a minimum because it is not forced to apply to an accredited certification body and pay their fees.
- 3.2 Retaining the role will mean that we can continuously improve the influence and relationship we have built since 2011/12 with the ECMs and the freight wagon community. We were in a position then in which ORR had less visibility, insight and knowledge of these players.

Cons

- 3.3 Continuing the role (with or without charging) means that ORR will need to continue to deploy resources onto the assessment of applications when such resource could be used for proactive and targeted risk-based supervision of ECMs or the wider freight sector.
- 3.4 Some accredited bodies have already expressed the view that if ORR continues the role of certification body without charging, then this could cause them to exit the market in Great Britain. This is because they would need to charge to recover their costs and they would not be able to compete with an organisation (ORR) offering a free service. The continued presence of ORR offering a free service may therefore adversely affect the development of the market.
- 3.5 If the accredited organisations leave the market because they are unable to compete with ORR's free service then the money from the taxpayer through Department for Transport funding for the accreditation scheme will have been wasted.
- 3.6 Like all our railway safety regulatory work, our ECM certification role is funded through the safety levy. However, 50% of freight wagon ECMs do not pay the safety levy (i.e. those that are not freight operating companies or Network Rail) and these will continue effectively to be subsidised by safety levy payers.

- 3.7 As a public authority the activities of an NSA performing the certification body function are confined to its national territory⁵. In respect of ECMs originating in another Member State, ORR does not have the freedom to carry out any business in that Member State as an accredited or recognised private body does.

Option 2 – ORR continues the certification body function and charges

Pros

- 3.8 In order to allow the accredited certification bodies to compete on a level playing field, ORR would need to charge for its services if it continues to perform the certification body function. The benefit is that we would be able to recover our costs without, in effect, any cross-subsidy from safety levy payers.
- 3.9 Charging might also provide an incentive for applicants to ‘get it right the first time’ when they make an application as failure to do so may mean repeated submissions which could increase their costs.
- 3.10 We surveyed 18 NSAs to find out if they charge for ECM certification. We received 17 responses and 9 (53%) of those charge. Some charge by the hour and some have a fixed fee.

Cons

- 3.11 Charging is likely to be unpopular with ECMs as this will increase their costs compared to the free service they currently enjoy from ORR, but we don’t have any evidence to suggest that it will drive ECMs out of the market.
- 3.12 It’s possible that even if ORR continues the role and charges at a fair market price, ECMs may still choose ORR over another certification body because they are already familiar with us, thus risking continued influence on market development.

Option 3 – ORR discontinues the certification body function

Pros

- 3.13 As noted above, this is our preferred option. If ORR ceases to be a certification body this would allow accredited certification bodies to compete on a level playing field. Some organisations have expressed an interest in doing this. As part of its NSA supervision role ORR could still take enforcement action if an ECM certified by any certification body fails to comply with the certification requirements. As NSA we

⁵ Application guide to the ECM Regulation (pp. 34 and 51): <http://www.era.europa.eu/Document-Register/Documents/ECM-guide%20V2%20-%20ERA-GUI-100.pdf>

would still have to cooperate with ECM certification bodies to share information and coordinate responses to any failure to comply with the safety-related regulatory framework.

- 3.14 Discontinuing the role provides an opportunity to gain efficiencies by undertaking more proactive and targeted risk-based supervision of ECMs, irrespective of whether they have been certified by ORR.
- 3.15 Stepping back from the role is in line with ORR's regulatory approach as we have reached a stage where we have more confidence in, and information about, the ECMs and their level of maturity.

Cons

- 3.16 NSAs have the flexibility to use the ECM certification scheme⁶ (the criteria for assessing applications) only as a guide and to bring their ECM certification process in line with existing processes for safety certification. The principle of this flexibility is based on
- the wide and more detailed view the NSAs have of stakeholders and interested parties in relation to safety risks on the railway system; and
 - using knowledge of the applicant, its level of maturity and a risk-based approach to target the assessment of the ECM's maintenance system.
- 3.17 Accredited (or recognised) certification bodies, on the other hand, do not have this flexibility and must apply the ECM certification scheme in full. Being subjected to a more rigorous and prescriptive assessment by an accredited body would maintain ORR's confidence in the decision-making around ECM certificates but could be more expensive for the applicant.
- 3.18 The certification body role has provided ORR with a valuable insight into the activities of freight wagon ECMs where contribution to system risk would not have been evident to us. It has enabled us to be proactive in influencing behaviour and promoting best practice, both from an engineering and safety perspective. If we relinquish the role, we will need to continue our supervision of ECMs to maintain these benefits by building and maintaining effective engagement and information-sharing with the certification bodies, supported by more proactive and targeted risk-based supervision of ECMs
- 3.19 The costs for the ECM are likely to increase if ORR gives up the ECM certification function as an accredited body is certain to charge to recover its costs.

⁶ <http://www.era.europa.eu/Document-Register/Documents/ERA-GUI-09-2011-SAF-%20ECM%20certification%20-%20guide%20ECM%20certification%20scheme%20v1%200.pdf>

- 3.20 Network Certification Body (NCB), which also administers the ECM Service Provision Agreement (ESPA), has indicated that funding for the ESPA will not be available beyond CP5. ECMs will therefore need to pay for the equivalent of this service as an internal cost or from a service provider such as NCB. NCB has indicated that if demand for the ESPA as a paid-for-service no longer exists beyond CP5 it will be withdrawn.
- 3.21 So it seems inevitable that costs for the ECM will increase, through ESPA or ECM certification.
- 3.22 It's possible that this option may drive some ECMs out of the market (or ECMs may pool their resources as some did when the scheme was introduced). Or it could attract newcomers as the scope of certification by accredited bodies is EU-wide and beyond.
- 3.23 We have noted that out of a total of 43 certification bodies across the EU and beyond, 22 are NSAs, 11 are accredited and 7 are recognised by the Member State (*source: European Railway Agency Database of Interoperability and Safety*⁷). So there are more NSAs carrying out the certification function than there are accredited and recognised bodies. The NSA coexists with accredited or recognised bodies only in France and Sweden (the NSAs in France and Sweden both charge). But as noted above, 53% of those NSAs surveyed charge for their services and ORR would need to charge if it coexisted with the certification bodies accredited by UKAS. ORR considers that such an arrangement may risk influencing the development of the market.

⁷ https://pdb.era.europa.eu/safety_docs/ecm/certBodies/default.aspx

4. Proposals for ORR's withdrawal from the ECM certification function

- 4.1 ORR is proposing to withdraw from the ECM certification function and no longer issue any certificates or carry out any surveillance visits after 31 December 2017.
- 4.2 ORR discontinuing the certification function will mean a transfer of certification by the ECM to another certification body. The ECM certification scheme uses the International Accreditation Forum (IAF) Mandatory Document 2:2007⁸ standard. Under this standard the ECM can transfer its certification to another accredited body if it has a valid ECM certificate.
- 4.3 The IAF MD2:2007 provides rules for transferring certification while maintaining its integrity. The transfer process is based on a pre-transfer review by the accepting certification body prior to transfer. This involves a review of documentation and a visit to an ECM and covers the following:
- confirmation that the certified activities of the ECM fall within the scope of accepting certification body's accredited activities;
 - the reasons for seeking a transfer (for example, withdrawal of the previous certification body from the role);
 - verification that the ECM has a valid certificate;
 - an evaluation of the last assessment reports;
 - the treatment of complaints and non-conformities.
- 4.4 After the pre-transfer review the accepting certification body can decide to either:
- accept the ECM certificate issued by ORR and carry out surveillance activities under the remaining validity of that certificate; or
 - offer to issue a new certificate and commence a new programme of on-going surveillance.

Transition arrangements

- 4.5 ORR is proposing a transition period until 31 December 2017 to give the ECM enough time to decide what course of action it wants to take. During this time the ECM will have the following options:

1. If the ECM certificate issued by ORR is due to expire on or before 31 December 2017

⁸ http://www.iaf.nu/upFiles/127162.IAF-MD2-2007_Transfer_of_Certification_Pub2.pdf

4.6 If the ECM certificate issued by ORR is due to expire on or before 31 December 2017, the ECM can choose to

- apply to another certification body; or
- apply to ORR by 1 June 2017 to allow us time to assess and issue a renewed certificate by 31 December 2017 and then select another certification body and paragraphs 4.3 - 4.4 above will apply (the risk for the ECM here is that the accepting certification body may decide to issue a new certificate).

2. If the ECM certificate issued by ORR is due to expire after 31 December 2017

4.7 If the ECM certificate issued by ORR is due to expire after 31 December 2017 the ECM can choose to

- select another certification body to transfer its certification to and paragraphs 4.3 – 4.4 above will apply; or
- ask ORR to continue with any surveillance activity that is due on or before 31 December 2017 and then select another certification body and paragraphs 4.3 – 4.4 above will apply.

4.8 These transition arrangements will ensure that no ECM is unfairly disadvantaged from ORR's withdrawal from the market. There will be a sufficient lead-in period and a clear date at which all ECMs must transfer their certification to a new certification body. This will allow a smooth transition in order to provide stability in the market and continuity in the process so that every ECM will have the opportunity to have a valid certificate issued by ORR at the time of withdrawal. However, in all cases it will be at the discretion of the accepting certification body whether it

- accepts the certificate issued by ORR and carry out surveillance activities under the remaining validity of that certificate; or
- offers to issue a new certificate and commence a new programme of on-going surveillance.

Supervision

4.9 If ORR withdraws from performing the certification function this will mean that it no longer performs surveillance of the ECM. Surveillance consists of:

- on-site assessment (audits and inspections); and/or
- examination of documents provided by the ECM, for instance by exchange of emails;
- non-conformities identified in the initial assessment and in any other preceding surveillance activities;

- the annual maintenance report; and
- the appropriate actions put in place by the certification body to check claims in relation to Articles 5(7)⁹ and 9¹⁰ of the ECM Regulation.

4.10 ORR therefore proposes to build and maintain close relationships with the certification bodies (for example by attending a forum for certification bodies in a similar way we do for Notified Bodies) supported by proportionate, proactive and targeted risk-based supervision of ECMs without increasing the burden on ECMs by duplicating surveillance by the certification bodies. This will include having sight of the annual maintenance report, which the ECM is required to provide to us upon request.

4.11 ORR also proposes to share its experience and best practice from the ECM certification function with other certification bodies.

Proposed extension of ECM certification to other vehicles

4.12 Currently, ECMs only require certification in relation to the maintenance of freight wagons. The possibility for the certification regime to be extended in future by the European Commission to all vehicles (e.g. including locomotives and passenger rolling stock) was enshrined in the ECM requirements of the original railway safety Directive (2004/49/EC) and remains a live possibility.

4.13 Indeed, the new railway safety Directive¹¹ (EU) 2016/798 adopted as part of the Fourth Railway Package requires the European Union Agency for Railways to “*evaluate the system of certification of freight wagon ECMs; consider the expediency of extending that system to all vehicles and the mandatory certification of maintenance workshops; and submit [a] report to the Commission*”. Any ORR decision to no longer perform the ECM certification would also apply to any future extension of certification to other vehicles.

⁹ **Article 5(7):** If a contracting party, in particular a railway undertaking, has a justified reason to believe that a particular entity in charge of maintenance does not comply with the requirements of Article 14a(3) of Directive 2004/49/EC [*transposed in Great Britain as regulation 18A of ROGS*] or with the certification requirements of this Regulation, it shall promptly inform the certification body thereof. The certification body shall take appropriate action to check if the claim of non-compliance is justified and shall inform the parties involved (**including the competent national safety authority if relevant**) of the results of its investigation.

¹⁰ **Article 9:** If a national safety authority has a justified reason to believe that a particular entity in charge of maintenance does not comply with the requirements of Article 14a(3) of Directive 2004/49/EC [*transposed in Great Britain as regulation 18A of ROGS*] or with the certification requirements of this Regulation, it shall immediately take the necessary decision and inform the Commission, the Agency, other competent authorities, the certification body and other interested parties of its decision.

¹¹ <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32016L0798&rid=1>

Providing your comments

- 4.14 We are inviting industry stakeholders to provide any comments they may have on the proposals set out above by not later than 7 April 2017. Please send your comments to ROGSGuidance@orr.gsi.gov.uk by the closing date.
- 4.15 After the closing date we will review any comments received and then publish our final decision.

Annex A: List of those consulted

AAA Certification AB

Altran UK

APNCF – Associação Portuguesa de Normalização e Certificação Ferroviária

Atkins

ATOC

BELGORAIL S.A.

Bureau Veritas Italia S.p.A

CERTIFER SA

Channel Commercials plc

Colas Rail

Davis Wagon Services

DB Cargo

Department for Infrastructure (Northern Ireland)

Department for Transport

Devon and Cornwall Railway

Direct Rail Services

ERC GmbH

ESG Rail

European Union Agency for Railways

Eurotunnel

Freightliner

GB Railfreight

GE Capital

Halcrow Rail Approvals

IIS CERT s.r.l.

Inspecta Sweden AB

Interfleet

Italcertifer S.p.A.

JSD Rail

MMRA

Mott MacDonald

Nacco Rail

Network Rail

Network Rail Certification Body Ltd trading as Network Certification Body (NCB)

Nigel Green Consultant

Plasmor Ltd

Porterbrook

PWF Rail

Quality Austria - Trainings, Zertifizierungs und Begutachtungs GmbH

Railway Approvals

Ricardo Rail

RINA Services S.P.A.

RSSB

Sconrail UK

SGS Correll Rail

SGS United Kingdom Ltd

South West Trains

STVA

Swiss Association for Quality and Management Systems (SQS)

TUV Rheinland UK Ltd

TÜV SÜD Landesgesellschaft Österreich GmbH

United Kingdom Accreditation Service

University of Zilina

Victa Railfreight Ltd

Volker Rail

VTG

W H Davis Ltd

Wabtec Rail Ltd

World Line - Atos Origin



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