

**EXPLANATORY MEMORANDUM TO
THE RAIL PASSENGERS' RIGHTS AND OBLIGATIONS (EXEMPTIONS)
REGULATIONS 2009**

2009 No. 2970

1. Introduction

1.1 This explanatory memorandum has been prepared by the Department for Transport and is laid before Parliament by Command of Her Majesty.

1.2 This memorandum contains information for the Joint Committee on Statutory Instruments.

2. Purpose of the instrument

2.1 This instrument exempts domestic train services from the application of some of the provisions of Regulation (EC) No. 1371/2007 on Rail Passengers' Rights and Obligations ("the Regulation"), from the entry into force of the Regulation on 4th December 2009.

2.2 Its purpose is to give the Department time to consider the evidence as to the desirability or otherwise of applying the Regulation in full to domestic services, and to finalise the measures necessary to support the implementation of the Regulation.

3. Matters of special interest to the Joint Committee on Statutory Instruments

3.1 There has been no consultation on this instrument, and no impact assessment has been produced. The reason is that the purpose of the measures contained in this instrument is precisely to have the time to reach a policy that has been properly consulted upon.

3.2 The Regulation will automatically come into force on 4th December 2009, by virtue of its direct applicability under Community law. It allows Member States to grant exemptions from some of its provisions to domestic services or to urban, suburban and regional services.

3.3 We have been preparing an instrument to facilitate the implementation of the Regulation in Great Britain ("the implementing instrument") – see paragraph 4.4 for further information on that instrument. Although the Regulation is not clear on this, our view is that that instrument needs to be in force by 3rd June 2010. We intended that, when we were consulting about that instrument, we would also consult on a preliminary view as to whether, and to what extent, to grant exemptions. That view was intended to be based on evidence as to how to achieve the right balance between ensuring the competitiveness of our economy and protecting the rights of passengers. To form our preliminary views on the exemptions and on the implementation of the Regulation generally, at the end of 2007 and beginning of 2008, we were in discussions with stakeholders. However, this process took longer than anticipated, and, by the time the draft implementing instrument was ready for consultation, the evidence obtained was

insufficient to allow us to reach a provisional view on whether exemptions should be applied. The finalisation of that draft was itself delayed because of the complexity of some of the issues it raised.

3.4 We started to consult on the implementing instrument, and on the use of the exemptions, on 11th August 2009. Consultation ended on 3rd November 2009. There is not enough time between that date and that of the entry into force of the Regulation to consider properly the results of consultation and make and implement a decision on the exemptions.

3.5 We believe that the burden of complying with the Regulation fully should not be imposed on businesses without consideration, where possible, of the case for and against using the exemptions, based on fuller evidence. From the point of view of passengers, we believe that it would not be desirable to be granted rights only for them to be taken away later if we decided to grant exemptions. Finally, a situation where the Regulation is in force, but not the implementing instrument, although, we believe, permissible from the point of view of European and domestic law, has disadvantages for all those concerned.

3.6 Therefore, we have decided to grant exemptions, to the maximum possible extent, from the entry into force of the Regulation, pending consideration of the results of the consultation, and the finalisation of the implementing instrument. This is only a transitional measure.

4. Legislative Context

4.1 Regulation (EC) No. 1371/2007 strengthens and harmonises the rights of rail passengers across the European Community. It applies to both international and domestic services.

4.2 As far as international services are concerned, currently, the main domestic instrument protecting passengers' rights is the Railways (Convention on International Carriage by Rail) Regulation 2005, SI 2005/2092, giving legal effect to the Convention concerning International Carriage by Rail (COTIF), of which the Regulation reproduces substantial parts.

4.3 Article 2(4) of the Regulation allows Member States to grant exemptions from the application of some of its provisions to domestic services. Article 2(4) exemptions may be granted for a maximum period of five years, renewable twice for a maximum period of five years on each occasion. Domestic services are defined in the Regulation as those which do not cross a border of a Member State. The effect of this instrument is therefore that those provisions to which the exemptions relate (described in more detail in section 7 below) will apply only to international rail passenger services.

4.4 Although the Regulation is directly applicable, domestic measures need to be taken to facilitate its enforcement, avoid inconsistencies with domestic legislation and minimise any adverse impact. To that aim, we have drafted what was termed above an implementing instrument; the consultation document and related information are available from the Department for Transport, and, in particular, its website (<http://www.dft.gov.uk/consultations/closed/passengerrights>) or Sharon Goodsell, tel. 020 7944 0523.

4.5 We take the view that, under Article 32 of the Regulation, the implementing instrument only needs to be in force, under Community law, by 3rd June 2010.

4.6 The proposal which resulted in Regulation EC 1371/2007 was published by the European Commission as part of the ‘Third Rail Package’ of documents and was the subject of a combined Explanatory Memorandum (EM) numbered 7170/04, 7147/04, 7172/04, 7149/04, 7148/04, and 7150/04 submitted to Parliament by the Department for Transport on 30 March 2004.

4.7 The House of Commons European Scrutiny Committee considered the EM on 21 April 2004. The Committee recommended that the document was of political interest and did not clear it (Report 17, session 2003/04). Ministerial letters were sent to the Committee Chairman to provide further information and keep the Committee informed of the progress of EU negotiations on 1 September 2004, 24 September 2004, 29 November 2004, 14 January 2005, 13 July 2005, 25 November 2005, 17 January 2007, 19 February 2007, and 11 July 2007. On 19 January 2005 the Committee recommended that the document was politically important and should be debated (Report 4, session 2004/05). The debate took place on 9 March 2005.

4.8 The House of Lords Select Committee on the European Union referred the EM to its Sub-Committee B for consideration (1176th sif, 6 April 2004). On 21 April the Chairman wrote to the Minister maintaining the scrutiny reserve. Ministerial letters were sent to the Committee Chairman to provide further information and keep the Committee informed of the progress of EU negotiations on 1 September 2004, 24 September 2004, 8 November 2004, 29 November 2004, 14 January 2005, 13 July 2005, 25 November 2005, 17 January 2007, 19 February 2007, and 11 July 2007. The scrutiny reserve was lifted in a letter from the Chairman to the Minister of 7 December 2005.

5. Territorial Extent and Application

5.1 This instrument extends to Great Britain.

6. European Convention on Human Rights

6.1 As the instrument is subject to negative resolution procedure and does not amend primary legislation, no statement is required.

7. Policy background

- What is being done and why

7.1 The purpose of the Regulation is to harmonise the rights of, and obligations on, rail passengers throughout the Community. It contains a number of core provisions, which must be applied to all rail services. It also contains other provisions, sometimes referred to as “the non-core provisions”, which may, at the discretion of Member States, be the subject of exemptions as described above.

7.2 The principal core provisions relate to train companies' liability for carrying passengers and their luggage (including for personal injury and damage to property), and to the right to transport of disabled people and people with reduced mobility.

7.3 The other provisions relate primarily to the information to be provided to passengers; companies' obligations to passengers in the event of delay, missed connections and cancellations; the definition and monitoring of service quality standards; the personal security of passengers; and the handling of complaints.

7.4 Whilst the full impact of the Regulation is still being assessed, it appears to us that the cost to business of its implementation will arise principally from the non-core provisions. The effect of the instrument is to apply to the full the exemptions provided in the Regulation, and thus delay the application of the non-core provisions to domestic services until their impact has been fully assessed and, if appropriate, a further instrument has lifted or reduced the scope of the exemptions. (The instrument specifies as a default position that the exemptions will end in December 2014, at the end of the first five-year period permitted by the Regulation. This does not preclude earlier termination, if this is appropriate once the consultation responses have been considered. Nor does it preclude extension of the exemption in accordance with the Regulation.)

7.5 In some instances, the Regulation makes an operator liable to a passenger for a particular default (e.g., delay) that was due to the actions of another operator, but also makes the other operator is, in turn, liable to the first for compensation. We believe there may be situations where, if the latter operator was exempt from the Regulation provisions making it liable, this could result in unfairness: the exemption would put the non-exempt operator in a worse position, and the exempt one in a better position, since the latter might not have to face any liability at all. Because the Regulation is complex, and its interpretation is, ultimately, a matter for the courts, we cannot be certain that this would happen, but we believe it is useful to be prepared. Regulation 4 of the instrument therefore provides that exempt operators remain liable to non-exempt ones as if the exemption did not apply.

7.6 The alternative approach to making the instrument would have been to allow the Regulation to come into force on 4th December 2009 without applying the exemptions, and then apply the exemptions if appropriate after the impact has been assessed. For the reasons set out in paragraph 3.5 above, we do not believe that that would have been desirable, either for businesses or for passengers.

- Consolidation

7.7 As this instrument does not amend another instrument, the issue of consolidation does not arise.

8. Consultation outcome

8.1 As explained in section 3 above, there has been no consultation.

9. Guidance

9.1 Guidance on the operation of the Regulation will be issued when a final decision about the extent of its application has been taken and the implementing instrument is laid.

9.2 As the purpose of the present instrument is, as far as is permissible under the Regulation, to maintain the status quo, we do not consider that detailed guidance is

required. We have, however, written to everyone to whom the consultation paper was sent to inform them of this instrument, and placed a copy of that notification on the Department's website. Copies have also been placed in the Libraries of both Houses.

10. Impact

10.1 The impact on business, charities or voluntary bodies is that they will not have to face the impact of most provisions of the Regulation for as long as the exemptions in the instrument remain in force.

10.2 The impact on the public sector is mainly that it will not be enforcing most of the provisions of the Regulation.

10.3 An Impact Assessment has not been prepared for this instrument, for the reasons outlined above.

11. Regulating small business

11.1 The legislation applies to small businesses, but, given the amount of capital necessary to start in the railway industry, there are few small businesses operating in the industry which could be affected.

11.2 To minimise the impact of the requirements on firms employing up to 20 people, the approach taken is to consult, as outlined above.

11.3 The basis for the final decision on what action to take to assist small businesses will be the evidence so collected.

12. Monitoring & review

12.1 The policy behind this instrument will be reviewed as outlined in sections 3 and 7 above.

13. Contact

13.1 Sharon Goodsell at the Department for Transport, tel: 020 7944 0523 or email: sharon.goodsell@dft.gsi.gov.uk can answer any queries regarding the instrument.