

COMMISSION IMPLEMENTING DECISION (EU) 2023/417**of 22 February 2023****accepting a request submitted by the Netherlands and Germany, pursuant to Directive (EU) 2016/797 of the European Parliament and of the Council, not to apply temporarily point 4.2.5.1. 'Radio communications with the train' and point 4.2.8. 'Key Management' of the Annex to Commission Regulation (EU) 2016/919 for the eight trainsets FLIRT3 EMU3 Limburg MS (L-435)***(notified under document C(2023) 1154)***(Only the Dutch and German texts are authentic)**

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Directive (EU) 2016/797 of the European Parliament and of the Council of 11 May 2016 on the interoperability of the rail system within the European Union ⁽¹⁾, and in particular Article 7(4) thereof,

Whereas:

- (1) On 15 and 20 July 2022, respectively, the Netherlands and Germany submitted to the Commission a request for temporary non-application of point 4.2.5.1. 'Radio communications with the train' and point 4.2.8. 'Key Management' of the Annex to Commission Regulation (EU) 2016/919 ⁽²⁾ to eight vehicles FLIRT3 EMU3 Limburg MS (L-435) (the 'trainsets') supplied by the manufacturer Stadler to the operator Arriva. The requests are based on Article 7(1), point (c), of Directive (EU) 2016/797 providing for a possibility of non-application due to the risk of compromising the economic viability of the project. Those trainsets are used to perform services between Maastricht (the Netherlands), Heerlen (the Netherlands) and Aachen (Germany).
- (2) The same eight trainsets FLIRT3 EMU3 Limburg MS (L-435) have already been the object of Commission Implementing Decision C(2020) 5081 final ⁽³⁾. By that implementing decision, the Commission accepted the request of the Netherlands to temporarily not apply point 7.4.2.1 of the Annex to Regulation (EU) 2016/919, which provides for the installation of European Train Control System (ETCS) Baseline 3 equipment ⁽⁴⁾ in vehicles intended for operations on TEN-T core network corridors. The temporary non-application was accepted on the basis of Article 7(1), point (c), of Directive (EU) 2016/797 which refers to the lack of economic viability of performing the upgrade to install European Rail Traffic Management System (ERTMS) on-board equipment in full compliance with Regulation (EU) 2016/919.
- (3) Implementing Decision C(2020) 5081 final granted the temporary non-application until 31 March 2022, with the possibility for the Dutch national safety authority to extend the period of non-application until 31 December 2022, if needed for reasons outside the responsibility of the trainsets' owner or manufacturer, and upon a request by either of them.
- (4) On the basis of the obligation of the Dutch authorities under Implementing Decision C(2020) 5081 final to monitor progress of the trainsets' owner and manufacturer as regards their obligation to bring the eight trainsets in full compliance with on-board ERTMS, the Dutch national safety authority authorised the extension of the period of non-application until 31 December 2022.

⁽¹⁾ OJ L 138, 26.5.2016, p. 44.

⁽²⁾ Commission Regulation (EU) 2016/919 of 27 May 2016 on the technical specification for interoperability relating to the 'control-command and signalling' subsystems of the rail system in the European Union (OJ L 158, 15.6.2016, p. 1).

⁽³⁾ Commission Implementing Decision C(2020) 5081 final of 29 July 2020 accepting a request submitted by the Netherlands, pursuant to Directive (EU) 2016/797 of the European Parliament and of the Council, not to apply point 7.4.2.1 of the Annex to Commission Regulation (EU) 2016/919 to eight trainsets of FLIRT3 EMU3 Limburg MS (L-435).

⁽⁴⁾ Table A 2.2 and Table A 2.3 of Annex A to the Annex of Commission Regulation (EU) 2016/919.

- (5) Thus, the eight trainsets concerned are currently equipped with class B systems, as the owner decided to postpone the installation of Baseline 2 and directly update to Baseline 3 by the end of 2022, on the basis of Implementing Decision C(2020) 5081 final.
- (6) As regards the current request for temporary non-application of point 4.2.5.1. and point 4.2.8. of the Annex to Regulation (EU) 2016/919, the information provided by the Dutch and German authorities in accordance with Article 7(4) of Directive (EU) 2016/797 enabled the Commission to carry out its analysis.
- (7) The project of updating the eight trainsets with ETCS Baseline 3 on-board equipment faced delays in the first year of the project, mainly due to external factors with only limited leverage by the manufacturer. The reasons for the delays include the lack of upgrading of the infrastructure to ETCS Baseline 3, vagueness regarding the requirements of the implementation of the type of Class B system, and the impact of COVID-19 on decision-making and communication between stakeholders.
- (8) In order to compensate for the delays and continue operating the trains, the Dutch and German authorities accepted the request from the manufacturer to temporarily remove the two functions 'GPRS packet switching' and 'online key management' from the specifications of the trainsets and explore the possibility of applying a restriction or condition of use to compensate for the two functions. However, GPRS packet switching and online key management are two technical functions inherently part of ETCS Baseline 3. GPRS packet switching is part of the requirements under point 4.2.5.1. 'Radio communications with the train' and online key management is part of the requirements under point 4.2.8. 'Key management' of the Annex to Regulation (EU) 2016/919. Thus, removal of those two functions constitutes non-compliance with Regulation (EU) 2016/919.
- (9) Therefore, without a derogation from full ETCS Baseline 3 application, the operation of the trainsets would need to be ceased. The trainsets are equipped with specific characteristics, namely three power supply systems (1,5 kV, 3 kV and 15 kV) and three Class B train control systems (ATB, TBL1+, and PZB). Trainsets with these or similar characteristics, authorised for running in the Netherlands and Germany, are currently not available on the market. Temporary replacement by leased trainsets is therefore impossible. As a result, the trainsets would need to be replaced by buses, which would not only have an economic impact in the missing income and high direct costs of an alternative road transportation service, but also have a negative socioeconomic impact on Arriva customers and loss of passenger trust in the operator due to the disruption of the service.
- (10) In accordance with Article 7(4) of Directive (EU) 2016/797, the applicants informed the Commission that the delay of implementation of the two functions will not affect safety and interoperability, as the trackside introduction of the two functions is not foreseen before 2026 and ETCS Baseline 3 on-board is fully compatible with the trackside signalling. Furthermore, the impact of the non-application of the two functions is limited, as the trainsets will only travel between Aachen and Maastricht.
- (11) Therefore, in order to avoid disruption of interregional rail services pending installation of the lacking ERTMS equipment, the condition set out in Article 7(1), point (c) of Directive (EU) 2016/797 should be considered as fulfilled and the derogation from point 4.2.5.1. and point 4.2.8. of the Annex to Regulation (EU) 2016/919 should be granted until 31 December 2024.
- (12) The measures provided for in this Decision are in accordance with the opinion of the Committee referred to in Article 51(1) of Directive (EU) 2016/797,

HAS ADOPTED THIS DECISION:

Article 1

The request of the Kingdom of the Netherlands and of the Federal Republic of Germany not to apply point 4.2.5.1. 'Radio communications with the train' and point 4.2.8. 'Key Management' of the Annex to Regulation (EU) 2016/919 to eight trainsets 'FLIRT3 EMU3 Limburg MS (L-435)', is accepted, subject to the conditions set out in Article 2.

Article 2

The Kingdom of the Netherlands and the Federal Republic of Germany shall inform the Commission by 31 March 2023 of the works scheduled for the implementation of point 4.2.5.1. and point 4.2.8. of the Annex to Regulation (EU) 2016/919 and notify the Commission of the actual implementation thereof by 31 December 2024.

Article 3

This Decision shall apply within the geographic limits of the Dutch and German railway networks.

Article 4

This Decision is addressed to the Kingdom of the Netherlands and the Federal Republic of Germany.

It shall apply until 31 December 2024.

Done at Brussels, 22 February 2023.

For the Commission
Adina-Ioana VĂLEAN
Member of the Commission
