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FINDINGS OF THE BOARD OF APPEAL OF THE EUROPEAN UNION AGENCY FOR RAILWAYS

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| Case number | EACLI EU-ERABA-2021-001 |
| Language of the case | English |
| Appellant | Siemens Mobility GmbH |
| Representative | Simon Fischer |
| Contested Act | Decision of the European Union Agency for Railways V-20210127-006 |

THE ERA BOARD OF APPEAL

Composed of:

Chair: Marcel Verslype

Member-Rapporteur: Joanna Marcinkowska

Member: Gilles Dalmas

Registrar: Zografia Pyloridou

Gives, on 5 October 2021 , the following findings n°**EACLI EU-ERABA-2021-001**:

The appeal is admissible and the grounds for the appeal are founded.

I. BACKGROUND

1. The appellant applied to the European Union Agency for Railways (hereinafter: ERA or Agency) for a conformity-to-type authorisation (hereinafter: C2T authorisation) on 20 January 2021 with application number V-20210120-009 (hereinafter: application 009). This application concerned one locomotive identified with number 91 85 4475 416-4.
2. The appellant also applied for a conformity-to-type authorisation on 27 January 2021 with application number V-20210127-006 (hereinafter: application 006). This concerned two locomotives: 91 80 6193 300-1 and 91 80 6193 311-8. Appeal against decision V-20210120-009-DEC V 1.0 which rejected application 009 is analysed separately under case Nr EACLI EU-ERABA-2021-002.
3. The application for C2T authorisation concerned existing vehicles whose placing on the market has already been authorised and which have since been in use.
4. The vehicles are equipped with ETCS baseline 2 (hereinafter: BL2).
5. The application was due to the fact that the geographical area of use of the vehicles concerned was to be extended to Belgium.
6. In order to supply the vehicles concerned with the latest software update before their use in Belgium they were upgraded from the authorised vehicle type 11-057-0001-5-003 to the authorised vehicle type 11-057-0016-3-001-002.
7. The type approval to which the application referred, namely type 11-057-0016-3-001-002, was entered in the ERATV on 14 October 2020.
8. ERA rejected application 006 with decision no. V-20210127-006-DEC V 1.0 on 26 February 2021.
9. In its rejection decision, ERA stated that the main reason for its decision was that the change in the on-board ETCS was made after 31 December 2020. According to ERA, 31 December 2020 was the deadline for obtaining authorisation for an upgrade of an authorised existing vehicle equipped with ETCS BL2 without the need to install ETCS baseline 3 (hereinafter: BL3).
10. According to ERA, because the application occurred after the above-mentioned date, the TSI CCS in force, thus Commission Regulation (EU) 2016/919 of 27.05.2016 concerning the technical specifications for the interoperability of the control-command and signalling subsystems of the rail system within the European Union (OJ L 158, 15.06.2016, p. 1), as last amended by Commission Implementing Regulation (EU) 2020/420 of 16.03.2020 (OJ L 84, 20.03.2020, p. 5), would have to be applied. Consequently, the vehicles should have been equipped with ETCS BL3.
11. According to ERA, this is also apparent from Clarification Note ERA12109-119 V1.0, which states that both newly built vehicles and existing vehicles in which ETCS is installed for the first time or in which an existing ETCS is upgraded or renewed can no longer be equipped with ETCS baseline 2 (hereinafter: BL2) after 31 December 2020.
12. On 9 March 2021, the appellant submitted to the Agency a request for a review of the rejection decision.
13. In its decision of 3 May 2021, ERA concluded the review stating that the rejection decision is upheld in its entirety.

II. PROCEDURE

14. On 23 June 2021, the appellant filed an appeal against two Agency decisions by using the appeal form available on the Board of Appeal website. The appellant filled the appeal in one appeal form for two appeal cases because according to the appellant the two cases refer to identical locomotives and identical application content.

15. On 25 June 2021, the Registrar notified the appeal to ERA and that notification triggered the interlocutory revision which applies in cases where applicant is the appellant and the Agency has a month to reconsider or confirm its position.
16. On 23 July 2021, the Registrar notified the appeal to the Board of Appeal (hereinafter: Board or BoA), together with the ERA statement of defence.
17. On 10 August 2021, the appellant filed an additional written submission which commented the ERA statement of defence and included a letter from the Belgian National Safety Authority (hereinafter: NSA) rejecting an application for non-application of the CCS TSI for Vectron locomotives.
18. On 26 August 2021, ERA replied to the appellant's additional written submission contesting it as inadmissible mainly on the ground that new evidence was presented without prior request by the Chair of the BoA.
19. On 31 August 2021, the Registrar notified to both parties a request to submit written replies to a number of questions from BoA. The replies were received within deadline, on 10 September 2021.

III. MAIN PROVISIONS AT ISSUE

20. From 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 (hereinafter: Directive (EU) 2016/797)

Recital (49)

In order to facilitate the placing on the market of vehicles and to reduce administrative burdens, the notion of a vehicle authorisation for placing on the market that is valid throughout the Union should be introduced. While authorisations for placing on the market allow for commercial transactions of vehicles anywhere on the Union market, a vehicle may only be used within the area of use covered by its authorisation. In that context, any extension of the area of use should be subject to an updated authorisation for the vehicle. It is necessary that vehicles already authorised under earlier Directives also receive an authorisation for placing on the market if they are intended to be used on networks not covered

Definitions

(14) 'upgrading' means any major modification work on a subsystem or part of it which results in a change in the technical file accompanying the 'EC' declaration of verification, if that technical file exists, and which improves the overall performance of the subsystem;

(15) 'renewal' means any major substitution work on a subsystem or part of it which does not change the overall performance of the subsystem;

(32) 'area of use of a vehicle' means a network or networks within a Member State or a group of Member States in which a vehicle is intended to be used;

Article 4

4.4. Each TSI shall be drawn up on the basis of an examination of an existing subsystem and indicate a target subsystem that may be obtained gradually within a reasonable timescale. Accordingly, the adoption

of the TSIs and compliance with them shall gradually facilitate achievement of the interoperability of the Union rail system.

Article 21

21.2. In its application for a vehicle authorisation for placing on the market, the applicant shall specify the area of use of the vehicle. The application shall include evidence that the technical compatibility between the vehicle and the network of the area of use has been checked.

21.3. The application for a vehicle authorisation for placing on the market shall be accompanied by a file concerning the vehicle or vehicle type and including documentary evidence of:

- (a) the placing on the market of the mobile subsystems of which the vehicle is composed in accordance with Article 20, on the basis of the 'EC' declaration of verification;
- (b) the technical compatibility of the subsystems referred to in point (a) within the vehicle, established on the basis of the relevant TSIs, and where applicable, national rules;
- (c) the safe integration of the subsystems referred to in point (a) within the vehicle, established on the basis of the relevant TSIs, and where applicable, national rules, and the CSMs referred to in Article 6 of Directive (EU) 2016/798;
- (d) the technical compatibility of the vehicle with the network in the area of use referred to in paragraph 2, established on the basis of the relevant TSIs and, where applicable, national rules, registers of infrastructure and the CSM on risk assessment referred to in Article 6 of Directive (EU) 2016/798.

21.5. The Agency shall issue vehicle authorisations for placing on the market in respect of vehicles having an area of use in one or more Member States. In order to issue such authorisations, the Agency shall:

- (a) assess the elements of the file specified in points (b), (c) and (d) of the first subparagraph of paragraph 3 in order to verify the completeness, relevance and consistency of the file in relation to the relevant TSIs; and
- (b) refer the applicant's file to the national safety authorities concerned by the intended area of use for assessment of the file in order to verify its completeness, relevance and consistency in relation to point (d) of the first subparagraph of paragraph 3 and to the elements specified in points (a), (b) and (c) of the first subparagraph of paragraph 3 in relation to the relevant national rules.

21.12. In the event of renewal or upgrading of existing vehicles which already have a vehicle authorisation for placing on the market, a new vehicle authorisation for placing on the market shall be required if:

- (a) changes are made to the values of the parameters referred to in point (b) of paragraph 10 which are outside the range of acceptable parameters as defined in the TSIs;
- (b) the overall safety level of the vehicle concerned may be adversely affected by the works envisaged; or
- (c) it is required by the relevant TSIs.

21. 13. Where the applicant wishes to extend the area of use of a vehicle which has already been authorised, it shall supplement the file with the relevant documents referred to in paragraph 3 concerning the additional area of use. The applicant shall submit the file to the Agency, which shall, after following the procedures laid down in paragraphs 4 to 7, issue an updated authorisation covering the extended area of use.

Article 24

Type authorisation of vehicles

1. The Agency or a national safety authority may, where appropriate, in accordance with the procedure laid down in Article 21, grant vehicle type authorisations. The application for a vehicle type authorisation and information about all applications, the stages of the relevant procedures and their outcome, and, where applicable, the requests and decisions of the Board of Appeal, shall be submitted through the one-stop shop referred to in Article 12 of Regulation (EU) 2016/796.
2. If the Agency or a national safety authority issues a vehicle authorisation for placing on the market, it shall at the same time as the applicant's request issue the vehicle type authorisation, which is related to the same area of use of the vehicle.
3. In the event of changes to any relevant provisions in TSIs or national rules, on the basis of which an authorisation of a vehicle type has been issued, the TSI or national rule shall determine whether the vehicle type authorisation already granted remains valid or needs to be renewed. If that authorisation needs to be renewed, the checks performed by the Agency or by a national safety authority may only concern the changed rules.
4. The Commission shall establish, by means of implementing acts, the model of declaration of conformity to type. Those implementing acts shall be adopted in accordance with the examination procedure referred to in Article 51(3).
5. The declaration of conformity to type shall be established in accordance with:
 - (a) the verification procedures of the relevant TSIs; or
 - (b) where TSIs do not apply, the conformity assessment procedures as defined in modules B+D, B+F and H1 of Decision No 768/2008/EC of the European Parliament and of the Council
6. Where appropriate, the Commission may adopt implementing acts establishing ad hoc modules for conformity assessment. Those implementing acts shall be adopted in accordance with the examination procedure referred to in Article 51(3).
7. The authorisation of vehicle types shall be registered in the European register of authorised vehicle types referred to in Article 48.

Article 25

Conformity of vehicles with an authorised vehicle type

1. A vehicle or a series of vehicles which is in conformity with an authorised vehicle type shall, without further checks, receive a vehicle authorisation in accordance with Article 21 on the basis of a declaration of conformity to that vehicle type submitted by the applicant.
2. The renewal of the authorisation of a vehicle type as referred to in Article 24(3) shall not affect vehicle authorisations for placing on the market already issued on the basis of the previous authorisation to place that vehicle type on the market.

Article 48

European register of authorised vehicle types

1. The Agency shall set up and keep a register of authorisations to place vehicle types on the market issued in accordance with Article 24. That register shall:
 - (a) be public and electronically accessible;
 - (b) comply with the common specifications referred to in paragraph 2;
 - (c) be linked with relevant vehicle registers.
2. The Commission shall adopt common specifications for the register of authorised vehicle types relating to content, data format, functional and technical architecture, operating mode and rules for data input and consultation, by means of implementing acts. Those implementing acts shall be adopted in accordance with the examination procedure referred to in Article 51(3).
3. The register shall include at least the following elements for each type of vehicle:
 - (a) technical characteristics, including those related to accessibility for persons with disabilities and persons with reduced mobility, of the type of vehicle as defined in the relevant TSIs;
 - (b) the manufacturer's name;
 - (c) the data of the authorisations related to the area of use for a vehicle type, including any restrictions or withdrawals.

Article 54

Transitional regime for using vehicles

1. Without prejudice to paragraph 4 of this Article, vehicles which need to be authorised between 15 June 2016 and 16 June 2019 shall be subject to the provisions set out in Chapter V of Directive 2008/57/EC.
2. Authorisations for the placing in service of vehicles which have been granted pursuant to paragraph 1 and all other authorisations granted prior to 15 June 2016, including authorisations delivered under international agreements, in particular RIC (Regolamento Internazionale Carrozze) and RIV (Regolamento Internazionale Veicoli), shall remain valid in accordance with the conditions under which the authorisations have been granted.
3. Vehicles authorised for placing in service pursuant to paragraphs 1 and 2 shall receive a new vehicle authorisation for placing on the market in order to operate on one or more networks which are not yet covered by their authorisation. The placing on the market on those additional networks shall be subject to Article 21.
4. At the latest from 16 June 2019 the Agency shall carry out the authorisation tasks pursuant to Articles 21 and 24 and the tasks referred to in Article 19 in respect of areas of use in the Member States that have not notified the Agency and the Commission in accordance with Article 57(2). By way of derogation from Articles 21 and 24, national safety authorities of Member States which have notified the Agency and Commission pursuant to Article 57(2) may continue to issue authorisations in accordance with Directive 2008/57/EC until 16 June 2020.

21. From 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 (hereinafter: CCS TSI of 2016)

Article 2

Scope

1. The TSI shall apply to all new, upgraded or renewed ‘trackside control-command and signalling’ and ‘on-board control-command and signalling’ subsystems of the rail system as defined in points 2.3 and 2.4 of Annex II to Directive 2008/57/EC.
2. The TSI shall not apply to existing ‘trackside control-command and signalling’ and ‘on-board control-command and signalling’ subsystems of the rail system already placed in service on all or part of any Member State’s railway network on the day this Regulation enters into force, except when the subsystem is subject to renewal or upgrading in accordance with Article 20 of Directive 2008/57/EC and Section 7 of the Annex

7.4.2.1. (3) New vehicles

From 1 January 2019, the set of specifications # 1 listed in Table 2.1 of Annex A of this TSI is not applicable any more for new vehicles to be placed in service for the first time.

7.4.2.2. Upgrading and renewal of existing vehicles

It is mandatory to fit ETCS on-board existing vehicles if installing any new train protection part of a control command and signalling on-board subsystem on existing high-speed vehicles.

ANNEX A

References

For each reference made in the basic parameters (Chapter 4 of this TSI) the following table indicates the corresponding mandatory specifications, via the Index in Table A 2 (Table A 2.1, Table A 2.2, Table A 2.3).

Specifications

One of the three tables in Table A 2 (Table A 2.1, Table A 2.2, Table A 2.3) of this Annex shall be applied. When a document listed in Table A 2 incorporates, by copying or by reference to, a clearly identified clause of another document, this clause, and only this, shall be considered a part of the document listed in Table A 2. For the purposes of this TSI, when a document listed in Table A 2 makes a ‘mandatory’ or ‘normative’ reference to a document not listed in Table A 2, the referenced document shall always be understood as an acceptable means of compliance with basic parameters (that can be used for certification of Interoperability Constituents and Subsystems and not requiring future revisions of the TSI) and not as a mandatory specification.

Table A 2.1

List of mandatory specifications: Set of specifications # 1 (ETCS Baseline 2 and GSM-R Baseline 1)

Table A 2.2

List of mandatory specifications: Set of specifications # 2 (ETCS Baseline 3 Maintenance Release 1 and GSM-R Baseline 1)

Table A 2.3

List of mandatory specifications: Set of specifications # 3 (ETCS Baseline 3 Release 2 and GSM-R Baseline 1)

22. From COMMISSION IMPLEMENTING REGULATION (EU) 2018/545 of 4 April 2018 establishing practical arrangements for the railway vehicle authorisation and railway vehicle type authorisation process pursuant to Directive (EU) 2016/797 of the European Parliament and of the Council (hereinafter: Regulation (EU) 2018/545)

Article 5

1. The holder of the vehicle type authorisation shall be responsible for the configuration management of the vehicle type and the accompanying file for the decision issued in accordance with Article 46.
2. Without prejudice of Articles 53 and 54, the holder of the vehicle type authorisation, as part of the configuration management of the vehicle type, shall inform the authorising entity that issued the vehicle type authorisation about any changes in Union law that affect the validity of the type authorisation.

Article 13

1. In accordance with the overall objective of managing and mitigating identified risks to an acceptable level, the applicant shall, before submitting an application, undertake a requirements capture process which shall ensure that all the necessary requirements covering the design of the vehicle for its life cycle have been:
 - (a) identified properly;
 - (b) assigned to functions or subsystems or are addressed through conditions for use or other restrictions; and
 - (c) implemented and validated.
2. The requirements capture performed by the applicant shall in particular cover the following requirements:
 - (a) essential requirements for subsystems referred to in Article 3 and specified in Annex III to Directive (EU) 2016/797;
 - (b) technical compatibility of the subsystems within the vehicle;
 - (c) safe integration of the subsystems within the vehicle; and
 - (d) technical compatibility of the vehicle with the network in the area of use.
3. The risk management process set out in Annex I to Commission Implementing Regulation (EU) No 402/2013 (1) shall be used by the applicant as the methodology for requirements capture as regards the essential requirements 'safety' related to the vehicle and subsystems as well as safe integration between subsystems for aspects not covered by the TSIs and the national rules.

Article 14

1. The applicant shall identify and choose the relevant authorisation from the following cases:
 - (a) first authorisation: the vehicle type authorisation and/or the vehicle authorisation for placing on the market issued by the authorising entity for a new vehicle type, including its variants and/or versions if any, and, where applicable, the first vehicle of a type, pursuant to Article 21(1) of Directive (EU) 2016/797;
 - (b) renewed vehicle type authorisation: the renewal of a vehicle type authorisation pursuant to Article 24(3) of Directive (EU) 2016/797 which does not require a change in design of the vehicle type;
 - (c) extended area of use: the vehicle type authorisation and/or the vehicle authorisation for placing on the market issued by the relevant authorising entity for an already authorised vehicle type and/or vehicle in order to extend the area of use without a change of the design, pursuant to Article 21(13) of Directive (EU) 2016/797;
 - (d) new authorisation: the vehicle type authorisation and/or vehicle authorisation for placing on the market issued by the authorising entity after a change of an already authorised vehicle and/or vehicle type, pursuant to Articles 21(12) or 24(3) of Directive (EU) 2016/797;
 - (e) authorisation in conformity to type: the vehicle authorisation for placing on the market for a vehicle or a series of vehicles that conform to an already authorised and valid vehicle type on the basis of a declaration of conformity to that type, pursuant to Article 25(1) of Directive (EU) 2016/797. Where applicable, there shall be a clear identification of the vehicle type version and/or the vehicle type variant to which the vehicle or series of vehicles is conform.

3. An applicant may combine: (a) a request for new authorisation with a request for an authorisation for an extended area of use; or (b) a request for a first authorisation with a request for authorisation in conformity to type.

Article 15

Changes to an already authorised vehicle type

1. Any changes to an authorised vehicle type shall be analysed and categorised as only one of the following changes and shall be subject to an authorisation as provided below:
 - (a) a change that does not introduce a deviation from the technical files accompanying the EC declarations for verification for the subsystems. In this case there is no need for verification by a conformity assessment body, and the initial EC declarations of verification for the subsystems and the vehicle type authorisation remain valid and unchanged;
 - (b) a change that introduces a deviation from the technical files accompanying the EC declarations for verification for the subsystems which may require new checks and therefore require verification according to the applicable conformity assessment modules but which do not have any impact on the basic design characteristics of the vehicle type and do not require a new authorisation according to the criteria set out in Article 21(12) of Directive (EU) 2016/797;
 - (c) a change in the basic design characteristics of the vehicle type that does not require a new authorisation according to the criteria set out in Article 21(12) of Directive (EU) 2016/797;
 - (d) a change that requires a new authorisation according to the criteria set out in Article 21(12) of Directive (EU) 2016/797.

2. When a change falls under point (b) or (c) of paragraph 1, the technical files accompanying the EC declarations for verification for the subsystems shall be updated and the holder of the vehicle type authorisation shall keep available the relevant information upon request of the authorising entity and/or the NSAs for the area of use.
3. When a change falls under point (c) of paragraph 1 the holder of the vehicle type authorisation shall create a new vehicle type version or a new version of a vehicle type variant and provide the relevant information to the authorising entity. The authorising entity shall register in ERATV the new version of the vehicle type or the new version of the vehicle type variant in accordance with Article 50.
4. If the entity managing the change is not the holder of the vehicle type authorisation and the changes made to the existing vehicle type are categorised as (b), (c) or (d) of paragraph 1, the following shall apply:
 - (a) a new vehicle type shall be created;
 - (b) the entity managing the change shall become the applicant; and
 - (c) the application for authorisation of the new vehicle type may be based on the existing vehicle type and the applicant may choose the authorisation case specified in Article 14(1)(d).

Article 16

Changes to an already authorised vehicle

1. Changes to an already authorised vehicle which are linked to substitution in the framework of maintenance and limited to replacement of components by other components fulfilling identical functions and performances in the framework of preventive or corrective maintenance of the vehicle do not require an authorisation for placing on the market.
2. Any other changes to a vehicle shall be analysed and categorised in accordance with Article 15(1).
3. The entity managing the change shall request a new authorisation for placing on the market in accordance with Article 14(1)(d) when a change falls under Article 15(1)(d).
4. If the entity managing changes categorised in accordance with Article 15(1)(b) and (c) to an already authorised vehicle is not the vehicle type authorisation holder it shall:
 - (a) assess the deviations from the technical files accompanying the EC declarations for verification for the subsystems;
 - (b) establish that none of the criteria set out in Article 21(12) of Directive (EU) 2016/797 are met;
 - (c) update the technical files accompanying the EC declarations for verification for the subsystems;
 - (d) notify the changes to the authorising entity.

This may apply to a vehicle or a number of identical vehicles.

The authorising entity may issue, within 4 months, a reasoned decision requesting an application for authorisation in case of a wrong categorisation or insufficiently substantiated information.

5. Every change to a vehicle shall be subject to configuration management under the responsibility of the keeper or of the entity entrusted by it.

23. From COMMISSION IMPLEMENTING REGULATION (EU) 2019/776 of 16 May 2019 amending Commission Regulations (EU) No 321/2013, (EU) No 1299/2014, (EU) No 1301/2014, (EU) No 1302/2014, (EU) No 1303/2014 and (EU) 2016/919 and Commission Implementing Decision 2011/665/EU as regards the alignment with Directive (EU) 2016/797 of the European Parliament and of the Council and the implementation of specific objectives set out in Commission Delegated Decision (EU) 2017/1474 (hereinafter: CCS TSI amendment of 16 May 2019)

Section 7.2 (*of CCS TSI*) is amended as follows:

(a) two new sections 7.2.1a and 7.2.1b are added below section 7.2.1 as follows:

7.2.1a Changes to an existing On-Board subsystem

This point defines the principles to be applied by the entities managing the change and authorizing entities in line with the EC verification procedure described in Article 15(9), Article 21(12) and Annex IV of Directive (EU) 2016/797. This procedure is further developed in Article 13, 15 and 16 of Commission Implementing Regulation (EU) 2018/545 (1*) and in Commission Decision 2010/713/EU (2*). This point applies in case of any change(s) to an existing on-board subsystem or on-board subsystem type, including renewal or upgrade. It does not apply in case of changes covered by Article 15(1)(a) of Implementing Regulation (EU) 2018/545.

7.2.1a.1 Rules to manage changes in on-board CCS subsystems

1. Parts, as defined in Table 4.1 of this TSI, and basic parameters of the on-board subsystem that are not affected by the change(s) are exempt from conformity assessment against the provisions in this TSI. The list of parts and basic parameters affected by the change is to be provided by the entity managing the change.
2. A new assessment against the requirements of the applicable TSI shall only be needed for the basic parameters which may be affected by the change(s).
3. The entity managing the change shall inform a Notified Body of all changes affecting the conformity of the subsystem with the requirements of the relevant TSI(s) requiring new checks, in accordance with Articles 15 and 16 of Implementing Regulation (EU) 2018/545 and Decision 2010/713/EU and by application of modules SB, SD/SF or SH1 for the EC verification, and if relevant Article 15(5) of Directive (EU) 2016/797. This information shall be provided by the entity managing the change with corresponding references to the technical documentation relating to the existing EC certificate.
4. The entity managing the change has to justify and document that applicable requirements remain consistent at subsystem level, and this has to be assessed by a Notified Body.
5. The changes impacting the Basic Design Characteristics of the on-board subsystem are defined in Table 7.1 Basic Design Characteristics and shall be classified as 15(1)(c) or 15(1)(d) of Implementing Regulation (EU) 2018/545, and in accordance with Table 7.1 Basic Design Characteristics changes not impacting but related to the Basic Design Characteristics shall be classified by the entity managing the change as 15(1)(b) of Implementing Regulation (EU) 2018/545.
6. Changes not covered by point 7.2.1a.1(5) above are deemed not to have any impact on the basic design characteristics. They will be classified by the entity managing the change as 15(1)(a)

or 15(1)(b) of Implementing Regulation (EU) 2018/545.

Note: The classification of the changes set out in points 7.2.1a.1(5) and 7.2.1a.1(6) above is performed by the entity managing the change without prejudice of the safety judgement mandated in Article 21(12)(b) of Directive (EU) 2016/797.

7. All changes shall remain compliant with the applicable TSIs (3*) regardless its classification.

Table 7.1

(3*):

According to Agency's Advice 2017/3 if there is no need for new authorisation the applicable TSI corresponds to the one used for the original certification. In case there is a need for new authorisation applicable TSI corresponds to the latest TSI.

Basic Design Characteristics

(table not copied here for editorial reason)

8. In order to establish the EC certificate, the Notified Body may refer to:

- The original EC certificate for parts of the design that are unchanged or those that are changed but do not affect the conformity of the subsystem, as far as it is still valid.
- Amendments to the original EC certificate for modified parts of the design that affect the conformity of the subsystem with the applicable TSI version used for the EC verification.

9. In any case, the entity managing the change shall ensure that the technical documentation which is relating to the EC certificate is updated accordingly.

10. The updated technical documentation, related to the EC certificate is referred to in the technical file accompanying the EC declaration of verification issued by the entity managing the change for on-board subsystem declared as conformant to the modified type.

11. The “system identifier” is as a numbering scheme to identify the system version of a CCS subsystem and distinguish between a functional and a realization identifier. The “functional identifier” is part of the system identifier and means a figure or a number of figures defined by the individual configuration management, which represents a reference of the basic design characteristics for CCS implemented in a CCS subsystem. The “Realization identifier” is part of the system identifier and means a figure or a number of figures defined by the individual configuration management of a supplier, which represents a specific configuration (e.g. HW and SW) of a CCS subsystem. The “system identifier”, “functional identifier” and “realization identifier” shall be defined by each supplier.

7.2.1a.2 Conditions for a change in the On-board ETCS functionality that does not impact the basic design characteristics

1. The target functionality (4*) remains unchanged or is set to the state already expected during the original certification or authorisation.
2. The interfaces relevant for safety & technical compatibility remain unchanged or are set to the

state already expected during the original certification or authorisation.

3. The result of the safety judgement (e.g. safety case according to EN 50126) remains unchanged.
4. No new safety related application conditions (SRAC) or interoperability constraints have been added due to the change.
5. An Assessment Body (CSM RA) as specified in point 3.2.1 has independently assessed the applicant's risk assessment and within it the demonstration that the change does not adversely affect safety. The applicant's demonstration shall include the evidence that the change actually corrects the causes of the initial deviation of the functionality.
6. The change is performed under a quality management system approved by a notified body (e.g. according to modules CH1, SH1, CD, SD). For other modules (e.g. CF, SF) it shall be justified that the verification performed remains valid (5*).
7. The individual configuration management defines a “system identifier” (as defined in 7.2.1a.1.11) and the functional part has not been changed after the change.
8. The change shall be part of the configuration management required by Article 5 of Regulation (EU) 2018/545.

7.2.1a.3 Conditions for a change in the on-board mobile communication functions for railways that does not impact the basic design characteristics

1. The target functionality (6*) remains unchanged or is set to the state already expected during the original certification or authorisation.
2. The interfaces relevant for technical compatibility remain unchanged or are set to the state already expected during the original certification or authorisation
3. The change is performed under a quality management system approved by a notified body (e.g. according to modules CH1, SH1, CD, SD). For other modules (e.g. CF, SF) it shall be justified that the verification performed remains valid (7*).
4. The change shall be part of the configuration management required by Article 5 of the Regulation (EU) 2018/545.

(38) Section 7.4.2.1 is amended as follows:

‘7.4.2.1 New vehicles

1. In order to be placed on the market in accordance with Article 21 of Directive (EU) 2016/797, new vehicles, including vehicles authorised in conformity to a type shall be equipped with ETCS in accordance with Annex A of this TSI and shall comply with set of specifications #2 or #3 referred to in Table A 2 of Annex A (*).

→ **Table A 2.2 specifications # 2 (ETCS Baseline 3 Maintenance Release 1 and GSM-R Baseline 1)**

→ **Table A 2.3 specifications # 3 (ETCS Baseline 3 Release 2 and GSM-R Baseline 1)**

2. The requirement to be equipped with ETCS does not apply to:

- (1) new mobile railway infrastructure construction and maintenance equipment;
- (2) new shunting locomotives;

- (3) other new vehicles not intended for operating on high-speed lines;
- (a) if they are intended exclusively for national service operated outside the corridors defined in point Annex I of Implementing Regulation (EU) 2017/6 and outside the lines ensuring the connections to the main European ports, marshalling yards, freight terminals and freight transport areas defined in Article 2(1) of Implementing Regulation (EU) 2017/6; or
- (b) if they are intended for off-TEN cross-border service, i.e., service until the first station in the neighbouring country or to the first station where there are connections further in the neighbouring country utilising only lines outside of the TEN.

3. All vehicle type authorisations granted based on conformity to set of specifications #1 referred to in Table A 2 of Annex A of this TSI shall not remain valid for authorising new vehicles in conformity to those vehicle types (without prejudice to the application of 7.4.2.3). All vehicles already authorised according to those vehicle types are not affected.

(*) Or placed into service in accordance with Directive 2008/57/EC, if Directive (EU) 2016/797 is not yet applicable.’;

(39) New section 7.4.2.3 is added as follows:

‘7.4.2.3 Application of the TSI requirements for new vehicles during a transition phase

1. Some projects or contracts, which started before the date of application of this TSI, may lead to apply for an authorisation to put on the market (*) of new vehicles equipped with ETCS complying with specification #1 referred to in Table A 2.1 of Annex A of this TSI, and which do not fully comply with Section 7.4.2.1 of this TSI. For vehicles concerned by those projects or contracts, and in accordance with point (f) of Article 4(3) of Directive (EU) 2016/797, a transition phase is defined, during which the application of Section 7.4.2.1 of this TSI is not mandatory.

2. This transition phase applies to new vehicles authorised in conformity to a vehicle type (**) authorised before 1 January 2019 in any Member State on the basis of conformity to set of specifications #1 referred to in Table A 2 of Annex A of this TSI up to December 31 2020.

3. The transition phase is:

(a) up to December 31 2020: In order to be placed on the market (*) in accordance with Article 21 of Directive 2016/797/EC, those new vehicles referred under 2 shall be equipped with ETCS in accordance with set of specifications #1, #2 or #3 referred to in Table A 2 of Annex A of this TSI.

(b) If set of specification #1 is used, a condition for use shall be included in their authorisation to put on the market (*) enforcing compliance with set specifications #2 or #3 within a period of time not exceeding 1 July 2023.

ANNEX A

Specifications

One of the three tables in Table A 2 (Table A 2.1, Table A 2.2, Table A 2.3) of this Annex shall be applied for the trackside subsystem. For the on-board subsystem either Table A 2.2 or Table A 2.3 shall be applied, after the transition period defined in 7.4.2.3.

(...)

ANNEX VIII

Table 2 - Parameters of ERATV

3 Authorisations

3.0 Area of use: MS — Network

3.1 Authorisation in:

3.1.1 Member State of authorisation

3.1.2 Current status

3.1.2.1 Status

Possible options: Valid, Suspended YYYYMMDD, Revoked YYYYMMDD, to be renewed YYYYMMDD

3.1.2.2 Validity of authorisation (if defined) [date] YYYYMMDD

24. From the COMMISSION IMPLEMENTING REGULATION (EU) 2020/387 of 9 March 2020 amending Regulations (EU) No 321/2013, (EU) No 1302/2014 and (EU) 2016/919 as regards the extension of the area of use and transition phases (hereinafter: CCS TSI amendment of 9 March 2020)

Article 3

Amendments to CCS TSI

Regulation (EU) 2016/919 is amended as follows:

(1) in Article 2, paragraph 2 is replaced as follows:

‘2. The TSI shall not apply to existing “trackside control-command and signalling” and “on-board control-command and signalling” subsystems of the rail system already placed in service on all or part of any Member State’s railway network on the day this Regulation enters into force, except when

(a) the subsystem is subject to renewal or upgrading in accordance with Section 7 of the Annex to this Regulation; or

(b) the area of use is extended in accordance with Article 54(3) of Directive (EU) 2016/797, in which case the provisions of Section 7.4.2.4 of the Annex to this Regulation shall apply.’

(2) the Annex is amended in accordance with Annex III to this Regulation.

ANNEX III

In the Annex to Regulation (EU) 2016/919, the following clause 7.4.2.4 is added:

‘7.4.2.4 Rules for the extension of the area of use for existing vehicle

The following rules apply to existing vehicles in operation and registered in the National Vehicle Register in accordance with Commission Decision 2007/756/EC (*), or in the European Vehicle Register in accordance

with Commission Implementing Decision (EU) 2018/1614 (**), when requesting an extension of the area of use:

(1) Vehicles shall comply with relevant special provisions applicable in the specific cases referred to in clause 7.6 of this Annex and with relevant national rules referred to in points (a), (c) and (d) of Article 13(2) of Directive (EU) 2016/797 notified in accordance with Article 14 of that Directive. In addition, in cases of partial fulfilment of the requirements in this TSI, provisions in point 6.1.1.3(3) shall apply.

(2) Vehicles already equipped with ETCS or GSM-R do not need to be upgraded, except where required for technical compatibility.

(3) Vehicles that are not already equipped with ETCS shall install ETCS and comply with sets of specifications #2 or #3 referred to in Tables A 2.2 and A 2.3 of Annex A.

Except where required for technical compatibility, the requirement to be equipped with ETCS shall not apply to:

(a) vehicles not specially designed for operation on high-speed lines (***), if authorised before 1 January 2015 ;

(b) vehicles not specially designed for operation on high-speed lines, authorised as of 1 January 2015, in either of the following situations:

(i) if they are intended exclusively for operations in one Member State outside the corridors specified in Annex I to Implementing Regulation (EU) 2017/6 and outside the lines ensuring the connections to the main European ports, marshalling yards, freight terminals and freight transport areas as referred to in Annex II to Regulation (EU) No 1315/2013;

(ii) if they are intended for off-TEN cross-border service, namely service until the first station in the neighbouring country or to the first station where there are connections further in the neighbouring country utilising only lines outside of the TEN;

(c) vehicles in Member States applying Article 7.4.3(2), where the area of the use following the Extension of Area of Use is exclusively within the same Member State, except when the area of use following the Extension of Area of Use includes more than 150 km of a section equipped with ETCS at the time of the Extension of Area of Use or to be equipped with ETCS within 5 years after the Extension of the Area of Use of those vehicles;

(d) mobile railway infrastructure construction and maintenance equipment;

(e) shunting locomotives.

(4) Vehicles that are not yet equipped with GSM-R voice radio shall install GSM-R voice cab radio and comply with the specifications referred to in Tables A 2.1, A 2.2 and A 2.3 of Annex A when the vehicle is intended for use on a network including at least one point equipped with GSM-R, except if superimposed to a legacy radio communication system compatible with the class B already installed in the vehicle.

(5) Vehicles that are not yet equipped with GSM-R for ETCS data shall install GSM-R ETCS Data only Radio and comply with the specifications referred to in Tables A 2.1, A 2.2 and A 2.3 of Annex A when the vehicle is required to install ETCS in accordance with point 3 and it is intended to operate in a network in the extended area of use that is equipped with only ETCS Level 2 or 3.

(6) Where an authorised vehicle benefited from non-application of TSIs or part of them pursuant to Article 9 of Directive 2008/57/EC, the applicant shall seek derogation(s) in the Member States of the extended area of use in accordance to Article 7 of Directive (EU) 2016/797. _____

(*) Commission Decision 2007/756/EC of 9 November 2007 adopting a common specification of the national vehicle register provided for under Articles 14(4) and (5) of Directives 96/48/EC and 2001/16/EC (OJ L 305, 23.11.2007, p. 30).

(**) Commission Implementing Decision (EU) 2018/1614 of 25 October 2018 laying down specifications for the vehicle registers referred to in Article 47 of Directive (EU) 2016/797 of the European Parliament and of the Council and amending and repealing Commission Decision 2007/756/EC (OJ L 268, 26.10.2018, p. 53).

(***) As set out in Annex I of Directive (EU) 2016/797.’.

(56) Annex A is replaced by the following:

New table A2 (not copied here for editorial reason)

Specifications

One of the three tables in Table A 2 (Table A 2.1, Table A 2.2, Table A 2.3) of this Annex shall be applied for the trackside subsystem

IV. SUBMISSIONS OF THE PARTIES

The Appellant

25. In its appeal, the appellant structured its arguments according to reasons given by ERA to justify its rejection decision, reasons given by ERA to justify its decision to maintain its rejection decision at the end of the review, argument based on operational impact, letters of support by stakeholders associations based in Brussels and, finally, a legal assessment by an independent legal firm.
26. ERA justified its rejection decision on the basis of the following arguments:
 - The vehicle authorization was not granted by ERA, as the Interoperability constituent #1 (ETCS on-board EVC) has been modified after 31/12/2020.
 - According to ERAs position, detailed in ERA1219-119, changes to an ETCS BL2 system according to Article 15(1)(c) or Article 15(1)(d) of Implementing Regulation (EU) 2018/545 are not possible from 01.01.2021.
27. This is justified by ERA with the argumentation that Table A 2.1 of TSI CCS cannot be applied any more since 01.01.2021, and that according to 7.2.1a.1. clause 7, in case of changes to an existing CCS subsystem, all changes must be compliant to the applicable TSI.
28. The appellant rejects this argumentation because TSI CCS defines in 7.4.2.2 the requirements for upgrading and renewal of existing vehicle: *It is mandatory to fit ETCS on-board existing vehicles if installing any new train protection part of a control-command and signalling on-board subsystem on existing high-speed vehicles..* According to the appellant, this requirement is fulfilled as:

- The Vectron locomotives have a maximum operating speed of 200 km/h
- The Vectron locomotives are equipped with an ETCS system (compliant to BL2)

29. In addition, the appellant further notes that

- TSI CCS, Table A 2.1. referred to by ERA is only relevant in connection with on-board installations on new vehicles. This intended distinction between existing vehicles and new vehicles is made clearly visible via the respective titles: “7.4.2.1 New vehicles / 7.4.2.3 Application of the TSI requirements for new vehicles during a transition phase only for new vehicles ETCS BL2 cannot be used anymore.”. In these paragraphs a dedicated reference to Table A 2.1. is made. This is also supported by the fact, that the time limitation of Table A 2.1. has only been introduced with amendment (EU) 2019/776. Target of the amendment was providing a transition period for new vehicles; existing vehicles were not targeted at all.
- TSI CCS 7.2.1a.1 is only applicable for management of changes to the ETCS subsystem. These changes have been made to the CCS subsystem type prior to 1.1.2021 and have been fully assessed in conformity to the TSI CCS in the application for the authorized vehicle type. The appellant clarifies that in order to make the vehicle conform to that authorized type, he only equipped an existing vehicle with an upgraded software of the EVC which includes an updated IC #1 certificate.

30. In the review of the contested decision, ERA further stated that “[...] Reading the aforementioned paragraphs altogether, it is understood that ‘new vehicles’ include the ‘vehicles authorised in conformity to a type’ and that if the latter are authorised after 31 December 2020, they shall comply with the set of specifications #2 or #3 referred to in Table A 2 of Annex A of Regulation (EU) 2016/919 as amended.”.

31. According to this argumentation, in the appellant’s view, any existing retrofit vehicle originally placed into service before 01.01.2021, that requires a new authorisation in conformity to a type, but with an CCS subsystem including ETCS BL2 remaining unchanged, could not be granted an authorisation in conformity to a type anymore since 01.01.2021. According to the appellant, this is in contradiction to the reasoning stated in the original refusal by ERA, respectively the ERA document ERA1219-119, according to which only changes to an ETCS BL2 system as per Article 15(1)(c) or Article 15(1)(d) of Implementing Regulation (EU) 2018/545 after 01.01.2021 prevent an authorization in conformity to a type.

32. The appellants adds that according the “Guide for the application of the CCS TSI” (Application Guide GUI/CCS TSI/2020) published by ERA, the interpretation according to the ERA review of the decision is wrong because section 2.7.7. of that guide provides the following: “In section 7.4.2.1 the meaning of ‘new vehicles’ in the CCS TSI is newly built vehicles.”. It is also clarified in section 2.7.11. that “According to section 7.4.2.1.3 all vehicle types based on set of specifications #1, can no longer be used for conformity to type of new vehicles.”.

33. In its appeal, the appellant also refers to arguments based on the operational impact.

34. According to the appellant, a modified ETCS BL2 system is neither a new vehicle, nor a new ETCS system. It also is not endangering the target of the TSI CCS, especially under the consideration that wayside equipment according to BL2 is still allowed.

35. Because of the contested decision, current ETCS BL2 onboard units are prevented from improvement and even safety-relevant or availability-relevant error corrections. In Belgium the newly implemented Alstom baseline 5.8.1 is minimum for stable operation. In the end, this might lead to fleet grounding either from authority/supervision side or from operator side in case there is no possibility to modify existing ETCS BL2 systems.
36. “Shift2Rail” promoting interoperable freight traffic is hindered. Several operators have made commitments for cross-border traffic to Belgium for which locomotives with SW E1.11 is mandatory. With the fact, that the available Vectron with an ETCS BL3 implementation is not allowed in Belgium due to ergonomic issues with three displays, interoperable traffic is blocked for the upcoming years. This currently affects more than 10 different operators with a fleet of 246 locomotives, causing an economic damage of up to 400.000 EUR per day. Confidence in ETCS is lost: Early adopters of ETCS BL2 are punished, as they are forced to invest in a heavy (and not yet available) ETCS BL3 upgrade and cannot flexibly configure their locomotive to the market’s needs. Despite this for 70% of the locomotives concerned (174 of 246) firm commitments for a BL3 upgrade in a second step are already been made.
37. EU subsidies to support trackside ETCS infrastructure are put as risk – the Vectron release with the modification of the EVC is required to run in the Czech Republic on ETCS BL2 tracks.
38. To summarise, the appellant stated that the interpretation of the TSI now made by ERA came as a surprise to the entire sector. A simple and clear requirement in the TSI CCS would have been possible, if the interpretation of ERA was the real intention of the legislator. In addition, some provisions of the TSI CCS are contradicted by the interpretation of ERA. The appellant believes that §7.4.2.4 was amended in order to allow the extension the area of use of existing vehicles, but the interpretation of ERA makes this extension impossible.
39. In order to strengthen its appeal the appellant attached to it three letters of support from stakeholders associations based in Brussels:
- ERFA letter to ERA & EC from 18.03.2021: ERFA refers to potential economic impact & lacking practical need for requiring Baseline 3 updates currently
 - UNIFE letter to EC & ERA from 22.03.2021: UNIFE refers to potential economic impact & impossibility to fulfil the deadline 31.12.2020 for modification of existing ETCS BL2 systems
 - CER letter to ERA & EC from 01.04.2021: CER refers to potential economic impact & impossibility to fulfil the deadline 31.12.2020 for modification of existing ETCS BL2 systems
40. The appellant also attached to its appeal a legal assessment submitted by Dr. Stephan Gerstner on 18 June 2021. The document bears the following header: Redker/Sellner/Dahs. The legal assessment concludes that *authorised vehicles that are equipped with ETCS baseline 2 do not have to be upgraded to ETCS baseline 3 if a further conformity to type authorisation is applied for, in particular if the application is due to achieve extension of the area of use for these vehicles. According to that lawyer, this also applies if the further conformity to type authorisation is applied for after December 31, 2020.*

The Agency

41. In its statement of defence ERA referred explicitly to the arguments submitted by the appellant one-by-one as follows:
42. The Agency had no comments on the introductory remarks of the appellant.
43. ERA reaffirmed that the contested decisions issued by the Agency are solely based on the requirements of the applicable law, namely solely of the applicable TSI CCS. Thus, the part of the appeal linked to the Agency's document ERA 1219-1191 and raised by the appellant shall be considered as inadmissible and in case it is not, as substantially wrong.
44. The Agency had no comments on paragraphs 1 and 2 of the appeal.
45. Point 7.4.2.2. of the TSI CSS is not referred to by the Agency's decisions subject to appeal.
46. Article 2.1 "Scope" of the TSI CSS states "The TSI shall apply to all new, upgraded or renewed 'trackside control-command and signalling' and "on-board control-command and signalling subsystems of the rail system as defined in points 2.3 and 2.4 of Annex II to Directive (EU) 2016/797 of the European Parliament and of the Council (1). Section 7.2.1a of the Annex shall apply to all changes to an existing On-Board subsystem." Paragraph 7 of Point 7.2.1a.1. of the TSI CCS requires *expressis verbis* that: "All changes shall remain compliant with the applicable TSIs regardless its classification". The Annex A of the TSI CCS defines the specifications for the on-board subsystem. Under the field with the title "Specifications" it is required that "for the on-board subsystem either Table A.2.2 or Table A.2.3 shall be applied, after the transition period defined in 7.4.2.3". Table A.2.1 of the TSI CCS states "Set of specifications # 1 (only for trackside Subsystems. For onboard subsystems not to be applied after the transition period defined in 7.4.2.3)(ETCS Baseline 2 and GSM-R Baseline 1)". The relevant date for the end of the transition period is defined in 7.4.2.3 as December 31, 2020.
47. Equipping an existing vehicle with an upgraded software is a change to its on-board subsystem. Thus, the relevant provisions of the TSI CCS apply. Article 2.1 and point 7.2.1a. of the TSI CCS refer to changes to an existing On-Board subsystem. Point 7.2.1a. states "This point applies in case of any change(s) to an existing on-board subsystem or onboard subsystem type, including renewal or upgrade." Paragraph 7 of Point 7.2.1a.1. of the TSI CCS requires *expressis verbis* that: "All changes shall remain compliant with the applicable TSIs regardless its classification". According to the information provided by the appellant, the change to the subsystem part of the vehicle type 11-057-0001-5-003 was implemented before the relevant date for the transition period while the applications for authorisation in conformity to type for the vehicles subject to changes in the on-board subsystem were submitted to the Agency after the expiration of the transitional period. Therefore, before the relevant date for the transition period the Set of specifications # 1 as defined in Table A.2.1 of the TSI CCS was applicable, while after the relevant date for the transition period the Set of specifications # 1 as defined in Table A.2.1 is not to be applied and either Table A.2.2 or A.2.3 shall be applied.
48. According to ERA, the review decisions IM-MS-D(2021)5097 & 5098 confirmed the Agency's initial decisions in their entirety. This statement of defence of the Agency refers only to the justifications of the initial decisions, which did not change after the review decisions.

49. The decisions subject to appeal refer to existing vehicles whose on-board CCS subsystems have been changed and for which an application for a conformity to type has been submitted which will entail an extension of their area of use to Belgium. The Agency did not find in the external legal statement from the appellant any reference to the change implemented by the applicant (and its timing) in the on-board CCS subsystem of the existing locomotives; in other words, the appellant's external legal statement does not cover the most decisive issue for the Agency's decision, namely the change in the on-board CCS subsystem of the locomotives.
50. According to ERA, the Agency, as Union authority responsible for issuing authorisations, based its decisions only on the rule of law. The Agency has no right to comment on alleged considerations which did not constitute part of its assessment tasks linked to the decisions subject to appeal.
51. The Agency attached to its statement of defence the replies that ERA sent to ERFA, UNIFE and CER. In those replies ERA refers mainly to its Clarification Note and to the possibility for the applicants to ask for a derogation.

V. REMEDY SOUGHT BY THE APPELLANT

52. In its appeal, the appellant requests that a vehicle authorisation for placing on the market is issued without further delay.
53. The appellant also asks for a revision of document ERA1219-119.

VI. FINDINGS OF THE BOARD OF APPEAL

Admissibility

54. Based on Article 11 of the Commission Implementing Regulation (EU) 2018/867 of 13 June 2018 laying down the rules of procedure of the Board(s) of Appeal of the European Union Agency for Railway (hereinafter: Regulation (EU) 2018/867) the Board considers that the appeal against the decision V-20210127-006 is admissible:
- the appeal meets the formal requirements set out in Article 9 of Regulation on BoA procedure;
 - the appellant did not exceed the time-limit for lodging an appeal;
 - the appeal was brought against a decision subject to appeal;
 - the appellant was an addressee of the decision challenged by the appeal.
55. However, on the basis of Article 11 of the Regulation (EU) 2018/867, the Board considers that the appeal insofar as the appellant seeks revision of document ERA1219-119 is inadmissible on the ground that it is not brought against a decision that can be the subject of an appeal.
56. The reason thereof is that Art. 59 of the Regulation (EU) 2016/796 of the European Parliament and of the Council of 11 May 2016 on the European Union Agency for Railways and repealing Regulation (EC) No 881/2004 states that any natural or legal person may appeal against a decision of the Agency addressed to that person, or of direct and individual concern to that person, pursuant to Articles 14 (decisions concerning single safety certificates), 20 (decisions concerning authorisations for the

placing on the market of vehicles) and 21 (decisions concerning authorisations for the placing on the market of vehicles types), or if the Agency fails to act within the applicable time limits.

57. The document containing the Clarification Note on authorisation of vehicles equipped with CCS train protection part according to set of specifications #1 (Baseline 2) after 31/12/2020 issued by ERA is not one of the decisions indicated in the provision quoted here-above. However if there is a direct link between the document ERA1219-119 and the contested decision the Board will analyse this aspect and, where applicable, include its conclusion in the findings.

Substance

58. One of the first observations of the Board is that the present case refers to several legislative acts and that the technical specification for interoperability relating to the ‘control-command and signalling’ subsystems of the rail system in the European Union (hereinafter: CCS TSI) has been amended several times. During the same period, the concerned type(s) have been authorised and the concerned locomotive(s) were placed in service and upgraded. It is important to put all events on a time line in order to understand if legislative acts are applicable when locomotive(s) are built, placed in service, upgraded and authorised. Annex A of the present findings shows the succession of all events in a table.

59. From the table in Annex A the Board observes that:

- The two locomotives of case 001 were built, authorised and placed in service before the date of transposition of the fourth railway package, and under the CCS TSI of 2016. These locomotives were upgraded the first time in July and August 2019, hence a few months after the date of application of CCS TSI amendment of 16 June 2019 which introduced the new provisions in case of changes to the on-board system, and a second time in January 2021, thus after the final transposition date of the fourth railway package and after CCS TSI amendment of 9 March 2020 which introduced some flexibility for the extension of area of use of existing vehicles.
- The locomotive of case 002 was built, authorised and placed in service in May 2020, thus between the first and the second date of transposition of the fourth railway package. It was upgraded in January 2021 to be able to run in Belgium, hence after CCS TSI amendment of 9 March 2020 which introduced some flexibility for the extension of area of use of existing vehicles.

60. In order to structure its findings the Board has classified the arguments of the parties according to a number of issues as follows.

Application of the relevant CCS TSI version and validity of the vehicle type

61. The main argument for ERA to reject the original application was that as the applicant implemented changes in the on-board CCS subsystem, Article 2.1 of the TSI CCS was applicable, hence changes to on-board CCS subsystems shall be managed according to point 7.2.1a of the same TSI. Thus, according to ERA, the latest version of the TSI applies.

62. This argument was not disputed by the appellant. The appellant agrees that the latest version of the CCS TSI applies, but disagrees on which provisions of the CCS TSI apply and how to interpret those provisions.
63. The Board considers, in the first place, that one needs to be more precise when stating that “the latest version of the CCS TSI applies”. A distinction needs to be made between the legislative part which is in general in the Commission enacting part, and the TSI itself which is in general an annex to the Commission act. In addition, the TSI itself is composed of various elements which are specified in Article 5 of Directive (EU) 2016/797. It is important to note and make a clear distinction between Chapter 4 of the TSI, which is a list of technical specifications, also called ‘target system’ and Chapter 7, which deals with implementation of TSI and specifies among others, the conditions on how to apply the TSI in case of renewal and upgrading. So the application of a TSI to an existing vehicle should be specified in the legislative part and/or in chapter 7, not in chapter 4, in terms of good legislation and in order to define the rights and obligations of the applicants in a way that leaves no room for doubt and different interpretations.
64. The Board considers, in the second place, that in the case of a conformity to type authorisation request, and if the type has been lawfully authorised and registered in the ERATV, and is still valid, the issue of which version applies is a non-issue as, according to Article 25 of Directive (EU) 2016/797: *A vehicle or a series of vehicles which is in conformity with an authorised vehicle type shall, without further checks, receive a vehicle authorisation in accordance with Article 21 on the basis of a declaration of conformity to that vehicle type submitted by the applicant only the declaration of conformity needs to be checked, and the applicable rules are mentioned in the registered type.*
65. The Board view is that if a type cannot anymore be used by an applicant, it should be clearly mentioned either in the ERATV, or in the TSI. On this point the Board submitted a written question to ERA. In its reply ERA said that *according to Article 26 of the Directive (EU) 2016/797 (the IOD), an authorising entity may decide to revoke or amend a granted authorisation when it is proven that an essential requirement was not met and that the non-conformity is representing a serious safety risk. This was not the case for the type under appeal which is still valid because is meeting the essential requirements. It is the responsibility of an applicant to comply with the applicable law. This obligation could imply that the applicant could have in place a process monitoring all changes in applicable legislation and to take the appropriate actions if needed. Being aware of the legal obligation under the CCS TSI, according to which newly built vehicles or existing vehicles installing for the first time ETCS or upgrading or renewing an existing ETCS installation can only be authorised after 31/12/2020 if the ETCS on-board equipment implements set of specifications #1 (ETCS Baseline 2) and considering its contractual needs for the concerned type, an applicant should take its own decision to request or not the relevant authority the relevant authorisation case.*
66. On this aspect the Board disagrees partially with ERA as Article 24(3) of the Directive (EU) 2016/797 provides that: *3. In the event of changes to any relevant provisions in TSIs or national rules, on the basis of which an authorisation of a vehicle type has been issued, the TSI or national rule shall determine whether the vehicle type authorisation already granted remains valid or needs to be renewed. If that authorisation needs to be renewed, the checks performed by the Agency or by a national safety authority may only concern the changed rules.*

67. In addition the ERATV register includes specific field related to the status of a type. In case ERA considered that the type 11-057-0016-3-001-002 cannot be used anymore and no vehicle may be authorised to be placed on the market on the basis of its conformity to this type, it should have indicated it as appropriate in ERATV. This is further illustrated in the guide for the application of the CCS TSI that states: *2.7.12. For the existing vehicle types in ERATV the parameter 3.1.2.1 "Status" should be set to the value "to be renewed", under the 4th RP regime. This option does not exist under the 3rd RP regime, so the closest option is "withdrawn". For the definitions refer to Section 6.- Glossary of ERATV Decision [18]. In all cases, this change needs to be done by the authorising entity of the vehicle type.*
68. *Furthermore, COMMISSION IMPLEMENTING DECISION of 4 October 2011 on the European register of authorised types of railway vehicles in the Glossary related to "Authorisation to be renewed" states: Decision taken by an authorising entity according to which an authorisation for a vehicle type needs to be renewed in accordance with Article 24(3) of Directive (EU) 2016/797 and no vehicle may be authorised to be placed on the market on the basis of its conformity to the given type. Authorisation to be renewed status for a vehicle type does not affect the vehicles already in use.*
69. In conclusion, if ERA considered that a vehicle type 11-057-0016-3-001-002 could not be used after 30 December 2020, it should, in accordance with the above provisions, enter an appropriate note in ERATV.
70. However, regardless of this, the Board recognizes that it is also the applicant's duty to decide whether, in light of the current provisions of the TSI or national rules, it can apply for an authorisation in conformity to a given type. In particular, the applicant should check whether the legislation has changed and whether it implies that the type authorisation is no longer valid. Such an obligation arises from Article 5 of Regulation (EU) 2018/545 that states that the holder of the vehicle type authorisation shall be responsible for the configuration management of the vehicle type.
71. In the light of the above provision, it was also important for the applicant to verify the stipulations of the CCS TSI, including whether they contained a rule implying that the type authorisation could not be used. In the Board's view, in this case, the applicant complied with this obligation and its decision to submit a C2T application was justified.
72. In particular, it should be stressed that there is no provision in point 7 of the CCS TSI indicating that existing vehicles that are compatible with a vehicle type that has been authorised based on compliance with the BL2 specifications could not continue to be authorised. The only provision concerning validity of the type authorisations is contained in point 7.4.2.1.(3), which reads as follows: *All vehicle type authorisations granted based on conformity to set of specifications #1 referred to in Table A 2 of Annex A of this TSI shall not remain valid for authorising new vehicles in conformity to those vehicle types (without prejudice to the application of 7.4.2.3). All vehicles already authorised according to those vehicle types are not affected.*
73. It follows from this provision, however, that authorisations for vehicle types approved based on BL2 specifications cease to be valid only in cases where C2T applications are submitted in respect of new vehicles. There is no corresponding provision in the CCS TSI indicating that existing vehicles in which

the on-board ECTS subsystem has been upgraded or renewed, cannot be authorised to be in conformity with a vehicle type approved under the BL2 specifications.

74. Furthermore, in the Board's view, it is not acceptable to conclude that existing vehicles with upgraded ECTS subsystem should be considered as new vehicles under this provision. The term “new vehicles” should be interpreted according to its linguistic meaning, which in this respect means newly built vehicles. This meaning is also supported by the fact that the CCS TSI itself makes a distinction between the term new vehicles and existing vehicles, clearly providing for separate regulations depending on which vehicles are involved. This interpretation is also confirmed by the guide for the application of the CCS TSI, which states: *2.7.7. In section 7.4.2.1 the meaning of “new vehicles” in the CCS TSI is newly built vehicles.*
75. In conclusion, the Board considers that the CCS TSI does not contain a provision from which the appellant could imply that the type 11-057-0016-3-001-002 is invalid for its C2T application. Further comments on the interpretation of the CCS TSI will be presented later in these findings. They will also confirm that the interpretation of the other relevant provisions of the CCS TSI allowed the conclusion that the appellant could submit a C2T application.

Application of the provisions concerning changes to an authorised vehicle or vehicle type

76. Changes to an already authorised vehicle are regulated by Article 16 of Regulation (EU) 2018/545. It was not directly apparent from the appeal and the documents in the OSS what changes had been made to the on-board vehicles subsystems and whether the appellant had applied Article 16 correctly. Therefore the Board submitted a written question on this issue to the appellant.
77. The appellant confirmed that it applied Article 16 and classified the change as per category 15(1)(d). Indeed the locomotive which was authorized according to an already authorized type was changed to be conform to another already authorized type. The appellant explained that *the change to the locomotive involved an upgrade from Release E1.03 to E1.11, for which the involved changes had already been assessed according to Article 15(1) prior to the applications for the type authorizations for release E1.11, which resulted in the respective authorized types, including 11-057-0016-3-001-002. The assessment revealed that the changes from release E1.03 to E1.11 fall under Article 15(1)(d), which is why the respective type authorizations had been applied for. This means that the changes applied to the actual locomotive also must fall under Article 15(1)(d), which is why the appellant had applied for a new authorization in conformity to type.*
78. This information was important for the Board, because if the changes had been qualified in accordance with Article 15(1)(a), the assessment of which CCS TSI provisions applied could have been different.
79. That explanation of the appellant also clarifies why the appellant opted for “conformity-to-type” authorisation, although the objective was “only” to extend the area of use of the authorisation of the existing vehicle to Belgium.

Further interpretation of the CCS TSI, including assessment on the possibility to implement BL2 set of specifications on existing vehicles when ETCS subsystem is subject to an upgrade or renewal after 30 December 2020

80. The Board already concluded here-above that both parties agree on the applicability of the latest version of the CCS TSI. As the CCS TSI was adopted in 2016 and amended several times, the Board took as a basis the consolidated version which includes amendments of 16 May 2019, 9 March 2020 and 16 March 2020 (hereinafter: CCS TSI).
81. In the Board's view it is crucial to understand which specific provisions of the CCS TSI apply and assess whether the appellant's decision to implement BL2 set of specifications on existing vehicles whose on-board ETCS subsystem has been upgraded after 30 December 2020, was correct under the provisions of CCS TSI. Chapter 7 of CCS TSI has the following structure:
- 7.4.2 onboard installations
 - 7.4.2.1 New vehicles
 - 7.4.2.2. Upgrading and renewal of existing vehicles
 - 7.4.2.3. Application of the TSI requirements for new vehicles during a transition phase
 - 7.4.2.4. Rules for the extension of the area of use for existing vehicle
82. The structure shows that only 7.4.2.2 and 7.4.2.4 apply to existing vehicles, while 7.4.2.1 and 7.4.2.3 apply to new vehicles. When reading 7.4.2.2 it appears that there is no specific rules for existing vehicles which are not high-speed vehicles. Section 7.4.2.4 would apply in case of extension of area of use, but the appellant opted for a conformity to type application. In its reply to a written question from the Board, the appellant explained his choice as follows.
83. *Opting for the combination of "extended area of use" and "new authorization" would have resulted in another authorized type, which would be identical to the already existing authorized type 11-057-0016-3-001-002. It does not seem to make sense to hold several authorized vehicle types which are identical. Additionally, according to (EU)2018/545, Article 34, clauses (1) and (2), the time frame for the assessment of a type authorization application, e.g., using the combination of "extended area of use" and "new authorization", would be 5 months, whereas according to clause (3) of the same article the time frame for an application using "conformity to type" is one month. Siemens therefore follows the strategy of authorizing the type first and upgrading the locomotive and declaring "conformity to type" only at a later point of time which is acceptable for the operator to minimize the downtime of the locomotive.*
84. The Board also notes that should the appellant had opted for an extension of area of use, the following provision would have applied: *Vehicles already equipped with ETCS or GSM-R do not need to be upgraded, except where required for technical compatibility.*
85. As the term "upgraded" may be interpreted in different ways, the Board submitted a written question on this aspect to the parties. ERA replied that as defined in the Directive (EU) 2016/797, the term "upgrade" refers to a "major modification [...] which improves the overall performance of the subsystem". So ERA does not interpret "upgrade" as obligation to apply a new version or baseline. This means that if the appellant had applied for an extension of area of use, 7.4.2.4 would apply instead of 7.4.2.2 or 7.4.2.3, and the appellant should have received an authorisation of extension of

area of use. This assumption would be in line with recital 49 and Article 21.13 of Directive (EU) 2016/797.

86. The main argument that ERA raised for rejecting the original application, during the review and in its statement of defence is that in the Annex A of the TSI CCS, under the field with the title *Specifications*, it is required that for the on-board subsystem either Table A 2.2 or Table A 2.3 shall be applied, after the transition period defined in 7.4.2.3.
87. However, as explained above, when reading 7.4.2.3 it appears clearly that 7.4.2.3 applies exclusively to new vehicles, as also confirmed by the title. Hence in the Board's view there is an inconsistency in the way the TSI CCS is written, between section 7 of CCS TSI and annex A. It has to be stated that only sections 7 of the CCS TSI should be decisive for the assessment of the validity of a type authorisation or changes made to the subsystems on existing vehicles. Requirements in the annex of the TSI which moreover refer to another section of TSI than section 7 cannot impose obligations on stakeholders.
88. If the legislator wanted an obligation to install ECTS subsystem implementing BL3 specifications to apply also to existing vehicles or to existing vehicles being subject of an upgrade or renewal, it should have provided for this explicitly under point 7 of CCS TSI. Furthermore, It should have also determined the validity of the vehicle type authorisations in such situations. The CCS TSI does not contain such provisions (except for provisions cited above referring to high-speed vehicles and extension of the area of use).
89. The prohibition on applying the BL2 specifications to existing vehicles on which an upgraded ECTS subsystem is installed cannot be also deduced from clause 7.2.1a of CCS TSI, and in particular from paragraph 7 of that point. This paragraph only implies that the changes should be in line with the applicable CCS TSI. The changes on the vehicles under appeal are in line with the latest CCS TSI as point 7 of CCS TSI does not prohibit the application of the BL2 specification to existing vehicles, including those whose ECTS subsystems are being upgraded.
90. Accepting the ERA's interpretation would lead to the conclusion that the obligation to use BL3 specifications to on-board subsystems of existing vehicles after 30 December 2020 would arise only from the requirement specified in the Annex A not being a main text of CCS TSI. Given that this requirement is inconsistent with section 7 of CCS TSI such an interpretation could lead to a breach of the principle of legal certainty. In light of this principle, obligations imposed on the addressees of legal acts should be formulated in a clear, simple and understandable manner. Without such precision, the addressee of the regulations is not able to predict the legal consequences of its actions. In view of doubts as to the meaning of the provisions, they should not be interpreted to the detriment of the addressee.
91. Such interpretation of the principle of legal certainty has been confirmed by European case law (Case C-209/96 United Kingdom v Commission [1998] ECR I-5655; Case C-108/01 Consorzio del Prosciutto di Parma and Salumificio S. Rita [2003] ECR I-5121 and Case C-255/02 Halifax and Others [2006] ECR I-1609). Principle of legal certainty must be observed more strictly in the case of rules liable to have financial consequences (Case C-94/05 Emsland-Stärke [2006] ECR I-2619).
92. It is also not acceptable, as it was already stated above, to conclude that the term 'new vehicles' in provision 7.4.2.3 of the TSI CCS includes the 'vehicles authorised in conformity to a type' as indicated

ERA in the review report dated on 3 May 2021. ERA observed in this document that *the application refers to an authorisation in conformity to a type. ‘New vehicles’ include the ‘vehicles authorised in conformity to a type’.* In accordance with sections 7.4.2.3.1 and 7.4.2.3.2 of Regulation (EU) 2016/919 as amended, these vehicles shall comply with the set of specifications #2 or #3 referred to in Table A 2 of Annex A of this Regulation.

93. The appellant argued that according to this interpretation any existing retrofit vehicle originally placed into service before 01.01.2021, that requires a new authorisation in conformity to a type, but with an CCS subsystem including ETCS BL2 remaining unchanged, could not be granted an authorisation in conformity to a type anymore since 01.01.2021. In the appellant’s view, this is in contradiction to the reasoning stated in the original refusal by ERA, respectively the ERA document ERA1219-119, according to which only changes to an ETCS BL2 system as per Article 15(1)(c) or Article 15(1)(d) of Implementing Regulation (EU) 2018/545 after 01.01.2021 prevent an authorization in conformity to a type.
94. As explained above, when analysing the structure of section 7 of the consolidated version of TSI CCS, the Board’s view is that only 7.4.2.2 and 7.4.2.4 apply to existing vehicles, while 7.4.2.1 and 7.4.2.3 apply to new vehicles. The term new vehicles should be interpreted according to its linguistic meaning, which in this respect means newly built vehicles. This interpretation is also confirmed by the guide for the application of the CCS TSI, which states: *2.7.7. In section 7.4.2.1 the meaning of “new vehicles” in the CCS TSI is newly built vehicles. 2.7.10. For the CCS on-board subsystem there is transition period defined in 7.4.2.3 to use set of specifications #1 for a limited time, and is only applicable for new vehicles, considering what has been indicated in this Application Guide in clause 2.7.7 for the meaning of “new vehicles”.*
95. As the locomotives subject to the present appeal (and related case EACLI EU-ERABA-2021-002) were built in 2017, 2018 and 2020, the Board considers that there is no doubt as to the fact that those locomotives were existing locomotives when the appellant requested their re-authorisation in January 2021.
96. To summarise this issue the Board’s view is that
- The notes to a table inserted in annex A of TSI CCS cannot be read in isolation. It is chapter 7 (and not chapter 4) of the TSI which regulates how the TSI must be applied in case of existing vehicles (maintenance, renewal and upgrading).
 - If the type chosen by the applicant is still valid and if the locomotive has to be in conformity with the type chosen by the applicant, then table A2.1 is applicable.

Additional remarks on transition period of point 7.4.2.3 of CCS TSI

97. In its decision to reject the authorisation request ERA argued that according to point 7.4.2.3 of the TSI CCS, the transition period expired on December 31, 2020.
98. In its statement of defence ERA confirmed that Table A.2.1 of the CCS TSI states: *Set of specifications # 1 (only for trackside Subsystems. For onboard subsystems not to be applied after the transition*

period defined in 7.4.2.3)(ETCS Baseline 2 and GSM-R Baseline 1). In ERA's view, the relevant date for the end of the transition period is defined in 7.4.2.3 as December 31, 2020.

99. The appellant argued that the time limitation of Table A 2.1. has only been introduced with amendment (EU) 2019/776 and that the target of the amendment was providing a transition period for new vehicles; existing vehicles were not targeted at all.
100. As explained here-above, in the Board's view the notes to the table inserted in annex A of TSI CCS cannot be read in isolation. It is chapter 7 (and not chapter 4) of the TSI which regulates how the TSI must be applied in case of existing vehicles (maintenance, renewal and upgrading).
101. In the Board's view, the provision invoked by ERA (7.4.2.3): "This transition phase applies to new vehicles authorised in conformity to a vehicle type authorised before 1 January 2019 in any Member State on the basis of conformity to set of specifications #1 referred to in Table A 2 of Annex A of this TSI up to December 31 2020." applies to new vehicles authorised in conformity to a vehicle type authorised before 1 January 2019, whilst the locomotives subject to the present appeal are existing vehicles and were authorised on the basis of a type authorised by ERA and registered in ERATV on 14.01.2020, thus certainly after 1st January 2019.
102. Hence the provision of the transition period is not relevant even if we were to consider that the existing vehicles on which the upgraded ECTS subsystem has been installed are new vehicles (with which the Board, as explained in paragraph 91, disagrees).

Board's opinion on the application of procedural rules and the obligation to consult national safety authorities

103. On 10 August 2021, the appellant filed an additional submission which commented the ERA statement of defence and included a new evidence - letter from the Belgian NSA rejecting an appellant's request for non-application of the CCS TSI for Vectron locomotives.
104. In parallel to the ongoing appeal, the appellant tried to obtain derogations from the CCS TSI to secure a timely upgrade of the locomotives. The derogation request to Belgium was refused, as the Belgian NSA did not see the legal need for such a derogation and supported the appellant's view that section 7.4.2.3 and in particular the transition period did not apply to the locomotives which were existing locomotives, not new locomotives.
105. The additional submission of the appellant was also duly notified to the Agency. On 26 August 2021 the Agency submitted to the Board its reply to the additional submission of the appellant. In ERA's view, the new evidence presented in appellant's written submission on 10 August 2021 cannot be considered procedural measures under Article 25(2)(b) of the Regulation (EU) 2018/867, as these have not been ordered by the Chairperson of the Board pursuant to Article 25(1). In addition, the Agency stated that the new evidence submitted by the appellant constituted supplementary information developed and shared after the date of issuing of the authorisation decisions by the Agency and thus should not be considered as admissible evidence. This statement is examined by the Board in line with Article 30 of the Regulation (EU) 2018/867.

106. The Board considers that Article 30 of the Regulation (EU) 2018/867 gives the right to the Board of Appeal to decide until when new arguments or evidence may be submitted. In the present case the Board set as deadline for submission of new evidence by the parties 10 September 2021. On 31 August 2021, the Registrar notified the parties accordingly.
107. The Board also notes that the derogation request was sent on 21 May 2021 to the Belgian NSA, hence after the review of the negative decision of ERA which itself noted that there was no derogation for Belgium. As the reply of the Belgian NSA was received on 13 July 2021 it could not be part of the appeal submitted on 23 June 2021. Consequently, the Board finds that the additional submission is admissible.
108. However, it must be stressed that this evidence was not essential to the outcome of this case. Indeed, the Board was required to make its own interpretation of the legislation, which it did and explained above. The evidence confirms that the CCS TSI rules are ambiguous and can be interpreted differently.
109. The additional submission also triggered doubts whether Belgian NSA should be consulted during the assessment of the application of the appellant or during the review of ERA's decision.
110. The Board notes that Article 25(5) of Directive (EU) 2016/797 provides the following:
- The Agency shall issue vehicle authorisations for placing on the market in respect of vehicles having an area of use in one or more Member States. In order to issue such authorisations, the Agency shall:*
- (a) assess the elements of the file specified in points (b), (c) and (d) of the first subparagraph of paragraph 3 in order to verify the completeness, relevance and consistency of the file in relation to the relevant TSIs; and*
- (b) refer the applicant's file to the national safety authorities concerned by the intended area of use for assessment of the file in order to verify its completeness, relevance and consistency in relation to point (d) of the first subparagraph of paragraph 3 and to the elements specified in points (a), (b) and (c) of the first subparagraph of paragraph 3 in relation to the relevant national rules.*
111. The Board also notes that the Implementing Regulation (EU) 2018/545 provides the following in its article 51.6. *Where the Agency acts as the authorising entity, a decision to reverse or not its decision shall be subject to review in coordination with the relevant NSAs for the area of use, where applicable.* Against this background the Board submitted a written question to the Agency in order to ascertain whether the Agency consulted Belgium before deciding to reject the request of the appellant and/or before deciding to confirm its negative decision during the review process. In its reply the Agency confirmed that the Belgian NSA was not consulted and explained the reasons thereof: there was no obligation to consult Belgium because the type is already authorised and it is in the process of authorisation of the types that the concerned NSA are involved.
112. The Board recognises that there was no legal obligation to consult the Belgian NSA. However in the Board's view, the terms "where applicable" in article 51.6 of Regulation (EU) 2018/545 leave some degree of interpretation; knowing that the subject was sensitive as the appellant applied for a review of ERA's negative decision, ERA could have consulted Belgian NSA on its own initiative.

Assessments of the non-legal arguments presented by the appellant

113. In its appeal, the appellant also refers to arguments based on the operational impact.
114. The appellant argued that *because of the contested decision, current ETCS BL2 onboard units are prevented from improvement and even safety-relevant or availability-relevant error corrections. In Belgium the newly implemented Alstom baseline 5.8.1 is minimum for stable operation. In the end, this might lead to fleet grounding either from authority/supervision side or from operator side in case there is no possibility to modify existing ETCS BL2 systems.*
115. The appellant also stressed in its appeal that *confidence in ETCS is lost: Early adopters of ETCS BL2 are punished, as they are forced to invest in a heavy (and not yet available) ETCS BL3 upgrade and cannot flexibly configure their locomotive to the market's needs.*
116. In its statement of defence, the Agency replied that *as Union authority responsible for issuing authorisations, it based its decisions only on the rule of law. The Agency considered that it has no right to comment on alleged considerations which did not constitute part of its assessment tasks linked to the decisions subject to appeal.*
117. The Board stresses that the economic arguments presented by the appellant, unrelated to the interpretation of the law, could not affect the conclusions in these findings, which are based on the above interpretation of the CCS TSI. However, it should be noted that the consequences that arise from decisions taken by administrative bodies are not insignificant, as they may adversely affect confidence in the European institutions. In the light of the abovementioned principle of legal certainty, legal provisions should be written and interpreted in a way that is acceptable and logical to their addressees.
118. This statement is relevant in light of the fact that ERA, as ERTMS system authority, is also responsible for the ERTMS migration strategy. As there is a link between the possible interpretation of some CCS TSI provisions and the migration strategy, the Board considers that ERA has the right to comment and could clarify the migration strategy in the case of such locomotives equipped with BL2. This is why the Board submitted the following written question to ERA:
- Do you consider the TSI CCS as in line with directive (EU) 2016/797) which requires in article 4 that each TSI shall be drawn up on the basis of an examination of an existing subsystem and indicate a target subsystem that may be obtained gradually within a reasonable timescale. Accordingly, the adoption of the TSIs and compliance with them shall gradually facilitate achievement of the interoperability of the Union rail system.*
119. ERA replied that *in its role as an EU authority, it is not for the Agency to comment about the status of the applicable EU law and more precisely of an applicable EU Regulation.*
120. The Board notes that Article 28.1 of Regulation (EU) 2016/796 of the European Parliament and of the Council of 11 May 2016 on the European Union Agency for Railways and repealing Regulation (EC) No 881/2004 (hereinafter: Regulation (EU) 2016/796) provides that *In its role as ERTMS system authority ERA shall ensure the coordinated development of the ERTMS within the*

Union, in accordance with relevant TSIs. Article 28.3 also provides that the development of new versions of ERTMS technical specifications shall not be detrimental to the rate of deployment of the ERTMS, the stability of the specifications which is needed to optimise the production of ERTMS equipment, the return on investment for railway undertakings, infrastructure managers and keepers, and efficient planning of the deployment of the ERTMS.

121. The Board's view is that as ERA has the responsibility to draft TSIs before their adoption by the Commission, and has to act in accordance with the Regulation (EU) 2016/796, including the provisions here-above, ERA should take into account whether the interpretation of the legislation would not be detrimental for the return of investment for railway undertakings.
122. The ERA's responsibility for the migration strategy may also be relevant in this context, in particular while assessing whether such strategy is clear and understandable to stakeholders and whether it is supported by the non-controversial provisions of the CCS TSI.

The Clarification Note

123. The appellant argued in its appeal that *the interpretation of the TSI made by ERA in the Clarification Note ERA1209/119 published on 18 February 2021 came as a surprise to the entire sector. The appellant considered that a simple and clear requirement in the CCS TSI would have been possible, if the effect would have been intended, and the statements in CCS TSI are not consistent. The appellant's view was that the objective of the amendment of §7.4.2.4 was the extension of the area of use of existing vehicles, but the interpretation of ERA made this objective impossible to reach.*
124. ERA reaffirmed in its statement of defence that *the contested Agency's decisions are solely based on the requirements of the applicable law, namely solely of the applicable TSI CCS. Consequently, in ERA's view, the part of the appeal linked to the Agency's document ERA 1219-1191 and raised by the appellant shall be considered as inadmissible and in case it is not, as substantially wrong.*
125. The Board notes that the Clarification Note "Authorisation of vehicles equipped with CCS train protection part according to set of specifications #1 (Baseline 2) after 31/12/2020" was drafted and validated on the same day by ERA, on 18 February 2021, thus one week before the ERA decision to reject the application. The Board also noted the strong reactions of stakeholders, detailed in the letters of support presented by the appellant in its appeal. This is why the Board submitted a written question to ERA, in order to ascertain if the Clarification Note had been discussed with NSAs and/or stakeholders before adoption and publication.
126. ERA replied that it makes a distinction between a Clarification Note produced by ERA as Authorising entity and a TSI Application guideline, which can be discussed with stakeholders before publication. ERA further explained that a Clarification Note is produced according to a clear internal process in the Agency.
127. As stated above, the appeal insofar as the appellant requested a review of the document ERA 1219-1191 is not admissible. The Board has no legal basis for imposing on the ERA an obligation to revise this document.

128. However, taking into account the possible diverging interpretations observed here-above, in particular of chapter 7 of TSI CCS, and the arguments presented in the previous section on the role of the ERA, including its responsibility for the migration strategy, the Board considers that further discussion and, where applicable, development on the Clarification Note with NSAs and the stakeholders could be beneficial for the railway sector. Such a recommendation has no binding legal effect on the ERA actions.

External legal assessment attached to the appeal

129. The appellant attached to its appeal form a legal assessment submitted by Dr. Stephan Gerstner on 18 June 2021. The document bears the following header: Redker/Sellner/Dahs. The legal assessment concludes that *authorised vehicles that are equipped with ETCS baseline 2 do not have to be upgraded to ETCS baseline 3 if a further conformity to type authorisation is applied for, in particular if the application is due to achieve extension of the area of use for these vehicles. According to that lawyer, this also applies if the further conformity to type authorisation is applied for after December 31, 2020.*

130. In its statement of defence, ERA argued that the decisions subject to appeal refer to existing vehicles whose on-board CCS subsystems have been changed and for which an application for a conformity to type has been submitted which will entail an extension of their area of use to Belgium. *The Agency did not find in the external legal statement from the appellant any reference to the change implemented by the applicant (and its timing) in the on-board CCS subsystem of the existing locomotives. In other words, ERA's view is that the appellant's external legal statement does not cover the most decisive issue for the Agency's decision, namely the change in the on-board CCS subsystem of the locomotives.*

131. In its additional submission, the appellant rejected the ERA's view here-above as:

- *the systematic structure of the external legal opinion follows the systematic structure of ERA's reasoning in its rejection decisions.*
- *On page 7 it explains that Point 7.2.1a of the Annex to TSI CCS constitutes a lex generalis, which is superseded by Point 7.4 of the Annex to TSI CCS.*
- *On page 8 ff. it points out that ERA, with regard to Point 7.4.2.3 of the Annex to TSI CCS, fails to recognize that this provision is only applicable to newly built vehicles.*
- *Finally, on page 10 f. it shows that the "Specifications" in Annex A TSI CCS cannot influence the previously correctly interpreted result on the transitional provision which is that according to Point 7.4 of the Annex to TSI CCS changes to the on-board CCS system in existing vehicles need not comply with ETCS BL3.*

132. The appellant concluded in its additional submission that *the concept of changes is not a question of facts and thus does not automatically lead to the legal conclusion drawn by ERA. Rather, it is a question of law whether the changes to the on-board CCS system made by the appellant lead to ETCS BL 3, as argued by ERA.*

133. ERA in its position sent by e-mail dated 26 August 2021 did not have further remarks on that part of the appeal.

134. The analysis presented in the section on interpretation of the CCS TSI shows that the Board's conclusions are consistent with those of the attached legal opinion, in particular:
- The version of TSI which applies is the CCS TSI in force at the time of the authorisation request;
 - 7.2 of CCS TSI are generally applicable rules and 7.4 are specific rules;
 - Had the appellant opted for an extension of area of use, 7.4.2.4 of CCS TSI would apply and upgrade to BL3 would not be mandatory as not necessary for technical compatibility;
 - 7.4.2.3 of CCS TSI does not apply because the vehicles subject to the present appeal were not “new” at the time of the re-authorisation request (January 2021).

Final considerations

135. Taking into account the views expressed by the Board on all issues above, the Board of Appeal considers in the first place that the grounds for the appeal are founded and that the locomotives subject to the present appeal should be authorised in the context of a conformity to type authorisation and according to the type chosen by the appellant.
136. The Board considers in the second place that the ERTMS migration strategy should be clarified as to existing locomotives equipped with BL2. This consideration is a suggestion that is not part of the appeal conclusions.
137. The Board considers in the third place that the TSI CCS application guide and the Clarification Note might be updated accordingly. This consideration is a suggestion that is not part of the appeal conclusions.

VII. CONCLUSION


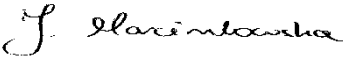
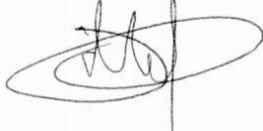
138. Having regard to the above the Board of Appeal finds that the grounds for appeal against decision V-20210127-006 are founded. In accordance with Article 33.1 of Commission Implementing Regulation (EU) 2018/867 and Article 62.3 of Regulation (EU) 2016/796 the Agency shall issue a final decision addressed to the appellant in compliance with the findings of the Board of Appeal within 1 month following the delivery of the findings of the Board of Appeal.
139. Thus, the case is remitted to the Agency.

VIII. CONCLUSION ON COSTS

140. In accordance with Article 7 of Commission Implementing Regulation (EU) 2018/764, as the grounds for appeal are founded no fee shall be paid by the appellant.

IX. JUDICIAL REVIEW

141. The final decision to be issued by Agency or failure to act may be appealed to the General court of the European Union, in accordance with Article 263 of the Treaty on the Functioning of the European Union in conjunction with Article 63 of Regulation 2016/796. Any appeal must be filed within two months from the notification of the final decision of the Agency or from the end of the deadline for issuing such decision in case the Agency has failed to act.

| <i>Name:</i> | <i>Signature:</i> |
|---|--|
| <i>Marcel Verslype</i> <i>Chair</i> |  |
| <i>Joanna Marcinkowska</i> <i>Member</i> |  |
| <i>Gilles Dalmas</i> <i>Member</i> |  |
| <i>Registrar</i> <i>Zografia Pyloridou</i> | |

ANNEX A- Timeline of events

| EVENT | TIME | COMMENT |
|---|------------------|--|
| Adoption of TSI CCS | 27 May 2016 | |
| Loco 91 80 6193 300-1 – first placing in service | 15 November 2017 | Case 001 |
| Loco 91 80 6193 311-8 – first placing in service | 7 March 2018 | Case 001 |
| Adoption of practical arrangements for the railway vehicle authorisation and railway vehicle type authorisation process | 4 April 2018 | Classification of authorisations Management of changes |
| Adoption of TSI amendments to align TSIs with 4 th railway package | 16 May 2019 | Modification of CCS TSI: two new sections 7.2.1a and 7.2.1b are added (changes to onboard systems) modification of 7.4.2.1 on new vehicles New section 7.4.2.3 is added as on Application of the TSI requirements for new vehicles during a transition phase Modification of ERATV specification |

| | | |
|---|---|--|
| type 11-057-0001-5-003 is registered in ERATV | 29 March 2019 | |
| type 11-057-0016-3-001-002 is registered in ERATV | 14 October 2019, according to application form of appellant | Area of use is “Belgium, Germany, Italy, Netherlands” according to application form |
| First transposition date of the Technical Pillar of the 4 th railway package | 16 June 2019 | Bulgaria, Finland, France, Greece, Italy, the Netherlands, Romania and Slovenia |
| Loco 91 80 6193 300-1 – intermediate upgrade | 2 July 2019 | Case 001 - Upgrade to E1.03 |
| Loco 91 80 6193 311-8 – intermediate upgrade | 20 August 2019 | Case 001 - Upgrade to E1.03 |
| Type 11-057-0016-3-001-002 is registered in ERATV | 14 January 2020, according to type published in ERATV | Area of use is “ Italy and Netherlands”, according to type published in ERATV |
| Modification of TSI CCS on area of use and transition phases | 9 March 2020 | New 7.4.2.4 applies also in case of extension of area of use Vehicles already equipped with ETCS or GSM-R do not need to be upgraded, except where required for technical compatibility. Vehicles that are not already equipped with ETCS shall install ETCS and comply with sets of specifications #2 or #3 referred to in Tables A 2.2 and A 2.3 of Annex A. |
| Loco 91 85 4475 416-4 – first placing in service | 11 May 2020 | Case 002 |
| Date of original certification of the locomotive (EVN 91 85 4475 416-4) | 18 May 2020 | Case 002 |
| Second transposition date for the technical pillar of the 4 th railway package | 16 June 2020 | |

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| Final transposition date for the technical pillar of the 4th railway package | 31 October 2020 | Extension due to Covid crisis |
| Loco 91 85 4475 416-4 – upgrade to release E1.11 | 18 January 2021 | Case 002 |
| Loco 91 80 6193 300-1 – upgrade to release E1.11 | 25 January 2021 | Case 001 |
| Loco 91 80 6193 311-8 – upgrade to release E1.11 | 25 January 2021 | Case 001 |
| Application for C2T authorization by appellant | 20 (case 002) and 27 (case 001) January 2021 | This application concerns an already existing vehicle, authorised and in operation, and which was modified: from type 11-057-0001-5-003 to type 11-057-0016-3-001-002. |
| ERA publication of Clarification Note | 18 February 2021 | an existing locomotive equipped with BL2 has to be upgraded to BL3 because of the end of the transition phase on 31 December 2020 |
| ERA decision to reject application | 25 February 2021 | |
| Application of review by appellant | 9 March 2021 | |
| ERA decision to uphold its negative decision | 3 May 2021 | |
| Appeal lodged by appellant | 23 June 2021 | |
| ERA statement of defence | 23 July 2021 | |
| Additional submission from appellant | 10 August 2021 | Comments on ERA statement of defence Letter of Belgium rejecting derogation request |
| Reply of ERA on additional submission | 26 August 2021 | Additional submission is not admissible as procedural measure not requested by BoA |

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| Questions from BoA to parties | 31 August 2021 | |
| Replies from parties to BoA | 10 September 2021 | |

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