

EXPLANATORY MEMORANDUM TO
THE RAILWAYS (INTEROPERABILITY) (AMENDMENT) (EU EXIT)
REGULATIONS 2019

2019 No. 345

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 This instrument amends the Railways (Interoperability) Regulations 2011 (S.I. 2011/3066) (the “Principal Regulations”), which transpose EU Directive 2008/57/EC on the interoperability of the European rail system.
- 2.2 The purpose of the amendments being made is to correct deficiencies that arise with the Principal Regulations as a result of the United Kingdom (“UK”) leaving the EU and to ensure that a clear and accessible legal framework continues to underpin the UK’s railway interoperability regime. This includes the creation of a framework for the Secretary of State to publish technical specification notices containing UK rail technical standards.

Explanations

What did any relevant EU law do before exit day?

- 2.3 The Principal Regulations implemented for the UK, Directive 2008/57/EC of the European Parliament and of the Council on the interoperability of the rail system within the Community (“the 2008 Directive”), which provided for a common assessment and authorisation process for rail projects based on conformity with harmonised standards, supplemented by national rules. Its over-arching objective was to create a harmonised European railway system that allowed for the safe and uninterrupted movement of trains and to promote the single market in the rail sector. It has led to the harmonisation of the rail technical standards framework of Member States including the technical standards for building and operating equipment and the process by which vehicles, infrastructure, and equipment designs are verified against these standards and authorised to be placed into service by the Safety Authorities in each Member State.
- 2.4 In the UK the Safety Authorities are: the Office of Rail and Road (Great Britain); the Department for Infrastructure (DfI) (Northern Ireland); and the Intergovernmental Commission (in relation to the UK section of the Channel Tunnel).
- 2.5 In addition, there is a body of directly applicable EU tertiary legislation sitting under the 2008 Directive, which deals with detailed aspects of the interoperability regime. This includes eleven instruments setting out the technical specifications for interoperability adopted by the European Commission (“TSIs”), which comprise harmonised technical standards. The revocation and amendment of this legislation will be dealt with in a separate EU Exit instrument following EU Exit.

- 2.6 The Principal Regulations also make provision regarding conformity with national technical rules to supplement the TSIs. These are set out within notified national technical rules (NNTRs) which include UK specific case requirements (rules that specifically address UK technical characteristics). These NNTRs have been notified to the European Commission. As part of the assessment process for authorisation of vehicles or other subsystems, independent conformity assessment bodies must verify conformity with TSIs and notified national technical rules (NNTRs) (the national rules notified to the European Commission) and certify that projects meet the required standards for an authorisation to be granted.
- 2.7 The bodies that assess against TSIs are notified to the European Commission and are known as “notified bodies”. The bodies that assess against NNTRs are known as “designated bodies”. Under the Principal Regulations authorisations are granted by the Safety Authority if conformity with the applicable TSIs, contained in direct EU legislation, and NNTRs is demonstrated.
- 2.8 Some of the key provisions of the framework set out in the Principal Regulations are as follows:
- processes for assessment and authorisation against TSIs and notified national technical rules;
 - a streamlined “type” authorisation process to make it easier to obtain an authorisation from the Safety Authorities to place an identical vehicle or infrastructure into service, including a requirement to provide information to the European Union Agency for Railways about vehicle types;
 - enabling a voluntary process of vehicle authorisation in the UK when a vehicle is already authorised in another Member State;
 - requirements for owners of infrastructure to publish data about their infrastructure and meet the requirements of an EU infrastructure register specification and that owners of vehicles supply data for a national vehicle register in line with EU specifications;
 - provision regarding the ability of the Secretary of State or DfI to grant a derogation from the whole or part of a relevant TSI in relation to a rail project and associated obligations to notify or seek permission from the European Commission as part of that process;
 - a power to apply for the Secretary of State or the DfI to grant a dispensation from notified national technical rules.
- 2.9 The Principal Regulations have been amended three times. The first amending instrument, the Railways (Interoperability) (Amendment) Regulations 2013, updated the requirements for technical standards to address the essential requirement of accessibility (implementing Directive 2013/9/EU). The second amending instrument, the Railways (Interoperability) (Amendment) Regulations 2014, updated the essential requirements in relation to noise pollution (implementing Directive 2014/38/EU). The third amending instrument, the Railways (Interoperability) (Amendment) Regulations 2015, transposed Directive 2014/106/EU, which amended Directive 2008/57/EC (implementing changes in the procedure for verifying conformity with standards) and updated the definitions of safety assessment reports and registers for infrastructure.

Why is it being changed?

- 2.10 The Principal Regulations contain a number of elements that will be inappropriate after the UK leaves the European Union and which, if left unchanged, would render them deficient in certain respects post exit.
- 2.11 The proposed changes are necessary to ensure that the existing regime for obtaining the authorisation to place rolling stock and infrastructure into service, and obtaining the necessary assessments and approvals to place rail components on the market, remains fully effective and to avoid uncertainty relating to the application of technical standards in the UK.
- 2.12 Many of the changes made are technical in nature. Such changes include the removal of obligations that will have no relevance following the UK's withdrawal from the EU, such as, for example, the requirement for UK Safety Authorities to notify the European Union Agency for Railways about information relating to vehicle types.

What will it now do?

- 2.13 This instrument ensures the continuation of an effective standards regime for the authorisation of railway rolling stock and infrastructure in the UK while making adjustments for the UK's withdrawal from the EU. The intention is to ensure that the current regulatory framework remains operable in UK law and to provide for a clear framework to authorise new, upgraded or renewed rolling stock and infrastructure so that it can be used on the UK rail system. It is also necessary to facilitate unilateral recognition of systems and components that have been previously assessed against EU standards where no additional UK-specific assessments are required.
- 2.14 In order to achieve this, this instrument creates new powers for the Secretary of State to set and publish technical standards which must be complied with for the purposes of seeking an authorisation. As is the case with the standards contained in existing TSIs and NNTRs, these standards may, amongst other things, relate to the design, construction, placing in service, upgrading, renewal, operation and maintenance of the parts of the rail system. They will be set out either in National Technical Specification Notices (NTSNs), published by the Secretary of State to replace the existing TSIs, or in National Technical Rules (NTRs), replacing and replicating the existing NNTRs, which will no longer be notified to the European Commission.
- 2.15 Notified bodies, the conformity assessment bodies which assess against the standards contained in TSIs and which are notified to the Commission in accordance with the 2008 Directive, will automatically become "approved bodies" from exit day if they were already appointed in the UK before that date. These bodies will no longer be notified to the European Commission after exit day. The UK's designated bodies, which currently undertake assessments against UK specific cases contained in TSIs and NNTRs, will retain their existing status and will be able to continue to assess against the UK specific rules contained within the relevant NTSNs and against the NTRs.
- 2.16 This instrument also inserts a number of new Schedules into the Principal Regulations to replace existing references in these Regulations to requirements and procedures contained in Annexes to the 2008 Directive. These Annexes include details of the processes to be carried out by notified and designated bodies and projects when verifying that standards have been met, including the verification procedures for checking that vehicles, systems and components conform with the applicable

standards. They also contain a range of deficiencies, such as references to the drawing up of EC certificates and declarations for systems and EC declarations for components, which is something the EU will no longer permit UK conformity assessment bodies to do from exit day. The new UK processes and requirements relevant to approved bodies and UK appointed designated bodies will be contained in new Schedules to the Principal Regulations. These include Schedules setting out the “UK” verification processes against the NTSNs and NTRs, new requirements for drawing up UK certificates and UK declarations, as well as a Schedule replicating the essential requirements against which vehicles, subsystems and components must be assessed, which is currently contained within an Annex to the 2008 Directive.

- 2.17 If a person wishes to first use a vehicle in the UK after exit day that was previously authorised in a Member State, and this authorisation remains valid, the instrument provides that they must apply to the Safety Authority for an additional authorisation for the vehicle to be used in the UK. This change to a mandatory additional authorisation process ensures that an assessment is always carried out to determine if the vehicle meets the requirements set out in UK specific rules and NTRs. This mandatory rather than voluntary process is considered more appropriate once the UK is no longer a Member State of the European Union and largely reflects existing practice across the European Union in any event.
- 2.18 There is a new requirement for the Safety Authority to publish and keep up to date a list of vehicle and infrastructure types that it has determined. This replaces the duty to notify the European Union Agency for Railways in accordance with the specification for vehicle types.
- 2.19 The ability for projects to seek derogations from the Competent Authority against TSIs is replaced by a similar provision enabling projects to seek exemptions from the Competent Authority in order to disapply NTSNs or parts of them. The Competent Authorities in the UK will continue to be the Secretary of State (Great Britain) and the DfI. Certain derogation criteria that are inappropriate as a result of EU withdrawal have been removed, as has the requirement for the Secretary of State to seek the permission of the European Commission in relation to TSI derogations or to notify them, as this is no longer appropriate.
- 2.20 An additional exemption category has also been added, enabling a project to seek an exemption from the Competent Authority against an NTSN requirement when there is a proposal to use an innovative solution as a means of meeting the essential requirements, instead of applying a specified requirement in an NTSN. This replaces a similar provision currently contained within TSIs for Member States to apply to the European Commission on behalf of projects for permission to use innovative solutions.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

- 3.1 None.

Matters relevant to Standing Orders Nos. 83P and 83T of the Standing Orders of the House of Commons relating to Public Business (English Votes for English Laws)

- 3.2 As the instrument is subject to negative resolution procedure there are no matters relevant to Standing Orders Nos. 83P and 83T of the Standing Orders of the House of Commons relating to Public Business at this stage.

4. Extent and Territorial Application

- 4.1 The territorial extent of this instrument is the whole of the United Kingdom.
4.2 The territorial application of this instrument is the whole of the United Kingdom.

5. European Convention on Human Rights

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

6. Legislative Context

- 6.1 This instrument is made in exercise of powers in section 247 of the Transport Act 2000, which enables the Secretary of State to make provision for the setting of standards to be complied with in relation to railway assets, railway vehicles or railway services. Section 247 provides for instruments to be made using the negative procedure. It corrects a number of deficiencies in the existing EU-derived domestic interoperability regime arising as a result of the UK's withdrawal from the EU.
- 6.2 The Principal Regulations implement Directive 2008/57/EC on the interoperability of the rail system which is a recast of two earlier rail interoperability Directives: the High-Speed Directive 1996 (Council Directive 96/48/EC) and the Conventional Directive 2001 (Directive 2001/16/EC). The Directives provide for a common assessment and authorisation process for rail projects. The Principal Regulations have subsequently been amended by SI 2013/3023, SI 2014/3217 and SI 201/2022.
- 6.3 The European Union (Withdrawal) Act 2018 ("the Withdrawal Act") makes provision for repealing the European Communities Act and will preserve EU law as it stands at the moment of withdrawal, converting this into UK law. Whilst it does not preserve EU directives, it saves EU-derived domestic legislation which was made to implement the UK's obligations as a member of the EU.
- 6.4 There is also a significant body of EU tertiary legislation relating to rail interoperability which currently has direct effect in the UK. The Withdrawal Act enables the creation of a new body of domestic legislation by bringing the texts of directly applicable EU legislation into domestic legislation. The revocation of or amendment of relevant EU tertiary legislation relating to interoperability will be dealt with in a separate statutory instrument made under the power in the Withdrawal Act to make secondary legislation to enable Ministers and the devolved administrations to deal with deficiencies in retained EU law. This approach reflects the focus on ensuring that those issues which are most needed for industry certainty are addressed by exit day.

7. Policy background

What is being done and why?

- 7.1 The Principal Regulations contain a number of deficiencies that arise as a consequence of the UK's departure from the EU, and which therefore need to be corrected to ensure legal certainty in the interoperability regime. Other than correcting these deficiencies, the changes made by this instrument to the Principal Regulations will maintain the regulatory status quo for the requirements and procedures for obtaining the authorisation to place into service in the UK.
- 7.2 These deficiencies include:
- obligations to notify the European Commission about national technical rules and third-party conformity assessment bodies, and to seek the Commission's permission to issue a derogation against an EU technical standard;
 - obligations placed upon the national safety authority to provide information to the European Union Agency for Railways about vehicle types;
 - arrangements regarding the recognition of EU documentation and the work of EU conformity assessment bodies following the UK's withdrawal from the EU; and
 - references in some cases to EU terminology such as "EC" certificates and declarations and "Member State".
- 7.3 New powers have been created to ensure that the UK can amend, update and issue its own rail technical standards. Without this power, UK technical standards could not be altered to respond promptly to UK industry requirements or changes to international technical standards in a timely manner, as amendments to EU rail technical standards will no longer have direct effect in the UK after exit. This system will permit the UK to maintain identical standards on exit day and will enable a sufficient level of flexibility for the UK to diverge from or keep pace with TSIs post-exit, subject to scrutiny of any requests for divergence and close collaboration with the rail industry in this regard. The NTSNs published on exit day will make only those minor and technical corrections of deficiencies contained in the TSIs which are necessary to ensure that there is no substantive change in the applicable standards.
- 7.4 It will be possible for the UK to diverge from or keep pace with new EU technical standards via the publication of these notices. In the event of any divergence, this will be clearly indicated within the text of the UK notices. The changes to enable the Secretary of State to publish NTSNs will ensure a sufficient level of flexibility to introduce new technical standards that will apply in the UK. This will facilitate a domestic regime for the authorisation of infrastructure and rolling stock. At the same time these changes ensure continuity through the facility to reproduce the technical content of TSIs in the format of NTSNs at the point of exit. This will ensure a smooth transition for railway projects and manufacturers.
- 7.5 Decisions about keeping pace or diverging from EU technical standards will be made by the Secretary of State. The views of stakeholders will be fully taken into account when decisions are made about future NTSNs and whether they should substantially reproduce new TSIs or diverge from them if it is appropriate to do so. These decisions will be informed through consultation with industry about the suitability of aligning with new EU technical standards. This consultation will involve the Rail Safety and Standards Board (RSSB) and other industry stakeholders with an interest

in technical standards. A key consideration when making such decisions will be to safeguard the interests of passengers, freight users and the industry.

- 7.6 The changes also enable the recognition of EU certificates and assessments against EU rules to avoid re-checking of vehicles, systems and components which meet the same requirements that are applicable in the UK. The policy objective is to avoid imposing unnecessary costs and burdens on the rail industry. These changes will limit additional checking in the UK to ensure conformity with rules that are relevant to the specific technical characteristics of the network. It will also help to ensure the continuity of cross-border services between the UK and the EU by providing a clear framework for the application of technical standards. This policy position was outlined in the interoperability and safety Rail Technical Notice, published on 12th October 2018 (see paragraph 11.2).
- 7.7 In order to ensure a smooth transition for the assessment bodies operating in the UK, this instrument ensures that the notified bodies appointed by the Secretary of State will become approved bodies without having to re-apply and be able to assess NTSNs post-exit. In order to ensure an appropriate check of vehicles, systems and components with EC certification, the designated bodies appointed by the Secretary of State will continue to check conformity with the rules that are specific to the UK network.
- 7.8 This instrument also requires rail vehicles first authorised in the EU to undergo a mandatory additional authorisation for use in the UK. The 2008 Directive provides that Member States can choose whether this is a voluntary or mandatory procedure. Unlike the majority of other EU Member States, the UK had previously elected to provide that this additional authorisation process should be voluntary. However, this is no longer appropriate once the UK leaves the EU. Under the voluntary process, the applicant must demonstrate the vehicle meets the requirements of any UK specific cases and NNTRs. The same requirements will apply under the mandatory process to ensure that vehicles comply with the UK's technical standards in specific cases and NTRs.
- 7.9 This instrument does not amend or revoke relevant EU tertiary legislation which will automatically become retained UK law after exit day. The Government will make a further instrument to correct deficiencies in certain pieces of EU tertiary legislation relating to the interoperability framework, including the revocation of legislation that is no longer relevant to the UK framework. It considers that doing so after exit day will not impact upon the effective operation of the railway.
- 7.10 This instrument applies to transport, which is a transferred matter for Northern Ireland under section 4(1) of the Northern Ireland Act 1998. This instrument also applies in large part to technical standards and requirements in relation to products in pursuance of an obligation under EU law, which is, save for standards and requirements in relation to food, agricultural or horticultural produce, fish or fish products, seeds, animal feeding stuffs, fertilisers or pesticides, a reserved matter under paragraph 38 of Schedule 3 to the Northern Ireland Act 1998. Transposition of EU Directives on interoperability has to date been done on a UK-wide basis with Northern Ireland's consent insofar as the matters to which the legislation related were transferred.
- 7.11 The UK Government remains committed to restoring devolution to Northern Ireland. We have been considering how to ensure a functioning statute book across the UK including in Northern Ireland for exit day, absent a Northern Ireland Executive. With

exit day imminent, and in the continued absence of a Northern Ireland Executive, given the need to prepare Northern Ireland's statute book for exit, UK Government Ministers have decided that in the interest of legal certainty in Northern Ireland, the UK will take through the necessary secondary legislation at Westminster for Northern Ireland, in close consultation with the Northern Ireland departments. This is one such instrument.

8. European Union (Withdrawal) Act/Withdrawal of the United Kingdom from the European Union

8.1 This instrument is not being made under the European Union (Withdrawal) Act. It is made under section 247 of the Transport Act 2000. It relates to the withdrawal of the UK from the European Union because it makes the changes that are necessary for the UK's railway interoperability regime to continue to function once the UK leaves the European Union. It provides for a clear and accessible framework for standards post-exit.

9. Consolidation

9.1 There are currently no plans to consolidate the legislation.

10. Consultation outcome

10.1 The Department for Transport has not undertaken a formal consultation on the provisions included in this instrument because the changes are of a highly technical nature. Their purpose is to only make the minimum changes that are necessary to ensure that the interoperability regime continues to function after the UK withdraws from the EU. The proposed fixes, including the intention to manage the UK standards framework through the notices system, has been discussed with the UK rail industry during four half-day workshops. These have been attended by a range of stakeholders including; the UK Safety Authorities; RSSB; Network Rail; the Rail Delivery Group (RDG); the Railway Industry Association; conformity assessment bodies; leasing companies and rail manufacturers. There was broad support from all sectors to the proposal to develop a system of notices for the UK.

10.2 Department for Transport Ministers and officials have regular engagement with the rail industry. Through specific meetings, a series of workshops on interoperability and EU Exit and at long-established stakeholder forums, a number of issues related to the UK's withdrawal from the EU have been addressed. This includes, in particular, plans for making secondary legislation to ensure that the statute book continues to function irrespective of the outcome of negotiations. The Department also works closely with RSSB and RDG on all interoperability-related matters, including preparing for EU Exit.

10.3 Following the series of stakeholder workshops in 2018, a questionnaire was issued to seek stakeholders' views on the changes and fourteen responses were received. The majority of these were supportive of the following proposals:

- the approach to developing National Technical Specification Notices;
- switching from a voluntary additional authorisation process for vehicles in the UK to a mandatory one;

- recognising EU documentation where appropriate for subsystems and components if standards are aligned and reassessment by a UK body if there is divergence in standards.
 - the arrangements for transferring the status of UK appointed notified bodies to become UK Approved Bodies.
- 10.4 There was one proposal that evenly divided opinion, where half of the responses supported NTSN exemptions to be made by the Secretary of State and the other half preferred the power to be given to an industry body. Broader concerns have been raised by some industry parties regarding the impact of potential divergence from EU standards. However, as we describe above, the standards that were in place on exit day will be preserved. Any decision to diverge will be a future one, informed by close engagement with industry.

11. Guidance

- 11.1 Administrative guidance will be provided to explain to railway projects, manufacturers and conformity assessment bodies the changes introduced by the Regulations. It will also explain the transition to the applicable standards for the UK within the National Technical Specification Notices and National Technical Rules. It will be published online prior to the coming into force of this instrument. The guidance will be maintained by the Department for Transport.
- 11.2 The Department for Transport published a Technical Notice for interoperability and safety to cover a no-deal scenario. Attention has been drawn to the Technical Notice via email communication to relevant stakeholders. This was published on GOV.UK on the 12th October 2018¹.

12. Impact

- 12.1 There is no, or no significant, impact on business, charities or voluntary bodies.
- 12.2 There is no, or no significant, impact on the public sector.
- 12.3 An Impact Assessment (IA) is submitted with this memorandum and published alongside the Explanatory Memorandum on the legislation.gov.uk website.
- 12.4 The IA provides a narrative analysis rather than a quantified assessment of net costs and benefits to businesses and focuses on the economic impacts that could eventually result from the ability to diverge from EU standards. In the future, maintaining alignment with EU technical standards for the railways will always be considered, but it is not possible at this stage to predict exactly how and when the UK may choose to diverge. Each case for divergence will be considered on its merits and the economic impacts, including on small and micro businesses, will be taken into account before a decision is made.

13. Regulating small business

- 13.1 The legislation applies to activities that are undertaken by small businesses.
- 13.2 To minimise the impact of the requirements on small businesses (employing up to 50 people), the approach taken is to maintain the status quo as far as possible while fixing

¹ <https://www.gov.uk/government/publications/meeting-rail-safety-and-standards-if-theres-no-brexideal/meeting-rail-safety-and-standards-if-theres-no-brexit-deal>

the deficiencies that result from the UK's withdrawal from the EU. This includes maintaining the same rail technical standards at the point of exit by replicating the EU's technical standards in new National Technical Specification Notices. Any proposals for future divergence of technical standards between the UK and EU will be managed carefully, and in consultation with industry, to minimise the impact on small businesses.

14. Monitoring & review

- 14.1 The approach to monitoring of this legislation is as set out in paragraph 14.2.
- 14.2 As the Principal Regulations already provide for a review clause, the Regulations as amended will be subject to a review no later than five years from the last review (January 2017). The next review will provide an opportunity to evaluate how the framework allowing the UK to diverge from EU technical standards has been used.

15. Contact

- 15.1 Ian Jones, Head of Interoperability at the Department for Transport, or Peter Coverdale, Policy Advisor for Interoperability at the Department for Transport, can be contacted with any queries regarding the instrument. Ian Jones: Telephone: 07917 883579 or email: ian.jones@dft.gov.uk. Peter Coverdale: 07977 423086 or email peter.coverdale@dft.gov.uk.
- 15.2 Dan Moore, Director, Rail EU Exit at the Department for Transport can confirm that this Explanatory Memorandum meets the required standard.
- 15.3 Andrew Jones, Parliamentary Under-Secretary of State for Transport, at the Department for Transport can confirm that this Explanatory Memorandum meets the required standard.