

EXPLANATORY MEMORANDUM TO
THE CHANNEL TUNNEL (INTERNATIONAL ARRANGEMENTS) (CHARGING
FRAMEWORK AND TRANSFER OF ECONOMIC REGULATION FUNCTIONS)
ORDER 2015

2015 No. 785

THE RAILWAYS INFRASTRUCTURE (ACCESS AND MANAGEMENT)
(AMENDMENT) REGULATIONS 2015

2015 No. 786

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

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

2. **Purpose of the instrument**

2.1 These instruments relate to the Channel Tunnel. They transfer rail economic regulation functions from the Intergovernmental Commission on the Channel Tunnel (IGC) to the national authorities of the United Kingdom and France. They also put in one single instrument the charging framework required by European law with respect to access to rail infrastructure.

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

3.1 The coming into force provision in article 1(2) of the Channel Tunnel (International Arrangements) (Charging Framework and Transfer of Economic Regulation Functions) Order 2015, which also determines the entry into force of the other instrument, is necessary to ensure that the bi-national regulation of the IGC will come into force simultaneously in the United Kingdom and France as intended by article 8 of that regulation. Article 8 of the bi-national regulation states that:

“Each Government shall notify the other of the completion of its necessary internal procedures to enable this regulation to come into force. This regulation shall enter into force on the date of reception of the later notification.”

3.2 The Department for Transport intends to ensure that the UK Government’s notification to the French Government of the completion of the UK internal procedures will not be given earlier than the expiry of 21 days from the date the two SIs are laid, so as to respect the “21 day rule”. Notice will be given in the London, Edinburgh and Belfast Gazettes of the date when the bi-national regulation, and so also the Order, comes into effect.

4. Legislative Context

4.1 These instruments relate to the implementation of Council Directive 91/440/EEC of 29 July 1991 on the development of the Community's railways (OJ L 237, 24.8.1991, p. 25) and Directive 2001/14/EC of the European Parliament and of the Council of 26 February 2001 on the allocation of railway infrastructure capacity and the levying of charges for the use of railway infrastructure and safety certification (OJ L 75, 15.3.2001, p. 29). A transposition note in respect of the new provisions made by these instruments is annexed to this memorandum.

4.2 The proposal that resulted in Directive 2001/14/EC was the subject of **EM 11375/98**. The House of Commons European Scrutiny Committee considered that EM on 4 November 1998 (Report 39, Session 1997-98, 19442), considered it politically important and asked for further information. The Minister wrote to the Chairman on 15 April 1999. The Committee considered the dossier politically important but cleared it from scrutiny on 21 April 1999 (Report 16, Session 1998-99).

4.3 The House of Lords European Union Select Committee considered EM 11375/98 on 2 November 1998 and referred it to Sub-Committee B (972nd sift). A letter was sent from the Chairman on 19 November 1998 requesting further information. The Chairman wrote to the Minister on 8 February 1999. The Minister replied to the Committee on 21 February 1999 and 15 April 1999. The Chairman replied on 29 April 1999 retaining scrutiny reserve. The Minister wrote to the Committee on 24 May 1999 with an update. The Chairman replied on 10 June 1999 and cleared the EM from scrutiny.

4.4 The Commission's amended proposal was the subject of **EM 13417/99 & ADDs 1, 2 & 3**, which was cleared from scrutiny in January 2000 (Commons Report 5, Session 1999-00, 20794, Lords European Union Select Committee letter of 27 January 2000 to the Minister).

4.5 The Commission's amendments in the light of the European Parliament's second reading were the subject of **EM 11575/00, 11576/00 and 11577/00** which was cleared from scrutiny in November 2000 (Commons European Scrutiny Committee Report 29, Session 1999-00, Lords European Union Select Committee letter to the Minister of 16 November 2000). The outcome of conciliation was reported to both Committees by a Ministerial letter of 12 December 2000.

4.6 Directives 91/440/EEC and 2001/14/EC have been implemented in Great Britain, as far as is relevant, by the Railways Infrastructure (Access and Management) Regulations 2005 (S.I. 2005/3049, as amended) and the Channel Tunnel (International Arrangements) Order 2005 (S.I. 2005/3207, as amended). The latter instrument gave effect to bi-national regulations made by the IGC. These were made under the Treaty of Canterbury between the United Kingdom and France, signed on 12 February 1986 (copies available from <http://www.channeltunneligc.co.uk/Essential-texts,24.html?lang=en>).

4.7 The European Commission questioned the implementation of the above Directives by the United Kingdom and France on a number of grounds. It alleged that the IGC, which had been designated as the regulatory body for the Channel Tunnel, did not have the required degree of independence and sufficient powers to perform its functions. The Commission also considered that there was no method in place for apportioning the costs of railway infrastructure that complied with EU law. It also said that, in its view, the charges levied by the Concessionaires of the Tunnel were not set in compliance with EU law, and that a particular agreement reserved capacity to some of industry parties for longer than was allowed under EU law.

4.8 The UK and France did not accept the Commission's views. After negotiations, an agreement was reached. The two Member States would transfer to their national regulatory bodies the functions of economic regulation relating to the Tunnel, and make it express that the extent of their enforcement powers was sufficient. This was going to be required, in any event, by Directive 2012/34/EU of the European Parliament and of the Council of 21 November 2012 establishing a single European railway area (OJ L 343, 14.12.2012, p. 32), under which Member States must establish a single national regulatory body for the railway sector which is a standalone authority distinct from any other public or private entity. The United Kingdom and France also agreed to put the charging framework for the Tunnel in a single instrument.

4.9 In order to implement the latter, the IGC made, on 23rd March 2015, a new bi-national regulation. That bi-national regulation is implemented, in UK law, by S.I. No. 2015/785 (the Channel Tunnel Order). Furthermore, S.I. No. 2015/786 (the Access and Management Amending Regulations) extend the scope of the Railways Infrastructure (Access and Management) Regulations 2005 to the Tunnel, thereby extending to the British side of the Tunnel the jurisdiction of the ORR; they also provide for the implementation of the EU provisions relating to the powers of the economic regulatory body for rail.

4.10 Directives 91/440/EEC and 2001/14/EC will be consolidated by Directive 2012/24/EU. The full implementation of Directive 2012/34/EU will take place at a later date.

5. Territorial Extent and Application

5.1 The Channel Tunnel Order applies to all of the United Kingdom. The Access and Management Amending Regulation apply to Great Britain.

6. European Convention on Human Rights

As the Access and Management Amending Regulations amend primary legislation, Baroness Kramer, Minister of State for Transport, has made the following statement regarding Human Rights:

“In my view the provisions of the Railways Infrastructure (Access and Management) (Amendment) Regulations 2015 are compatible with the Convention rights.”

As the Channel Tunnel Order 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 these instruments is to implement the agreement reached with the Commission, as described above in section 4. In doing so, we have worked together with the European Commission in reconciling the needs of achieving legal certainty, avoiding litigation risks, ensuring the opening of the international railway market as required by EU law, and protecting the viability of the railway industry. A copy of the exchanges between the UK Government and the European Commission can be found at:

<https://www.gov.uk/government/publications/channel-tunnel-non-compliance-by-the-uk-and-france-with-provisions-of-the-first-railway-package>.

7.2 Under EU law, as a minimum, Member States are required to provide for a regulatory body for rail. There are no derogations that would allow the UK to give fewer functions to a regulator than we are going to give the ORR. Therefore, the UK is meeting its minimum EU law obligations in this respect. While recognising concern around the UK and French regulators taking conflicting decisions for the Tunnel, the Department and its French counterparts have ensured the two regulators are both required to ensure that working arrangements are put in place to permit, as far as is possible, the adoption of aligned decisions or opinions. When adopting their decisions or opinions they are also required to coordinate their decision-making, and to consult all interested parties where it appears that there is a risk that they may adopt inconsistent decisions or opinions. The Department believes these provisions are a way of reducing the risk of conflicting decisions being adopted.

7.3 The charging framework is also an EU law requirement which requires the framework to set out rules around how costs are distributed between the different users of the infrastructure under EU law. The Department and its French counterparts have ensured that the framework does not contain rules that were more onerous than is required by EU law. Its main effect, in practice, will be to make it explicit that the infrastructure manager may not recover the same infrastructure cost twice – something that there is no reason to believe it is doing – and to require it expressly to put in place a method for apportioning those costs, as required under EU law.

7.4 In 2013, the policy area concerned generated coverage in the national press, although there has been no such coverage since then. However, our handling of the discussions with the Commission mentioned above, and their implementation, did generate interest among the infrastructure manager of the Channel Tunnel, the infrastructure managers of HS1, and the current and potential operators of trains using the Tunnel.

7.5 It is likely that, on the occasion of the implementation of Directive 2012/34/EU, the amendment made by the Access and Management Amending Regulations will be consolidated.

8. Consultation outcome

8.1 The Department held a four week public consultation on both these instruments, which concluded on 23 January 2015, as the transfer of economic regulation of the Channel Tunnel only affects a narrow range of stakeholders.

8.2 A total of 6 responses were received: 3 from freight or passenger operators with the remainder being made up of the Infrastructure Managers of HS1 and the concessionaire of the Tunnel. Overall stakeholders were supportive of the Department's proposed approach. As expected the key concern was around how the two regulatory bodies would work together to avoid taking conflicting decisions. Also, both the Concessionaires and Eurostar International Limited (currently the only operator of passenger services through the Tunnel) expressed concerns about the way the charging framework provision relating to the recovery of long-term costs was drafted. They also expressed concerns about the provision, in that framework, requiring a reduction of certain costs, in real terms, by 1.1% a year. Finally, Eurotunnel was concerned about the provision concerning public funding and the balancing of accounts. The Department and its French counterpart took into account the concerns of stakeholders by making the following key changes to the bi-national regulation, in addition to some minor technical changes:

- The regulatory bodies and the Intergovernmental Commission (IGC) are now expressly allowed to consult one another on any issue and at any point in their decision-making processes.
- Where an appeal concerning the Channel Fixed Link is made to one of the regulatory bodies, a corresponding appeal must also be made to the other regulatory body.
- One of the considerations which the regulatory bodies must have in mind when adopting decisions or opinions is the need to coordinate and to be consistent with one another.
- The working arrangements put in place by the regulatory bodies must permit, as far as is possible, the adoption of aligned decisions or opinions by the regulatory bodies.
- The regulatory bodies must publish their working arrangements.
- The regulatory bodies must consult all interested parties where it appears that there is a risk that they may adopt inconsistent decisions or opinions.
- The function of dealing with challenges to IGC decisions that were taken before the transfer of economic regulation functions is no longer left to the IGC.

- The provision on the restrictions on public funding being used to finance the Tunnel has been redrafted in order to make it closer to the wording of the Treaty of Canterbury. The provision requiring the infrastructure manager to balance its accounts has been deleted.
- The reference to “construction costs” was deleted. The provision on long term costs was redrafted. Their wording is now closer to that of Article 8(3) of Directive 2001/14/EC.
- The provision requiring a 1.1% reduction, in real terms, of the charges levied to recover long-term costs has been deleted.

9. Guidance

9.1 Whilst the subject-matter of these instruments is technically complex, their main users will be industry stakeholders with experience of the regulatory framework. The main stakeholders have had an active involvement in the shaping of the policy. No comprehensive guidance will therefore be necessary. The Office of Rail Regulation (ORR) will be publishing the cooperative working arrangements agreed with the French regulator, the Autorité de Régulation des Activités Ferroviaires (ARAF) in relation to the economic regulation of the Tunnel.

10. Impact

10.1 The impact on business, charities or voluntary bodies will be nil. The proposed new charging framework will allow the infrastructure managers and train operators to continue to set charges at the optimum level, within the rules established by EU law. The framework has no influence on the level of the costs of running the infrastructure, since it is about how these costs are distributed between the different users of the infrastructure. It is therefore cost-neutral to industry as a whole.

10.2 There is no impact on the public sector. The IGC staff and resources used in the United Kingdom for the economic regulation of the Tunnel are, in practice, currently provided by the Office of Rail Regulation (ORR). They will now be provided directly by the ORR, at no extra cost to them.

10.3 An Impact Assessment has not been prepared for this instrument.

11. Regulating small business

11.1 The legislation does not apply to small business.

12. Monitoring & review

12.1 There will be no monitoring or review of this legislation as these changes are intended to be superseded by full implementation of Directive 2012/34/EU for Great Britain (including the Tunnel) through a separate instrument which will

reflect the amendments made to the Railways Infrastructure (Access and Management) Regulations 2005 by the Access and Management (Amendment) Regulations. That instrument will be subject to monitoring and review.

13. Contact

Mike Franklyn at the Department for Transport Tel: 020 7944 5761 or email: mike.franklyn@dft.gsi.gov.uk can answer any queries regarding the instrument.