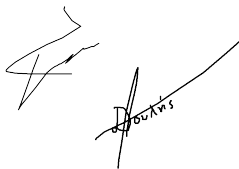




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Clarification note

Applicability of national rules when the Agency is safety certification body

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Document History

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1.0	21/01/2020	First version

The purpose of this document is to foster an harmonised EU approach to the safety certification process. Those concerned with this clarification note are encouraged to voluntarily apply it.

The present document is a non-legally binding guidance of the European Union Agency for Railways. It is without prejudice to the decision-making processes foreseen by the applicable EU legislation. Furthermore, a binding interpretation of EU law is the sole competence of the Court of Justice of the European Union.

1. Issue description

According to Article 10(3) of Directive (EU) 2016/798, a railway undertaking that applies for a single safety certificate has to accompany its application with a file containing documentary evidence that it meets both the applicable EU requirements and the requirements set out in the national rules notified in accordance with Article 8 of the same Directive.

The [NOTIF-IT](#) application provides the Member States with the means to notify the national safety rules to the Commission, and to make them available to the public in order to improve rule accessibility.

It is possible that some national rules notified in [NOTIF-IT](#) may not be consistent with EU and national legislation in force, and/or may not have been notified in accordance with Article 8 of Directive (EU) 2016/798.

This situation could create:

- › a burden for the applicant who could be requested to submit the same evidence several times in the one-stop shop, possibly in different languages;
- › duplicate assessments with possible conflict between the Agency and the national safety authorities concerned, and also additional costs for the applicant;
- › legal uncertainty for an applicant against whom there could be legal action in a Member State for not abiding by the national law.

2. Clarification

The following categorisation of national legislation is helpful for the interpretation of the term “national rules” for the purposes of application of Articles 10(3) and 8 of Directive (EU) 2016/798:

	Type	Example	NOTIF-IT
a)	National rules notified in accordance with Art. 8 of Directive (EU) 2016/798 and kept in NOTIF-IT	For example, company rules of a Railway Undertaking (notified by 15 June 2016 and which comply with TSIs, CSMs and CSTs and are not discriminatory)	Notifiable in NOTIF-IT
b)	Rules of the Member State notified in NOTIF-IT which should have not been notified in NOTIF-IT and are i) either withdrawn from NOTIF-IT unilaterally by a Member State or after the Agency’s proposal or ii) they are kept still in NOTIF-IT, even though they should not have been kept there	For example, operating rules made redundant by EU law (a TSI), but nevertheless they are still kept in NOTIF-IT	Withdrawn or not from NOTIF-IT
c)	National rules not notified even though the Member State was obliged to notify them in accordance with Art. 8 of Directive (EU) 2016/798	For example, operating rules not covered by a TSI (such as rules described in Art. 8(3) of Directive (EU) 2016/798) which were never notified	Notifiable in NOTIF-IT
d)	Rules and restrictions of a strictly local nature	For example, rules applicable to a defined local area of MS X	Discretion of the Member State to notify it in NOTIF-IT

	Type	Example	NOTIF-IT
e)	Rules transposing an EU Directive or adapting an EU Regulation in the national legal order	For example, rules on train drivers' qualification schemes transposing Train Driver Directive	Non-notifiable in NOTIF-IT
f)	Rules containing urgent preventive measures (Art. 8(5) of Directive (EU) 2016/798)	For example, urgent operating rule	Notifiable in NOTIF-IT
g)	Draft national rules – these are still not considered as rules	For example, draft operating rule	Notifiable in NOTIF-IT

From the table above, the cases *b-ii*, *c* and *e* need more explanation on how they will be dealt by the Agency and the national safety authorities within the framework of an application for a single safety certificate in the case where the Agency is safety certification body.

a) Case b-ii

Directive (EU) 2016/798 specifies in its Articles 8(1), (2) and (3) the criteria for which national rules may continue to exist.

Member States are obliged to repeal existing national rules that have been notified in NOTIF-IT, and cannot lay down new national rules, as long as they have been made or are made redundant by European Union law (e.g. Common Safety Methods and Technical Specifications for Interoperability) respectively, or they do not comply with it.

In case of a conflict of law, the general principle of primacy of EU law foresees that the EU law prevails over the national law. Practically, this means that the demonstration of compliance with such “notified rules (conflicting with EU law)” by an applicant should not be requested during the assessment carried out by the national safety authorities, as referred to in Article 10(3)(b) of Directive (EU) 2016/798.

a) Case c

National rules not notified in accordance with Article 8 of Directive (EU) 2016/798 shall not apply for the purposes of this Directive.

In applying this Article, when the Agency acts as safety certification body, national rules that are not notified in NOTIF-IT, despite the Member State's obligation to notify them, do not apply for the purposes of Directive (EU) 2016/798.

Practically, this means that the demonstration of compliance with such “non-notified rules” by an applicant should not be requested during the assessment carried out by the national safety authorities, as referred to in Article 10(3)(b) of Directive (EU) 2016/798.

The applicant should demonstrate that it manages all the risks, including those addressed or identified by the “non-notified rules”. However, such a demonstration does not need to be aligned with the non-notified national requirements it should simply manage the risks that such rules cover.

b) Case e

The EU Regulations (e.g. Regulation (EU) 2018/763, Regulation (EU) 2015/995 and Regulation (EU) 2019/773) apply to the Member States without any need for national legislation adapting them in the national legal order.

In addition, in a case of conflict between an EU Regulation and a national rule adapting an EU regulation, the Agency considers that the original content of the EU legal act prevails over the national law and its content is binding for all parties involved in the EU part of the assessment referred to in Article 10(3)(a) of Directive (EU) 2016/798.

By analogy, the same applies to the requirements set out in national laws transposing Directive (EU) 2016/798.

Practically, this means that the demonstration of compliance with such “rules transposing a railways related EU Directive or adapting an EU Regulation in the national legal order” by an applicant should not be requested during the assessment carried out by the national safety authorities, as referred to in Article 10(3)(b) of Directive (EU) 2016/798. The assessment of compliance of an application file with the original content of the EU railway legal act (Directive, Regulation or other legal act) is a responsibility of the Agency.

3. Legal background

a) Directive (EU) 2016/798

- Article 8. National rules in the field of safety

“1. National rules notified by 15 June 2016 pursuant to Directive 2004/49/EC shall apply if they:

(a) fall into one of the types identified under Annex II; and

(b) comply with Union law, including in particular TSIs, CSTs and CSMs; and

(c) would not result in arbitrary discrimination or a disguised restriction on rail transport operation between Member States.

2. By 16 June 2018, Member States shall review the national rules referred to in paragraph 1 and repeal:

(a) any national rule which was not notified or which does not meet the criteria specified in paragraph 1;

(b) any national rule which has been made redundant by Union law, including in particular TSIs, CSTs and CSMs.

To that end, Member States may use the rule management tool referred to in Article 27(4) of Regulation (EU) 2016/796 and may request Agency to examine specific rules against the criteria specified in this paragraph.

3. Member States may lay down new national rules pursuant to this Directive only in the following cases:

(a) where rules concerning existing safety methods are not covered by a CSM;

(b) where operating rules of the railway network are not yet covered by TSIs;

(c) as an urgent preventive measure, in particular following an accident or an incident;

(d) where an already notified rule needs to be revised;

(e) where rules concerning requirements in respect of staff executing safety-critical tasks, including selection criteria, physical and psychological fitness and vocational training are not yet covered by a TSI or by Directive 2007/59/EC of the European Parliament and of the Council.

[...]

8. Member States may decide not to notify rules and restrictions of a strictly local nature. In such cases, Member States shall mention those rules and restrictions in the registers of infrastructure referred to in Article 49 of Directive (EU) 2016/797 or indicate in the network statement referred to in Article 27 of Directive 2012/34/EU where those rules and restrictions are published.

[...]

11. Without prejudice to paragraph 8, national rules not notified in accordance with this Article shall not apply for the purposes of this Directive.”

- Article 10. Single safety certificate

“[...]

3. The application for a single safety certificate shall be accompanied by a file including documentary evidence that:

(a) the railway undertaking has established its safety management system in accordance with Article 9 and that it meets the requirements laid down in TSIs, CSMs and CSTs and in other relevant legislation in order to control risks and provide transport services safely on the network; and

(b) the railway undertaking, where applicable, meets the requirements laid down in the relevant national rules notified in accordance with Article 8.

[...]”.