

Clarification note

Application of Article 19 and Article 55 of Directive (EU) 2016/797 in relation to tendering procedures

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<i>Date</i>	13/03/2025	13/03/2025	13/03/2025
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Document History

<i>Version</i>	<i>Date</i>	<i>Comments</i>
0.1	07/10/2024	Draft version discussed within the TA WG
1.0	13/03/2025	First version of the document. Version updated according to comments exchanged within the TA WG

The purpose of this document is to foster an harmonised EU approach to trackside approval process with the aim to fulfil the objectives of the 4th Railway Package. The actors concerned with this clarification note are encouraged to voluntarily apply it.

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 established 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 objective of this document is to clarify the position of the European Union Agency for Railways (the Agency) concerning application of provisions in Articles 19 and 55 of Directive (EU) 2016/797¹ in conjunction with the framework on tendering procedures, specifically when do entities fall under obligation to apply to the Agency for trackside approval as well as to provide Agency's view regarding the most common relevant business cases.

While Directive 2014/24/EU on public procurement or Directive 2014/25/EU on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC do not contain a legal definition of a tender, the term 'tender' is widely used throughout these directives as well as in Directive (EU) 2016/797.

Official EU sources describe a *tender* as an official proposal that a company submits as a response to calls for tenders, which are used to award specific procurement contracts. *Calls for tenders* are in their turn described as procedures applied to generate offers from companies competing for works, supply or service contracts in the framework of public procurement². Directive 2014/25/EU is a European legal act to be transposed into the national legislation of the Member States, therefore tendering procedures are also subjected to national rules, which adds complexity and requires acceptable interpretation of the framework governing applications for trackside approvals.

2. Line to take

2.1. Conditions of eligibility for trackside approval

Before submitting applications for trackside approval, the applicants are invited to assess their projects based on the conditions described below.

2.1.1. Calls for tenders

Calls for tenders should be understood as any type of procurement procedures conducted according to legal framework of a Member State to generate offers from company(-ies) competing for works, supply or service contracts. It should be emphasised that according to provisions of Directive (EU) 2016/797 the calls for tenders are the mandatory precondition for starting the trackside approval process. The absence of a call for tenders renders the trackside approval not compulsory.

To allow the Agency check of the technical solutions envisaged, any call for tenders that specifies ERTMS requirements necessitates the prior submission of trackside approval application(s) within the one-stop shop (OSS). Specifically, applicants should submit these applications, encompassing the full scope of the ERTMS tender(s), before the call for tenders is officially launched. It is permissible for a single trackside approval to encompass the scope of multiple tenders.

Subsequent requests to a national safety authority (NSA) for authorisation for placing in service of fixed installations should be accompanied by trackside approval decision(s) that cover the entire geographical scope of the requested authorisation. While the geographical scope of the trackside approval decision(s) may exceed the authorisation's scope, it should never be narrower.

¹ 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

²[https://international-partnerships.ec.europa.eu/funding-and-technical-assistance/looking-funding/tenders_en#:~:text=Related%20links-,Definition,\(equipment%2C%20materials%20etc.\)](https://international-partnerships.ec.europa.eu/funding-and-technical-assistance/looking-funding/tenders_en#:~:text=Related%20links-,Definition,(equipment%2C%20materials%20etc.)) and https://single-market-economy.ec.europa.eu/about-calls-tenders_en

Applicants should therefore develop a trackside approval submission strategy that guarantees all authorisation requests include trackside approval decision(s) covering at least the corresponding geographical area.

The Agency provides guidance on optimizing trackside approval submission strategies during the initial engagement process. The scope of the application can be corrected during the approval process, if necessary and according to the modifications of the projects.

2.1.2. Scope of tenders

To be eligible for the trackside approval, the tenders should be relevant to ERTMS trackside equipment. This applies to new infrastructure projects as well as to renewal or upgrading the existing infrastructure or their combinations. The tenders should be aimed at purchasing of design, installation works or supply of ERTMS trackside equipment.

The geographical scope of the projects should be limited to the territory of EU Member States.

2.1.3. Level of details and completeness of the draft calls for tenders

Considering the requirement in Article 19(2) of Directive (EU) 2016/797, specifically the obligation to apply for the trackside approval before the actual publication of the call for tenders, it is believed that the eligible procurement documents or their drafts should include details of any of the specifying high-level or detailed requirement(s) that define the ERTMS trackside technical solution envisaged (radio communication part, ETCS part or both), such as the version of the CCS TSI and/or the specifications, the ETCS system version.

In case of application to the Agency, submitted evidence can be initially incomplete, then the assessment process will go on until the defined reasonable deadline considering availability of the design details and can be extended after the tender phase.

2.1.4. Purpose of the trackside approval

Considering the provisions of Article 18(3) of Directive (EU) 2016/797 trackside approval is one of the aspects to be covered by an applicant for the authorisation for the placing in service of fixed installations. Therefore, the trackside approval should be sought only in the context of obtaining an authorisation for the placing in service of fixed installations, i.e. where such authorisation is not requested by national safety authorities, there should not be a need to apply for trackside approval (see also ERA clarification note 1210 of 2020).

2.2 Application of transitional provisions:

2.2.1. Date of transposition

As the date of transposition of Directive (EU) 2016/797 varies for different Member States (16 June 2019 or 31 October 2020, see Art. 1 of Directive (EU) 2020/700), the obligations to comply with the requirements regarding the trackside approval arise in different moments in time, which also affects the application of transitional provisions in Article 55 of Directive (EU) 2016/797.

2.2.2. Date of completion of tendering/contracting phase

The end of tendering or contracting phase mentioned in Article 55(3) of Directive (EU) 2016/797 should be linked to the actual transposition date of the Directive in the given Member State, i.e. exemption from application for trackside approval should be applicable depending on the transposition date in their respective Member State.

For calculation of the end date of tendering phase, the time needed to process complains/appeals against the results of the procurement procedure should be taken into account.

2.2.3. Options

For the purpose of this clarification note the options referred to in Article 55(4) of Directive (EU) 2016/797 should be understood as “an agreement in which a company buys a product from another company and has the right to buy more of that product later but does not have to do so.”³

The important aspect of the provision of Article 55(4) is that the options outside the scope of trackside approval should derive from contracts that were signed before the reference 15 June 2016. Additionally, it has to be noted that application of Article 55(4) does not depend on the date of transposition of the Directive (EU) 2016/797 as the Article refers to the date of entering into force of the Directive, not the date of its transposition.

3. Legal background

Articles 18(1) and 18(4) of Directive (EU) 2016/797:

1. The trackside control-command and signalling, energy and infrastructure subsystems shall be placed in service only if they are designed, constructed and installed in such a way as to meet the essential requirements, and the relevant authorisation is received in accordance with paragraphs 3 and 4.

4. The applicant shall submit a request for authorisation of the placing in service of fixed installations to the national safety authority. The application shall be accompanied by a file which includes documentary evidence of:

(a) the declarations of verification referred to in Article 15;

(b) the technical compatibility of the subsystems with the system into which they are being integrated, established on the basis of the relevant TSIs, national rules and registers;

(c) the safe integration of the subsystems, established on the basis of the relevant TSIs, national rules, and the common safety methods ('CSMs') set out in Article 6 of Directive (EU) 2016/798;

(d) in the case of trackside control-command and signalling subsystems involving European Train Control System (ETCS) and/or Global System for Mobile Communications — Railway (GSM-R) equipment, the positive decision of the Agency issued in accordance with Article 19 of this Directive; and, in the case of a change to the draft tender specifications or to the description of the envisaged technical solutions that occurred after the positive decision, the compliance with the result of the procedure referred to in Article 30(2) of Regulation (EU) 2016/796.

³ <https://dictionary.cambridge.org/dictionary/english/option-to-buy>

Articles 19(2) and 19(4) of Directive (EU) 2016/797:

2. In order to ensure the harmonised implementation of ERTMS and interoperability at Union level, before any call for tenders relating to ERTMS track-side equipment, the Agency shall check that the technical solutions envisaged are fully compliant with the relevant TSIs and are therefore fully interoperable.

4. Within one month of receipt of the applicant's request, the Agency shall inform the applicant that the file is complete or ask for relevant supplementary information, setting a reasonable deadline for the provision thereof.

The Agency shall issue a positive decision, or inform the applicant of possible deficiencies, within a predetermined, reasonable time period, and in any case, within two months of receipt of all relevant information. The Agency shall base its opinion on the file of the applicant and on possible opinions from the national safety authorities.

If the applicant agrees with the deficiencies identified by the Agency, the applicant shall rectify the project design and introduce a new request for approval to the Agency.

If the applicant does not agree with the deficiencies identified by the Agency, the procedure referred to in paragraph 5 shall apply.

In the case referred to in point (a) of Article 7(1), the applicant shall not request a new assessment.

Articles 55(2), 55(3) and 55(4) of Directive (EU) 2016/797:

2. Directive 2008/57/EC shall continue to apply in relation to ERTMS trackside projects which are to be placed in service between 15 June 2016 and 16 June 2019.

3. Projects which have completed the tendering or contracting phase prior to 16 June 2019 are not subject to the pre-authorisation by the Agency referred to in Article 19.

4. Until 16 June 2031 options included in contracts which were signed before 15 June 2016 shall not be subject to the pre-authorisation by the Agency referred to in Article 19, even if they are exercised after 15 June 2016.

Article 1 of Directive 2014/25/EU (as amended):

1. This Directive establishes rules on the procedures for procurement by contracting entities with respect to contracts as well as design contests, whose value is estimated to be not less than the thresholds laid down in Article 15.

2. Procurement within the meaning of this Directive is the acquisition by means of a supply, works or service contract of works, supplies or services by one or more contracting entities from economic operators chosen by those contracting entities, provided that the works, supplies or services are intended for the pursuit of one of the activities referred to in Articles 8 to 14.

3. The application of this Directive is subject to Article 346 of TFEU.

4. This Directive does not affect the freedom of Member States to define, in conformity with Union law, what they consider to be services of general economic interest, how those services should be organised and financed, in compliance with the State aid rules, and what specific obligations they should be subject to. Equally, this Directive does not affect the decision of public authorities whether, how and to what extent they wish to perform public functions themselves pursuant to Article 14 TFEU and Protocol No 26.

5. This Directive does not affect the way in which the Member States organise their social security systems.

6. The scope of this Directive shall not include non-economic services of general interest.
