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| <p>Title: Post implementation review of the Health and Safety (Enforcing Authority for Railways and Other Guided Transport Systems) Regulations 2006 (as amended)</p> <p>PIR No: ORR1701</p> <p>Lead department or agency: Office of Rail and Road</p> <p>Other departments or agencies: Department for Transport</p> <p>Contact for enquiries: stefano.valentino@orr.gov.uk 020 7282 2003</p> | Post Implementation Review |
| | Source of intervention: Domestic |
| | Type of regulation: Secondary legislation |
| | Type of review: Statutory - other |
| | Date of implementation: 01/04/2006 |
| | Date review due (if applicable): 21/05/2018 |
| Summary: Intervention and Review | RPC Opinion: Not Applicable |

1a. What were the policy objectives and the intended effects? (If policy objectives have changed, please explain how).

The original objectives of Health and Safety (Enforcing Authority for Railways and Other Guided Transport Systems) Regulations 2006 [S.I. 2006/557] (“EARR”) were to:

- allocate health and safety enforcement functions to the then Office of Rail Regulation [now Office of Rail and Road (ORR)] to support the transfer of railway safety functions to ORR from the Health and Safety Executive (HSE); and
- clarify ORR’s and HSE’s respective responsibilities for enforcement of health and safety law in relation to railways, tramways and other guided transport systems.

The intended effects of EARR in 2006 were to make:

- ORR the enforcing authority for health and safety law in relation to the operation of railways, tramways and certain other systems of guided transport (for example airport transit systems), instead of HSE;
- HSE the enforcing authority for health and safety law in relation to the operation of cableways, guided buses, any other road based systems of guided transport, (other than tramways) and lifts (unless they are used in the operation of a railway, tramway or other system of guided transport); plus, railway activities within certain premises; and
- amendments to various pieces of legislation to substitute ORR for HSE in exercising exercise certain functions for purposes connected with health and safety on the transport systems enforced by the relevant authority.

Section 3 and Schedule 3 of the Railways Act 2005 made provision for the transfer of various safety functions in relation to railways, tramways and certain other modes of transport, conferred by or under the Health and Safety at Work etc. Act 1974 from HSE to the ORR. The aim¹ was to

- simplify the regulatory structure of the industry and encourage cultural change across the industry;
- develop an independent regulator with specialist economic and safety rail expertise; and
- enable decisions which touch on both economic and safety regulation to be brought together.

EARR support the aim of the Railway Act 2005 by ensuring a clear and effective health and safety regulatory environment for railways, tramways and other guided transport systems.

In the light of experience of operating under the provisions, EARR were substantially amended as set out below.

¹ The goals of the Railways Act 2005 are not the goals of EARR, which are to clarify the health and safety regulatory responsibility. Although the goals of EARR are helpful to achieve the goals of the Railways Act 2005, they are not expected to achieve them fully. The goals of the Railways Act 2005 are therefore not assessed in this PIR.

2008 amendments

The Health and Safety (Enforcing Authority for Railways and Other Guided Transport Systems) (Amendment) Regulations 2008 [S.I. 2008/2323] made amendments to EARR to improve clarity of the enforcement boundary between ORR and HSE. These changes clarified that:

- 1) HSE is the enforcing authority for miniature railways (i.e. railways under 350mm gauge);
- 2) ORR is the enforcing authority for pier railways (in terms of 'harbour areas' rather than 'docks' to provide consistency with ROGS);
- 3) HSE is the enforcing authority for bus substitution services from the point where such a service leaves the operational premises in question, when ORR will be the enforcing authority;
- 4) HSE is the enforcing authority for construction of any extension or enlargement of existing railways if there is no risk to construction workers from the operation of a railway;
- 5) ORR is the enforcing authority for the extension or enlargement of existing railways which are in close proximity to an operating railway; and
- 6) ORR is the enforcing authority for construction at 'operational premises' except where the work falls into one of the following three categories, in which case HSE enforces:
 - (a) the construction work undertaken has no connection with the operation of a railway, tramway or other system of guided transport; or
 - (b) the operation of the railway, tramway or other system of guided transport is suspended in the operational premises, (other than the through running of trains), and
 - (i) the work is carried out in physically segregated areas at operational premises; and
 - (ii) the contractor controls access and can exclude from the segregated area persons who are not attending in connection with the construction work;
 - (c) the operation of the railway, tramway or other system of guided transport continues at the operational premises and in addition to (b)(i) and (b)(ii) above the access to the areas(s) where the construction work is carried out is such that it does not allow access to the remainder of the operational premises.

2013 amendments

The Railways and Other Guided Transport Systems (Miscellaneous Amendments) Regulations 2013 [S.I. 2013/950] made amendments to EARR to allow ORR inspectors to enter and have enforcement powers in those premises that they were not able to enter without HSE authorisation because those premises are excluded from the definition of 'operation of a railway'. The purpose of the amendment was solely to enable ORR inspectors to monitor compliance by 'entities in charge of maintenance' with the requirements in regulation 18A of the Railways and Other Guided Transport Systems (Safety) Regulations 2006 [S.I. 2006/599] (as amended) (ROGS).

These premises are:

- a harbour area within premises referred to in any of sub-paragraphs (c) to (h);
- any other harbour area subject to certain exceptions;
- an establishment to which the Control of Major Accident Hazards Regulations 2015 [S.I. 2015/483] apply;
- a factory;
- a mine;
- a GB nuclear site (within the meaning given in section 68 of the Energy Act 2013);
- a quarry; or
- warehouse premises.

2014 amendments

The Energy Act 2013 (Office for Nuclear Regulation) (Consequential Amendments, Transitional Provisions and Savings) Order 2014 [S.I. 2014/469] inserted an enforcement flexibility provision in regulation 5A of EARR. This provides flexibility for ORR and the Office for Nuclear Regulation (ONR) to agree which authority is more appropriate to be responsible for enforcement where there is uncertainty in a particular case. Whichever authority is assigned the enforcement responsibility must then notify any person affected by the assignment.

1b. How far were these objectives and intended effects expected to have been delivered by the review date? If not fully, please explain expected timescales.

These objectives and intended effects were expected to have been fully delivered by the review date.

2. Describe the rationale for the evidence sought and the level of resources used to collect it, i.e. the assessment of proportionality.

The Railways and Other Guided Transport Systems (Miscellaneous Amendments) Regulations 2013 [S.I. 2013/950] inserted the review clause into EARR (regulation 8). This requires that by 21 May 2018 (and every five years thereafter) the Secretary of State:

- carries out a post implementation review (PIR) of the whole of EARR;
- sets out the conclusions of the review in a report; and
- publishes the report.

The scope of this PIR is limited to the statutory requirement and concerns EARR as originally made in 2006 and the subsequent substantial amendments made in 2008, 2013 and 2014.

A low evidence, low resource PIR is appropriate for the following reasons:

- EARR do not impose duties or obligations on businesses. They enable ORR to enforce health and safety law (for example the Health and Safety at Work etc. Act 1974 and regulations made under it) in relation to railways, tramways and other guided transport systems.
- The original impact assessment for EARR² did not identify any material ongoing costs for businesses. However, it estimated that there were likely to be some costs for businesses related to understanding the new Regulations, but these were not quantified.
- ORR carried out an internal review of EARR in 2012 (“the 2012 review”) which sought the views of HSE and operational inspectors within ORR. The review concluded that on the whole EARR are working well but identified that in a small number of cases, it is necessary for ORR and HSE to agree on an interpretation of the regulations leaving a degree of legal uncertainty as to whether ORR or HSE is the correct enforcing authority. This arises in areas of activity, such as construction, when it is often necessary for ORR and HSE to reach agreement on whether an activity falls within the term “operation of a railway”. In some cases, there is uncertainty as to which enforcing authority should act until discussions have taken place as to the precise nature of an activity or incident. It is not possible for the regulations to list every possible scenario where this is likely to occur, as every situation is different.
- In 2014 ORR consulted³ stakeholders on a different set of regulations (the Railway Safety Regulations) which give duties to infrastructure managers or any person operating a train or Mark I rolling stock. As part of this consultation (“the 2014 consultation”), ORR asked stakeholders whether they had any views to support making amendments to EARR to include an enforcement flexibility provision. This would provide flexibility for ORR and HSE to agree which authority is more

² http://www.legislation.gov.uk/ukxi/2006/557/pdfs/ukxiem_20060557_en.pdf

³ http://orr.gov.uk/__data/assets/pdf_file/0004/13837/revising-railway-safety-regulations.pdf

appropriate to be responsible for enforcement where there is uncertainty in a particular case. Such a provision will provide clarity for those affected by enforcement activity and would potentially speed up the enforcing authority's response to an incident. Of the 21 stakeholders that responded⁴ to this proposal, there was support from 16 (76%).

- To supplement the 2012 review and the 2014 consultation, ORR carried out a survey in 2017 ("the 2017 survey"), which was sent to 311 stakeholders (which included 273 rail operators). The survey also sought the views of ORR and HSE from their experience of operating under the provisions. ORR received nine responses and the survey indicated that from the perspective of regulated businesses the Regulations appear to be working well.

Because EARR applies to ORR and HSE, they do not generate a high level of interest from rail operators. The low response rate to the 2017 survey is therefore not surprising and is an indication that the impact on businesses is low. For these reasons ORR believes that the approach it has taken on this PIR is proportionate.

3. Describe the principal data collection approaches that have been used to gathering evidence for this PIR.

This PIR uses a process evaluation approach, which assesses whether the Regulations have been implemented as intended. It uses evidence collected in the 2012 review; the 2014 consultation; the 2017 survey and supplementary information from operational cases and records.

The 2012 review was internal to ORR. It sought the view of 66 inspectors as well as HSE. There were 10 responses from ORR inspectors (a response rate of 15%) as well as a response from HSE.

The 2014 consultation was sent to 88 consultees (70 rail operators and 18 others). There were 21 respondents (a response rate of 24%).

The 2017 survey was sent to 311 stakeholders (273 rail operators, and 38 others). There were 9 responses (a response rate of 3%).

The rail operators in Great Britain under ROGS comprise:

- 55 mainline railway safety certificate or authorisation holders that either manage or maintain mainline railway infrastructure or operating trains above 40 kilometres per hour on the mainline railway (these include TOCs, FOCs, Network Rail, infrastructure maintainers and ECMs);
- 18 non-mainline safety certificate or authorisation holders rail operators that either manage or maintain non-mainline infrastructure or operate vehicles above 40 kilometres per hour on non-mainline infrastructure (these include light rail and metro systems and people movers);
- 6 freight wagon ECM certificate holders that do not have a mainline safety certificate or authorisation; and
- 9 modern tramways and over 250 heritage, museum or tourist railways and tramways operating below 40 kilometres per hour.

This makes an estimated total of around 338 rail operators. Therefore, the representation of rail operators in the 2014 consultation and the 2017 survey is as shown in Table 1.

Because EARR applies to ORR and HSE, they do not generate a high level of interest from rail operators. The low response rate shown in Table 1 is therefore not surprising and is an indication that the impact on businesses is low. For these reasons ORR believes that the approach it has taken on this PIR is proportionate.

⁴ http://orr.gov.uk/__data/assets/pdf_file/0019/17317/final-consultation-responses-summary.pdf

Table1: Representativeness of consultation and survey samples

| Type of operator | 2014 consultation | | 2017 survey | |
|-----------------------------|-------------------|---|------------------|---|
| | No. of responses | Percentage of sample representative of total rail operators | No. of responses | Percentage of sample representative of total rail operators |
| Train operator | 11 | 3.25% | 0 | 0% |
| Heritage railway operator | 0 | 0% | 3 | 0.89% |
| Metro operator | 1 | 0.29% | 1 | |
| Rail freight operator | 3 | 0.89% | 0 | 0% |
| Rail infrastructure manager | 1 | 0.29% | 0 | 0% |

4. To what extent has the regulation achieved its policy objectives? Have there been any unintended effects?

Achieving the policy objectives

The 2012 review found that overall EARR are working well but identified that in a small number of cases, it is necessary for ORR and HSE to agree on an interpretation of the regulations leaving a degree of legal uncertainty as to whether ORR or HSE is the correct enforcing authority. 90% of ORR inspectors that responded to the consultation were in favour of an enforcement flexibility provision in the legislation.

The 2017 survey seems to support these findings. It found that, overall, EARR were somewhat successful in achieving their objectives and that further success in achieving the policy objectives can be obtained if EARR provided legal certainty over whether ORR or HSE has the power to take enforcement action in specific cases where there is doubt so that matters can proceed without delay. In addition, comments in the survey indicated that greater clarity is needed on how HSE's and ORR's enforcement responsibilities are defined (which could be achieved through the existing Memorandum of Understanding (MoU)⁵ between HSE and ORR).

An analysis of ORR's operational records found that there have been at least 15 cases since EARR were introduced, which required discussions between HSE and ORR to arrive at an interpretation of which organisation is the correct enforcement authority. This need for interpretation arises because the enforcing authority is determined by the activity that is taking place and whether it falls within the meaning of 'operation of a railway'. Collaboration on these cases between HSE and ORR has been working well but without legal certainty there is a risk that enforcement action could be challenged on the basis that the wrong enforcement authority has acted. Examples of areas where such cases occur are railway construction sites, the road/rail interface, activities at stations and the UK Concession Area of the Channel Tunnel.

The Office for Nuclear Regulation (ONR) was part of HSE before it became a separate statutory public corporation on 1 April 2014 under the Energy Act 2013. EARR also provides an enforcement boundary between ONR and ORR, therefore similar issues arise. However, EARR were amended in 2014 to include an enforcement flexibility provision. This provides flexibility for ORR and ONR to agree which authority is more appropriate to be responsible for enforcement where there is uncertainty in a particular case. Whichever authority is assigned the enforcement responsibility must then notify any person affected by the assignment. ORR believes that a similar provision between HSE and ORR in EARR

⁵ http://orr.gov.uk/_data/assets/pdf_file/0006/1698/mou-between-hse-and-orr.pdf

would provide legal certainty in cases where there is doubt. This view has been supported, in principle, by HSE and by respondents to the 2014 consultation. In its report on a review of level crossing law in 2013⁶, the Law Commission also supported this principle when it made recommendations to the Department for Transport.

However, before any legislative solution is sought, HSE and ORR will firstly need to carry out an appraisal of the options to determine if the desired policy outcome can be achieved through non-legislative means (for example the MoU or agency agreements or through the existing mechanism of collaboration and effective communication). If the conclusion were that there should be a flexibility provision in EARR, it would need to be drafted in such a way that it (a) did not create inappropriate precedence beyond any specific transferred case and (b) fully deals with the risk of legal challenge on the grounds of vires. It would also require an amendment to the Health and Safety at Work etc. Act 1974 but given the current priorities and demands on Parliament's legislative time, it seems unlikely that this would proceed in a timely manner.

The MoU between HSE and ORR clarifies how EARR work in practice (in particular Appendix A) and there are agency agreements between ORR and HSE⁷ that provide certainty over enforcement responsibility in certain areas by legally transferring functions, by agreement, from HSE to ORR. HSE and ORR agree that these are working effectively, but clarification is still required in some areas. For example, paragraph A45 of the MoU states that "*the whole of the 'UK Concession Area', which includes the terminal and three tunnels (up to the mid-point), is considered to be a railway operation for which ORR is the sole enforcing authority*". Some activities within the UK Concession Area, such as loading or unloading of lorries in the truck parks, arguably would fall outside the scope of 'operation of a railway'. Therefore, the MoU needs amending to provide greater clarity on the types of activities that do not come within the meaning of 'operation of a railway' and would not therefore be for ORR to enforce.

Unintended effects

Two-thirds of respondents to the 2017 survey were not aware of any unintended effects of EARR. However, the issues below were raised in this context.

- HSE indicated that the transfer of the railway inspectorate from HSE to ORR means that HSE has no expertise to regulate the guided section of guided bus systems. ORR does not consider that this is an unintended effect of EARR because it was the intention of the Railways Act 2005 that the regulation of guided bus systems remains with HSE.
- HSE also considers that ORR is in a better position to regulate the guided sections of guided bus systems because ORR has expertise in guided transport systems. There are existing arrangements in the MoU between HSE and ORR (paragraph 21) for ORR to provide specialist support to HSE on risks from railway activity remaining within HSE's remit, for example, railways within industrial sites, cableways and fairground equipment. ORR will explore with HSE how we can interpret or amend the MoU to include technical support for the guided section of guided bus systems.
- One respondent to the 2017 survey said that investigations and recommendations resulting from a particular railway accident have resulted in a huge amount of work for other duty holders. However, it is ORR's view that lessons learned and recommendations from rail accident investigations and any additional work that a duty holder may need to do to implement them are not a direct result of EARR.

⁶ <https://www.lawcom.gov.uk/project/level-crossings/>

⁷ <http://orr.gov.uk/about-orr/who-we-work-with/agency-agreements-and-mous>

5a. Please provide a brief recap of the original assumptions about the costs and benefits of the regulation and its effects on business (e.g. as set out in the IA)

The original impact assessment⁸ to EARR did not estimate any costs to businesses (but costs to public authorities for the transfer of the railway safety functions from HSE). This is because the Regulations do not place duties on businesses. However, the impact assessment stated that any additional costs to industry resulting from the transfer of the railway safety function from HSE to ORR were likely to be those relating to understanding the new Regulations and the implications of a change of enforcing authority.

5b. What have been the actual costs and benefits of the regulation and its effects on business?

The 2017 survey did not identify any costs on businesses but it found that businesses could benefit from EARR by understanding who will be the appropriate enforcing authority. The actual cost and benefits of EARR on businesses appear to be in line with the original assumptions. Calculation of the actual cost for the transfer of railway safety functions from HSE has not been made. Such effort would be disproportionate for this PIR.

6. Assessment of risks or uncertainties in evidence base / Other issues to note

As EARR apply to ORR and HSE as enforcing authorities, rather than the businesses that they regulate, most of the evidence in this PIR is weighted towards the operational experience of both organisations.

7. Lessons for future Impact Assessments

There are no significant lessons for future impact assessments arising from this PIR. The assessment of the impact on businesses in the original impact assessment and the assumptions made appear to be in line with the actual impact.

The original impact assessment estimated costs to public authorities. It is not necessary for future impact assessments to make these estimates as the focus is on the Equivalent Annual Net Costs to Businesses and public authorities are outside the scope of the statutory review provision (see section 8).

8. What next steps are proposed for the regulation (e.g. remain/renewal, amendment, removal or replacement)?

The 2017 survey found that just over half of respondents (56%) thought that EARR should be kept as they are but comments indicate that there should be some tweaks around enforcement flexibility. A third of respondents thought that some changes to EARR should be made. Comments indicate that there should be some further clarification around enforcement flexibility in cases where there is doubt. One respondent thought that EARR should be removed and replaced with something else that sets up a new regulator.

Therefore, overall, the 2017 survey found that EARR should largely remain the same but with some changes made around enforcement flexibility.

ORR recommends that EARR remain in place as the objectives remain valid. However, subject to a proposal arising from further analysis and discussions with HSE (as indicated in section 4) and the Department for Transport, ORR (in collaboration with HSE) will invite ministers to consider introducing to EARR at the earliest opportunity an enforcement flexibility provision that would provide legal certainty over whether ORR or HSE has the power to take enforcement action in specific cases where there is doubt.

⁸ http://www.legislation.gov.uk/ukxi/2006/557/pdfs/ukxiem_20060557_en.pdf

In addition, comments in the survey and ORR's and HSE's operational experience indicated that greater clarity is needed on how HSE's and ORR's enforcement responsibilities are defined in certain areas. ORR proposes that discussions take place with HSE to include the following areas:

- How HSE and ORR can interpret or amend the MoU to include provision of technical support by ORR to HSE for the guided section of guided bus systems.
- Amending the MoU to clarify the types of activities that are carried out within the UK Concession Area that would not fall within the meaning of 'operation of a railway'.

Statutory review provision

Section 28 of the Small Business, Enterprise and Employment Act 2015⁹ ("the SBEEA") (and associated statutory guidance¹⁰) requires UK Government ministers to either include review provisions in secondary legislation that make or amend regulatory provisions in relation to any activity ("qualifying activity") carried on by

- (a) a business for the purposes of the business, or
- (b) a voluntary or community body for the purposes of the body,

or else publish a statement that it is not appropriate in the circumstances to do so.

Under the SBEEA "business" or "voluntary or community body" do not include a business or a voluntary or community body which is

- (a) controlled by a public authority, or
- (b) acting on behalf of a public authority in carrying out the activity.

The Railways and Other Guided Transport Systems (Miscellaneous Amendments) Regulations 2013 inserted the review clause into EARR on 21 May 2013, before the SBEEA came into force. EARR

- allocate health and safety enforcement functions to ORR to support the transfer of railway safety functions to ORR from HSE; and
- clarify ORR's and HSE's respective responsibilities for enforcement of health and safety law in relation to railways, tramways and other guided transport systems.

They do not make regulatory provision in relation to any 'qualifying activity'.

As HSE and ORR are public authorities, ORR does not believe that they fall within the scope of the requirement for ministers to include a review provision. ORR therefore proposes that consideration should be given to whether the review provision in regulation 8 of EARR should be removed

Sign-off for Post Implementation Review:

I have read the PIR and I am satisfied that it represents a fair and proportionate assessment of the impact of the policy.

Signed: Adam Martin (Aviation and Maritime Economics)

Date: 18/01/2018

⁹ <http://www.legislation.gov.uk/ukpga/2015/26/contents/enacted>

¹⁰ <https://www.gov.uk/government/publications/small-business-enterprise-and-employment-act-statutory-review-requirements>

Evidence Base

Please provide additional evidence in subsequent sheets, as required.