

EXPLANATORY MEMORANDUM TO
THE RAILWAYS (ACCESS, MANAGEMENT AND LICENSING OF RAILWAY
UNDERTAKINGS) REGULATIONS 2016

2016 No. 645

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.

2. Purpose of the instrument

- 2.1 The Railways (Access, Management and Licensing of Railway Undertakings) Regulations 2016 (“the Regulations”) implement an EU directive known as the Recast Directive (see paragraph 4 for further details). The Recast Directive repeals existing EU Council Directives and amending instruments, which broadly aim to increase the competitiveness and efficiency of the EU’s railways, and consolidates these into one document. It also makes some changes to substantive law by clarifying and strengthening a number of existing provisions and introducing measures to increase competition, strengthen the national rail regulators, and to encourage investment.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

- 3.1 None.

Other matters of interest to the House of Commons

- 3.2 As this instrument is subject to the negative procedure and has not been prayed against, consideration as to whether there are other matters of interest to the House of Commons does not arise at this stage.

4. Legislative Context

- 4.1 These Regulations implement Directive 2012/34/EU, establishing a single European railway area (recast) (“the Recast Directive”). They repeal the Railways Infrastructure (Access and Management) Regulations 2005 (S.I. 2005/3049) (“the 2005 Access and Management Regulations”) and amend the Railway (Licensing of Railway Undertakings) Regulations 2005 (S.I. 2005/3050) (“the 2005 Licensing Regulations”). These 2005 instruments comprise two of a number of implementing instruments made since active EU involvement in rail policy began in the early 1990s.
- 4.2 Three key pieces of EU legislation formed the basis of EU regulation of the railways in the 1990s (“the Initial EU Directives”). These were as follows:
- Council Directive 91/440/EEC on the development of the Community’s railways, which required Member States to grant rail companies independence from government and introduce commercial rail management techniques, as well as separating the management of infrastructure from transport management;
 - Directive 95/18/EC which standardised licensing of railway undertakings; and

- Directive 95/19/EC (since repealed) which dealt with infrastructure capacity allocation and the charging of infrastructure fees.
- 4.3 The Initial EU Directives have been heavily amended and expanded since the late 1990s in three tranches of amending legislation known as "packages". In particular, the 2001 "First Railway Package" of three further directives made changes aimed at stimulating fair competition in the rail market. The First Railway Package has itself been amended since 2001.
- 4.4 Directive 2001/12/EC amended Directive 91/440/EEC to require separate accounts for infrastructure managers and service operators, and to open access for international freight. Directive 2001/13/EC amended Directive 95/18/EC to set out uniform freight licensing conditions. Directive 2001/14/EC repealed Directive 95/19/EC and set out a defined policy for capacity allocation and charging as well as requiring the designation of independent national regulator bodies to guarantee fair access to railway infrastructure.
- 4.5 As part of the Second Railway Package, Directive 2004/51/EC further amended Directive 91/440/EEC to liberalise national and international freight services on the entire European network.
- 4.6 The Initial EU Directives were implemented in Great Britain largely by the Railways Regulations 1992 (S.I. 1992/3060) and subsequently by the Railways Regulations 1998 (S.I. 1998/1340) which revoked the 1992 Regulations. The further changes required by the First Railway Package and some elements of the Second Railway Package were implemented by the following three instruments (known as the "Current Implementing Legislation"), which replaced the Railways Regulations 1998 and consolidated amendments:
- The 2005 Access and Management Regulations, which implemented Directive 91/440/EEC, as amended, and Directive 2001/14/EC;
 - The 2005 Licensing Regulations, which implemented Council Directive 95/18/EC, as amended, to provide for European licences for train operators; and
 - The Channel Tunnel (International Arrangements) Order 2005 (S.I. 2005/3207) ("the 2005 Channel Tunnel Order").
- 4.7 The Channel Tunnel is regulated by the Governments of both France and the UK so a binational regulation was made by the Intergovernmental Commission ("the IGC", a joint UK and French body established under the Treaty of Canterbury 1986) to implement the Initial EU Directives (as amended) in respect of the Channel Tunnel ("the 2005 binational regulation"). The 2005 Channel Tunnel Order gave the 2005 binational regulation force of law in the UK. As noted below, this Order has since been amended (in 2009) and revoked (in 2015) and the 2005 binational regulation has been replaced by a 2015 binational regulation (see paragraphs 4.8 and 4.10).
- 4.8 The Current Implementing Legislation was amended by two instruments which implement changes made by Directive 2007/58/EC, allowing any licensed undertaking to provide international rail passenger services by 2010. These are:
- The Railways Infrastructure (Access and Management) (Amendment) Regulations 2009 (S.I. 2009/1122), which amended the 2005 Access and Management Regulations; and

- The Channel Tunnel (International Arrangements) (Amendment) Order 2009 (S.I. 2009/2081), which amended the 2005 Channel Tunnel Order, to give effect to a binational regulation adopted on 23 July 2009 (“the 2009 binational regulation”) which revoked and replaced the 2005 binational regulation.
- 4.9 The European Commission questioned the implementation of the 1991 and 2001 Directives by the UK and France in so far as concerned the Channel Tunnel on several grounds, arguing, amongst other points, that the IGC did not have the required degree of independence and sufficient powers to perform its functions. Whilst the UK and France did not accept the Commission was correct on this point, nevertheless following negotiations with the Commission the two Member States agreed to transfer to their national regulatory bodies the functions of economic regulation. This was, in any event, going to be required by the Recast Directive. The UK and France also agreed at the same time to put into place a charging framework for the Tunnel in a single instrument.
- 4.10 Implementation of this agreement has been effected in UK law by:
- The Channel Tunnel (International Arrangements) (Charging Framework and Transfer of Economic Regulation Functions) Order 2015 (“2015 Channel Tunnel Order”), which gives legal effect to a binational regulation made on 23 March 2015 (“2015 binational regulation” – the text of this is set out in the schedule to the 2015 Channel Tunnel Order), which revoked the 2009 binational regulation and transferred the IGC’s functions to the national regulatory bodies and established a charging framework; and
 - The Railways Infrastructure (Access and Management) (Amendment) Regulations 2015 (“2015 Access and Management Amendment Regulations”), which amended the 2005 Access and Management Regulations so that they applied as appropriate to the Channel Tunnel, for example by extending the ORR’s functions to the Tunnel, and applying the charging framework set out in the 2015 binational regulation to the Channel Tunnel.
- 4.11 The present Regulations now consolidate (with some minor amendments) the changes made to the 2005 Regulations by the 2015 Access and Management Amendment Regulations and these are now also revoked along with the 2005 Access and Management Regulations. Consequently, subject to the points noted below at paragraph 7.5, the Regulations now apply to the British part of the Channel Tunnel in the same way as they do in relation to the rest of Great Britain.
- 4.12 The Recast Directive predominantly consolidates the Initial EU Directives, and the various subsequent amending directives detailed above. It also harmonises terminology and eliminates the need to cross refer to different directives. It also clarifies and strengthens some substantive provisions.
- 4.13 A brief scrutiny history for the instrument is submitted with this memorandum at **Annex A**.
- 4.14 A Transposition Note is also submitted with this memorandum.

5. Extent and Territorial Application

- 5.1 This instrument extends to Great Britain, except for Paragraph 5 of Schedule 1 which also extends to Northern Ireland. This provision amends section 17 of the Railways and Transport Safety Act 2003 (c. 20) so that Part 2 of that Act (which provides for the establishment of a body corporate to regulate the railways – the Office of Rail and

Road (“ORR”)) extends to Northern Ireland, in order to enable implementation of the requirement in the Recast Directive for there to be a single national regulator. The actual powers will need to be granted to the ORR in Northern Ireland regulations.

- 5.2 This instrument applies to Great Britain, except for one provision which also applies to Northern Ireland (paragraph 5 of Schedule 1, as above).
- 5.3 Responsibility for railways in Northern Ireland is devolved to the Northern Ireland Assembly and is administered by the Northern Irish Department for Infrastructure (previously named the Department for Regional Development (Northern Ireland)) which will implement the requirements of the Recast Directive.

6. European Convention on Human Rights

- 6.1 Claire Perry, the Parliamentary Under-Secretary of State for Transport, has made the following statement regarding Human Rights:

“In my view the provisions of the Railways (Access, Management and Licensing of Railway Undertakings) Regulations 2016 are compatible with the Convention rights.”

7. Policy background

What is being done and why

- 7.1 The Recast Directive supports the objectives of the EU Common Transport Policy of revitalising railways throughout the EU by opening up rail markets to competition, and providing that access to the railway infrastructure and service facilities (for example, stations, rail freight terminals, ports and maintenance facilities) in all Member States is available on a fair and non-discriminatory basis. It also includes requirements to enhance cross-border cooperation and coordination among regulatory bodies and cooperation between infrastructure managers; measures relating to Member State rail funding and development strategies; incentives for cost reduction and development; enhancement of regulatory body competences, independence and powers and amendments to train operator licensing requirements.
- 7.2 Overall, the Recast Directive aims to address issues in the EU railway market such as low levels of competition, low levels of public and private investment in railways and inadequate regulatory oversight by national authorities. None of these problems are considered to be significant issues in the domestic railway market of Great Britain, which has been one of the most liberalised in the EU for some time.
- 7.3 The existing structure and regulation of the rail market in Great Britain already meets the vast majority of the requirements of the Recast Directive. Implementation of the Recast Directive is therefore expected to have only limited impact on the railway market in Great Britain.
- 7.4 Of particular significance to the UK, however, is the requirement in the Recast Directive for Member States to establish a single national regulator. As noted above, to effect this requirement in the UK (where historically the railway sectors in Northern Ireland and the Channel Tunnel have been regulated by the (newly named) Department for Infrastructure and the IGC respectively), these Regulations provide a framework for the ORR’s jurisdiction to be extended to Northern Ireland by Northern Ireland regulations, and consolidate earlier changes transferring responsibility for economic regulation of the Tunnel, on the UK side, to the ORR.

- 7.5 The 2015 binational regulation does not in itself implement the Recast Directive fully in respect of the Channel Tunnel. Implementation is effected by provisions in these Regulations together with the charging framework established under the 2015 binational regulation. So, these Regulations impose a requirement on the infrastructure manager of the Tunnel to determine and collect fees for use of the Tunnel infrastructure in accordance with the charging framework established by the 2015 binational regulation.
- 7.6 The Recast Directive also requires Member States to strengthen the enforcement powers of the national regulators, including enabling them to have the power to enforce breaches of the Recast Directive's requirements (e.g. in relation to the allocation of capacity or levying of charges) with fines. Sections 55-57A of the Railways Act 1993 already provide the ORR with the power to bring enforcement action, including fines, against bodies which hold a licence under that Act (such as a train operating company, or infrastructure manager) where that body has breached a condition of its licence. However, not all breaches of the Recast Directive's requirements (as implemented in the Regulations) would amount to breaches of a licence term and so these provisions alone would not fully have implemented the Recast Directive's requirements. In addition most train operating companies have European licences issued under the 2005 Licensing Regulations rather than under the 1993 Act. Under the 2005 Access and Management Regulations there was also provision for the ORR to bring civil proceedings, seeking interdict, injunction or any other relief, in respect of a person's failure to comply with the specific regulations listed and a fine could be imposed for contempt if any court order was not complied with. The levying of fines for contempt, however, is wholly at the discretion of the courts and so this would also not fully meet the requirements of the Recast Directive for the regulator itself to have a power to enforce its decisions with fines. The Regulations therefore apply certain of the provisions of sections 57A, 57B, 57D, 57E and 57F of the Railways Act 1993 to certain contraventions of the requirements of the Regulations by train operators and infrastructure managers.
- 7.7 The changes made by the Recast Directive in consolidating Directive 95/18/EC, and which are implemented by the Regulations, are minor ones relating, for instance, to the details of financial fitness requirements for railway undertakings and insurance obligations. The Regulations, however, also make a number of minor consequential changes to provisions in primary and secondary legislation referring to licences granted, whether by UK competent authorities or competent authorities in other EEA states, for the purposes of Directive 95/18/EC. The consequential changes made to the provisions mean that these will now cross refer to the Recast Directive in addition to Directive 95/18/EC. Referring to both Directives in this way make it clear that licences granted for the purposes of Directive 95/18/EC continue to be valid, in accordance with their terms, alongside licences granted for the purposes of the Recast Directive. Train operating companies with licences granted pursuant to Directive 95/18/EC are not therefore required to reapply for a licence under the provisions of the Recast Directive.

Consolidation

- 7.8 The Department chose to amend the 2005 Licensing Regulations rather than revoke and re-enact them because this was considered the most straightforward approach given the limited changes which the Recast Directive makes to the licensing

provisions. Should EU legislation make further changes to licensing provisions consideration will be given to consolidation at that time.

8. Consultation outcome

- 8.1 The Department carried out a public consultation on a draft of the Regulations. The consultation ran from 24 March 2015 to 18 May 2015 because the proposals were of interest only to a limited number of bodies in the railway sector and because those bodies had also already been informally consulted during the negotiation of the Recast Directive. The main issues on which views were sought were:
- Whether the policy option of basing the Regulations on the existing 2005 Access and Management Regulations rather than using copy out was the least burdensome and least costly approach;
 - Whether or not to retain the existing derogations in the Regulations;
 - Whether applying a penalties regime akin to sections 55-57A of the Railways Act 1993 in relation to breaches of various provisions in the Regulations would give the ORR appropriate and adequate powers to enforce its decisions as required by Article 56(9) of the Recast Directive; and
 - Whether stakeholders anticipated any costs as a result of the Regulations, and whether any benefits would accrue.
- 8.2 Eleven responses to the consultation were received. Five responses were received from train operating companies. Responses were also received from the Rail Delivery Group, Rail Freight Group, Network Rail, Transport Scotland, Transport for London and the Office of Rail and Road. All seven of the responses which expressly commented on the proposed approach of generally not using copy-out and instead basing the Regulations on the already familiar 2005 Access and Management Regulations agreed with this. Several respondents did suggest areas for further clarification and particular areas where they thought copy out should be used in preference to the drafting from the 2005 Access and Management Regulations. As a result, in certain areas, the Department has decided to revert to copy-out in order to minimise the risk of misinterpretation.
- 8.3 Six of the eleven responses agreed with the proposed general approach of retaining the existing derogations in the Regulations with others either not commenting on this general approach or raising minor queries in relation to the working of specific derogations. In line with Government policy the Department decided to take advantage of all available derogations.
- 8.4 In respect of a penalties regime, the majority of responses agreed with the proposed approach to apply a regime akin to that in sections 57A, 57B, 57D, 57E and 57F of the Railways Act 1993 to enable the ORR to enforce the requirements in the Regulations, imposing fines where appropriate. One response suggested the existing regime as provided by the Railways Act 1993 was sufficient.
- 8.5 Following further consideration, the Department determined that it was not satisfied that the existing penalties regime meets the requirements of the Recast Directive. The existing penalties regime enables the ORR to bring enforcement against licence holders in respect of breaches of those licences. However, for the purposes of the Regulations, provision is needed to enable the ORR to take action against breaches of the requirements in the Regulations irrespective of whether not that body has a licence under the 1993 Act and whether or not there has been a breach of any such licence. As

noted above, most train operating companies covered by the Regulations however will hold licences issued under the 2005 Licensing Regulations (i.e. European licences issued for the purposes of Directive 95/18/EC or Chapter 3 of the Recast Directive) rather than licences issued under the 1993 Act (from which they are consequently exempt) and so would not be subject to enforcement action under the 1993 Act for licence breach. In addition even where a licence issued under the 1993 Act is held, a relevant breach of provisions of the Recast Directive will not necessarily also represent a breach of licence conditions. Furthermore, the ability of the ORR to bring civil proceedings which might ultimately result in a fine imposed by a court is not an adequate form of implementation because such fines are purely at the discretion of the Court; this does not provide the ORR with the freestanding right to impose fines as required under the Directive. As such, the Department has taken the decision to apply the enforcement mechanism in Sections 57A, 57B, 57D, 57E and 57F of the 1993 Act to breaches of the requirements in the Regulations.

- 8.6 The consultation identified possible regulatory impacts in three main areas:
- Changes to the provisions governing access to service facilities. These are facilities (such as stations, freight terminals, ports and maintenance facilities) which are connected to the main railway network and which provide services to railway undertakings. The Recast Directive brings some additional services into scope and makes minor changes to the rules on access to all service facilities. However, it also contains a number of safeguards which reduce the risk of those service providers suffering loss of revenue or profit or incurring significant additional costs.
 - Additional requirements for operators of service facilities which are under direct or indirect control of a dominant body or firm.
 - Changes to accounting requirements. Where a company provides both rail passenger and rail freight services, it is required to present separate accounts for these activities.
- 8.7 Although quantified estimates of cost impacts were not provided in most of the responses, the responses nevertheless did provide further qualitative information which was used to refine the Department's Impact Assessment. The absence of any quantified cost impacts in the responses suggests that it is unlikely that the changes will threaten the viability of consultees' businesses.
- 8.8 The Government's response to the public consultation can be found at: <https://www.gov.uk/government/consultations/recast-first-railway-package>.
- 8.9 The Department also received comments from Eurotunnel after the consultation had closed in respect of the Channel Tunnel. Eurotunnel's key concern was that separate implementation legislation on the UK and French sides (instead of the previous approach of unified binational legislation) could lead to a lack of clarity, legal uncertainty and conflicts of interpretation. Paragraphs 4.9-4.11 detail the UK's approach to implementation for the Channel Tunnel.
- 8.10 The Department does not consider it likely that the approach taken will cause such problems. First and foremost, the UK and French governments are both implementing the same Recast Directive and are equally obliged to transpose the provisions accurately in accordance with their respective legislative frameworks. Moreover, the 2015 binational regulation (at article 3) makes detailed provision for information sharing and cooperation between the ORR and its French counterpart (ARAF –the

Autorité de Régulation des Activités Ferroviaires) and for the coordination, so far as possible, of regulatory decisions. The two regulators have also entered into and published, in accordance with article 3 of the 2015 binational regulation, a formal cooperation agreement setting out their collaborative working arrangement published on the ORR's website¹. In addition, under the Treaty of Canterbury² the IGC still retains the function of supervising all matters concerning the operation of the Channel Tunnel and discussion regarding any specific points of detail including on the respective UK and French legislation or causes of general concern can take place under the supervision of the IGC.

9. Guidance

- 9.1 The Department has prepared guidance on the scope of the Regulations by updating the existing guidance on the scope of the 2005 Access and Management Regulations and the 2005 Licensing Regulations. This is being published on the Department's pages on the Gov.uk website.

10. Impact

- 10.1 The impact on business, charities or voluntary bodies is expected to be low. There are some new requirements for service facility operators, such as the requirement to provide the infrastructure manager with information on access to and charging for the use of service facilities, and there will need to be some action in gathering this information and providing it to the infrastructure manager. The requirement for railway undertakings which operate both passenger and rail freight services to present separate accounts is likely to have a minimal impact because the Department is not aware of any railway undertakings which currently provide both scheduled passenger and freight services. There are some new requirements for infrastructure managers, which will likely impact those with smaller networks and will require some action such as the requirement to publish the network statement in two EU languages.
- 10.2 The impact on the public sector is expected to be low. The ORR is the main public body affected as the Regulations place a number of duties on the regulatory body. Many of these functions are already carried out by the ORR but there are some additional duties such as the extended enforcement powers. The impact on the main infrastructure manager, Network Rail (classified as a public body in 2014) is also expected to be low. Network Rail noted that it already satisfies many of the requirements through existing practices, but there are areas which will require some action, such as consolidation into the Network Statement of information provided by a service facility operator in accordance with the requirements of the Regulations.
- 10.3 An Impact Assessment is submitted with this memorandum and will be published alongside the Explanatory Memorandum on the legislation.gov.uk website.

11. Regulating small business

- 11.1 The legislation applies to activities that are undertaken by small businesses.
- 11.2 To minimise the impact of the requirements on small businesses (employing up to 50 people), the approach taken is to publish clear guidance regarding the scope of the

¹ See http://orr.gov.uk/data/assets/pdf_file/0011/17759/orr-araf-cooperation-agreement-english.pdf

² The text of the Treaty can be found on the IGC's website at <http://www.channeltunneligc.co.uk/Essential-texts,24.html?lang=en>.

Regulations to assist small businesses in determining which of the requirements apply to them. Small businesses cannot be entirely excluded from the scope of the 2016 Regulations because the proposals are of EU origin but all available derogations have been applied.

12. Monitoring & review

The Secretary of State must review the Regulations and publish a report which assesses whether the objectives of the Recast Directive have been achieved and remain appropriate. The report must be published within 5 years of the Regulations coming into force, and within every 5 years after that. The impacts of the Regulations will be monitored through informal communication with ORR and other affected bodies.

13. Contact

- 13.1 Robin Groth at the Department for Transport Telephone: 0207 944 5371 or email: robin.groth@dft.gsi.gov.uk can answer any queries regarding the instrument.

Scrutiny History

The proposal which resulted in Directive 2012/34/EU was the subject of Explanatory Memorandum (EM) 13789/10.

The House of Commons European Scrutiny Committee considered the EM on 17 November 2010. The Committee recommended that the document was politically important and did not clear it (Report 8, Session 2010-2012, reference 32037). A Ministerial letter was sent to the Chair on 17 May 2011. The Committee considered this on 24 May 2011, maintained its recommendation and did not clear the document (Report 31, Session 2010-2012). Further Ministerial letters were sent to the Chair on 6 June 2011 (considered on 8 June, Report 33), 11 July 2011 (considered and the document cleared from scrutiny on 19 July 2011, Report 38), 30 November 2011 and 12 July 2012.

The House of Lords Select Committee on the European Union referred the EM to Sub-Committee B at the 1406th sift on 10 November 2010. The Chair wrote to the Minister on 23 November 2010, holding the document under scrutiny. Ministerial letters were sent on 22 December 2010, 14 February 2011, 19 May 2011, 6 June 2011, 11 July 2011, 3 November 2011, 30 November 2011, 31 January 2012, and 12 July 2012. The document was cleared from scrutiny by a letter to the Minister of 14 June 2011.