

EXPLANATORY MEMORANDUM ON EUROPEAN UNION LEGISLATION

Proposal for a Regulation of the European Parliament and of the Council on certain aspects of railway safety and connectivity with regard to the cross-border infrastructure linking the Union and the United Kingdom through the Channel Fixed Link

Submitted by the Department for Transport

14 December 2020

SUBJECT MATTER

1. The purpose of this Commission proposal for a Regulation is to mitigate the potential for disruption to cross-border rail services when the Transition Period ends on 31 December 2020, at which point UK-issued rail certificates and licences will no longer be valid in the European Union. Safety authorisations issued by a binational safety authority in respect of specialised cross-border infrastructure will also cease to be recognised in the European Union where the UK is one of the relevant states constituting that safety authority. The proposed Regulation provides for the temporary continued recognition of certain licences, certificates and authorisations to facilitate the continued smooth operation of cross-border services through the Channel Tunnel from 1 January 2021.
2. Under Directive 2004/49/EC, in order to be able to manage and operate rail infrastructure, a rail infrastructure manager must obtain a safety authorisation from the national safety authority in the EU Member State in which it is established. This Directive also permits a binational body to act as that national safety authority in respect of specialised cross-border infrastructure. Under the same directive, rail operators must hold a valid Part A and Part B safety certificate, with the Part A certificate issued by the safety authority in the EU Member State in which the rail operator first establishes its operation, to operate services in the EU. Under Directive 2012/34/EU, rail operators must also hold a valid operator licence issued by a licensing authority situated within the EU Member State in which they are established order to operate rail services in the EU.
3. In the context of the Channel Tunnel, the issuing authority for the relevant safety authorisation, and also for Part B safety certificates, is the Intergovernmental Commission (IGC), which is currently the joint UK-French safety authority for the Channel Tunnel. From the end of the Transition Period, the IGC will no longer be recognised as a safety authority under EU law and, as indicated in the European Commission's stakeholder notices, the safety authorisation and certificates issued by it will no longer be valid in the EU under the above-mentioned directives, including in the part of the Channel Tunnel situated on French territory. Nor will UK-issued Part A safety certificates or UK-issued operator licences be recognised by the EU.

4. The proposed Regulation therefore provides for the continued validity, for a temporary period of two months from 1 January 2021, of the IGC-issued safety authorisation issued under Article 11 of Directive 2004/49/EC¹ to infrastructure managers for the management and operation of the Channel Tunnel. In this case, the relevant infrastructure manager is Eurotunnel.
5. It also provides for the continued validity, for a temporary period of nine months from 1 January 2021, of safety certificates issued under Article 10 of Directive 2004/49/EC and rail operator licences issued under Chapter III of Directive 2012/34/EU² to rail operators established in the UK and operating services through the Channel Tunnel. The validity of these certificates and licences applies only to services between the UK and the first border crossing station and terminal (Fréthun freight yard for rail freight services and the Calais-Fréthun passenger terminal for passenger services). The continued validity of safety certificates and operator licences applies to both passenger and freight services operated by railway undertakings through the Channel Tunnel, including those operated by Eurostar International Limited (EIL), DB Cargo and GB Railfreight.
6. During the temporary recognition period provided for under the proposed Regulation, these licences, authorisations and certificates are subject to the relevant rules applicable to them in accordance with Directive 2012/34/EU and Directive (EU) 2016/798, the latter being the new EU fourth railway package safety directive which includes transitional provisions relating to safety certificates issued under the 2004 Directive.
7. Under the Commission proposal, the above-mentioned continued validity is contingent upon the holders of these authorisations, licences and certificates, as well as the authorities which issued them (the IGC and ORR), cooperating with the French national safety authority (Établissement public de sécurité ferroviaire, EPSF) and providing it with the relevant documents and information within the time limits set by that safety authority.
8. If these conditions are not met, the Commission reserves the right, under this proposal, to withdraw the continued recognition of the validity of these documents. In these circumstances, the Commission could bring forward further legislation to enable it to withdraw these benefits in circumstances where it has justified doubts that the relevant safety standards being applied are in line with EU law.
9. In such cases it would notify the French national safety authority (EPSF) and the issuing authority, as well as relevant holders of the documentation, in advance of withdrawing the benefit and provide them an opportunity to put forward their views.
10. Under the proposed Regulation, the French national safety authority is responsible for monitoring compliance with rail safety standards and EU rail safety law by Channel Tunnel operators and the infrastructure manager. It may also recommend to the Commission and the EU Agency for Railways

¹ <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A32004L0049>

² <https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:32012L0034>

(ERA) that the continued validity of the authorisations, licences and certificates provided for in the proposed Regulation be withdrawn. The French licensing authority is responsible for monitoring whether rail operators licensed in the UK continue to meet the requirements under Articles 19 to 22 of Directive 2012/34/EU.

11. The Commission also reserves the right to withdraw the continued recognition and validity of the authorisations, licences and certificates if it deems that the relevant safety standards under EU law are not being met by the infrastructure manager or operators, or if the UK authorities fail to provide, in whole or in part, information requested by the French national safety authority within a reasonable period of time. In these circumstances, the Commission could bring forward further legislation to enable it to withdraw these benefits in circumstances where it has justified doubts that the relevant safety standards being applied are in line with EU law.
12. In such cases the Commission would again notify the holder, the French national safety authority (EPSF), the issuing authority, the relevant holders of the documentation, as well as the UK national safety authority and licensing authority, in advance of withdrawing the benefit and provide them an opportunity to put forward their views.

SCRUTINY HISTORY

13. There is no scrutiny history for this document. Directive (EU) 2016/798 was part of the Commission's Fourth Railway Package. The proposals that resulted in the legislative pillars of the Fourth Railway Package were the subject of two EMs: **5960/13, 5985/13 & 6020/13** (the market pillar); and **6012/13, 6013/13, 6014/13 & 6017/13** (the technical pillar). The House of Commons European Scrutiny Committee considered the EMs on 27 February 2013. The Committee recommended that the documents were politically important and recommended them for debate on the floor of the House (Report 33, Session 2012/2013, 34666, 34672, 34675, 34667, 34668, 34669, and 34673). The debate took place on 25 April 2013, and cleared the documents from scrutiny. Ministerial letters were sent to the Chairman on 4 June 2014, 18 March 2015, 15 July 2015, 23 November 2015, 15 March 2016 and 3 May 2016 to keep the Committee informed of subsequent progress.
14. The House of Lords Select Committee on the European Union referred the EMs to its Sub-Committee B at the 1497th sif on 26 February 2013. The Chairman wrote to the Minister on 7 June 2013, holding the documents under scrutiny. Ministerial letters were sent to the Chairman on 18 June 2013, 7 July 2013, 3 October 2013, 18 December 2013, 6 March 2014, 4 June 2014, 18 March 2015, 15 July 2015, 2 October 2015, 2 November 2015, 15 March 2016, and 3 May 2016 to keep the Committee informed of subsequent progress. The Committee cleared the documents from scrutiny on 5 May 2016.
15. The Commission introduced a previous contingency legislation covering cross-border services through the Channel Tunnel, which was the subject of EM **6340/19** dated 28 February 2019 and letters to both Committees of 7

March 2019. The House of Commons European Scrutiny Committee considered the EM and letter on 13 March 2019 and recommended that the document was politically important and requested further information from the Minister (Report 59, Session 2017-19, 40383). A response was sent to the Committee on 27 March 2019. The House of Lords Select Committee on the European Union referred the EM to its EU Internal Market Sub-Committee at the 1730th siff on 4 March 2019. The Chairman wrote to the Minister on 21 March clearing the proposal from scrutiny but asking for further information, and a response was sent on 4 April 2019.

16. In July 2020 the Commission published a proposed Council Decision empowering France to negotiate an agreement supplementing its existing bilateral Treaty with the UK concerning the construction and operation by private concessionaires of a Channel Fixed Link, and a proposed Regulation amending Directive (EU) 2016/798, as regards the application of railway safety and interoperability rules within the Channel Fixed Link. These documents were the subject of EM **9974/20** and **9976/20**. The House of Commons European Scrutiny Committee considered the EM on 16 September 2020, recommended that the document was politically important and requested further information from the Minister (Report 21, Session 2020-21, 41434, 41435). The Minister responded on 15 October, and the Committee considered the letter on 18 November. The Committee Chair wrote to the Minister on 19 November requesting an evidence session, which has been scheduled for 16 December. The House of Lords Select Committee on the European Union cleared the EM from scrutiny, however the Chair wrote on 2 October, 29 October and 26 November 2020 seeking further information. Responses were sent to the Committee on 16 October and 12 November 2020.

MINISTERIAL RESPONSIBILITY

17. The Secretary of State for Transport.

INTEREST OF THE DEVOLVED ADMINISTRATIONS

18. Rail safety is a reserved matter in relation to Scotland and Wales but is transferred to Northern Ireland. Rail interoperability, which is also relevant to safety management systems and authorisations, is a reserved matter in relation to Scotland and Wales and is partially transferred to Northern Ireland, in circumstances where the reservation at paragraph 38 of Schedule 3 to the Northern Ireland Act 1998 does not apply. Scottish Government Ministers, Ministers of the Welsh Government, and Northern Ireland have an interest in the subject matter. The Devolved Administrations have been consulted in the preparation of this EM.

LEGAL AND PROCEDURAL ISSUES

19. The following legal and procedural issues apply:

- i. **Legal basis**

The legal basis is Article 91(1) of the Treaty on the Functioning of the European Union (TFEU). This article sets out the procedure for the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, to lay down common rules applicable to international transport to or from the territory of a Member State or passing across the territory of one or more Member States, the conditions under which non-resident carriers may operate transport services within a Member State, measures to improve transport safety and any other appropriate conditions.

ii. **Voting procedure**

Qualified majority voting.

iii. **Timetable for adoption and implementation**

The exact timetable for the consideration of these proposals by the Council of Ministers and European Parliament is not yet known but is expected to take place quickly. On 2 December the Council's Permanent Representatives Committee (COREPER) agreed on a negotiating mandate for discussions with the European Parliament on the proposal (without amendment). The European Parliament is expected to approve the proposal at the plenary session on Tuesday 15th December. The European Parliament is using the urgent procedure, so no amendments are expected to be proposed. We understand that the proposal will go to COREPER for final approval in the same week, and the intention is to have the Regulation signed and adopted on the 23rd December. The proposed Regulation stipulates in Paragraph 12 of the Preamble that, in view of the urgency entailed by the end of the transition period, it is appropriate to provide for an exception to the eight-week period referred to in Article 4 of Protocol No 1 on the role of national Parliaments in the Union, annexed to the Treaty on European Union, to the Treaty on the Functioning of the European Union and the Treaty establishing the European Atomic Energy Community.

iv. **Does the proposal affect the substance of EU law that will remain in effect under the Northern Ireland Protocol or is it likely to be the subject of a request by the EU to be added to the Protocol under Article 13(4) thereof?**

No. The proposals relate solely to the Channel Tunnel and therefore do not have an impact on, or relevance to, the Northern Ireland Protocol.

v. **Do JHA opt-in, Schengen opt-out issues arise?**

No. There is no impact on the Justice and Home Affairs (JHA) opt-in or the Schengen opt-out, as the proposals do not include any new JHA or Schengen-related measures.

POLICY IMPLICATIONS

20. It was agreed in the 2019 Political Declaration setting out the framework for the future relationship between the European Union and the United Kingdom that future arrangements for the Channel Tunnel would be dealt with bilaterally

between the UK and France and outside the wider UK-EU future relationship negotiations. The proposed Regulation therefore has no implications for the UK's future relationship negotiations with the EU.

21. As France's mandate from the Commission³ to negotiate the necessary arrangements with the UK was only published in the Official Journal of the European Union on 22 October, there is now insufficient time remaining before the end of the Transition Period for these arrangements to be formally negotiated and implemented in time for 1 January 2021.
22. The Government understands the Commission has therefore introduced this contingency legislation to provide for the temporary continued validity of cross-border rail authorisations, licences and certificates to secure the continuation of services through the Channel Tunnel from 1 January 2021, while the necessary bilateral arrangements are agreed between the UK and France.
23. The two-month extension to the validity of safety authorisations is intended to give Eurotunnel, the Channel Tunnel infrastructure manager, time to obtain a new safety authorisation from the French authorities. Under EU law, Eurotunnel's existing safety authorisation will become invalid in the EU from 1 January 2021, as it was issued by a joint UK-France safety authority, the Intergovernmental Commission, which will no longer be recognised as a safety authority under EU law once the Transition Period ends. Eurotunnel's existing IGC-issued safety authorisation will continue to be recognised in the UK and the validity period of the authorisation in the UK is not affected.
24. Eurotunnel will be required to apply for a new safety authorisation to the French safety regulator (EPSF) which will then be authorised once EPSF has completed its examination and has the authority to issue a new Safety Authorisation. This cannot happen before 1 January 2021 and as such the Commission has introduced this contingency Regulation to provide a temporary period of continued recognition of the existing safety authorisation until such time as EPSF can issue a new authorisation.
25. The nine-month extension to the validity of safety certificates is intended to provide sufficient time for the UK and France to negotiate and implement a bilateral agreement on the recognition of cross-border safety certificates under Article 10(9)(a) of Directive (EU) 2016/798⁴. This is because Eurotunnel, Eurostar (EIL), DB Cargo and GB Railfreight's existing safety certificates, issued by ORR and the IGC, will no longer be recognised in the part of the Channel Tunnel situated in French territory from 1 January 2021.
26. The nine-month extension to the validity of operator licences is intended to provide sufficient time for the UK and France to negotiate and implement a bilateral agreement on the mutual recognition of cross-border operator licences under Article 14 of Directive 2012/34/EU. Again, this is because operator

³ https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=urisrv%3AOJ.L_.2020.352.01.0004.01.ENG&toc=OJ%3AL%3A2020%3A352%3ATOC

⁴ <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32016L0798>

licences issued by ORR to DB Cargo, GB Railfreight and Eurostar (EIL) will no longer be recognised in the EU from 1 January 2021.

27. The Commission introduced similar contingency legislation for cross-border rail services in advance of the UK's withdrawal from the EU⁵, to provide for the continued recognition of licences, authorisations and certificates had the UK left the EU without a withdrawal agreement in place. This new proposed regulation, unlike the original, does not make provision for train driving licences. The Government continues to work closely with operators and French counterparts to ensure appropriate contingency arrangements are in place for UK-licensed train drivers operating cross-border services, including ensuring they hold valid EU train driving licences. It also does not apply to Northern Ireland as the Northern Ireland Executive has put in place appropriate arrangements to secure the continuation of cross-border services. The other key difference is that the recognition period of safety authorisations has been reduced, reflecting the short time needed by French authorities to issue a new safety authorisation to Eurotunnel covering the French half of the Channel Tunnel.
28. In the light of the above, the Government welcomes the introduction of this legislation by the Commission, as it supports and provides certainty around the continuation of services from the end of the Transition Period and will allow time for the necessary bilateral agreements to be formally concluded between the UK and France, building on the discussions that have already taken place. This will help to provide full certainty, clarity and confidence to cross-border operators and passengers that services will continue in all scenarios from 1 January 2021 and reduces any possible risk of licensing or certification issues from 1 January. The Government has also been clear that it is fully committed to seeing these important services continue without disruption, and it is in the interests of both the UK and the EU to ensure this. While alternative measures have been developed to address certain of these issues (most particularly contractual safety arrangements between operators and the infrastructure manager under Article 10(9)(b) of the Rail Safety Directive (EU) 2016/798), the Regulation provides significant greater certainty for operators.
29. The Government also welcomes the geographical scope of the proposed Regulation, which provides for temporary continued validity of licences, authorisations and certificates up to the Calais-Fréthun border crossing station and terminal. This is important as it will enable Channel Tunnel operators to provide services up to the first border crossing point in France, which covers the scope of operation of rail freight operators through the Tunnel.
30. Furthermore, the Government believes that the nine-month recognition period provided for in relation to safety certificates and operator licences is sufficient for the necessary agreements on safety certificates and operator licences to be negotiated and implemented. We have been clear, however, that any such agreements must be consistent with the UK's status as an independent,

⁵ [https://eur-lex.europa.eu/eli/reg/2019/503/oj#:~:text=Document%2032019R0503&text=Regulation%20\(EU\)%202019%2F503,\(Text%20with%20EEA%20relevance.\)](https://eur-lex.europa.eu/eli/reg/2019/503/oj#:~:text=Document%2032019R0503&text=Regulation%20(EU)%202019%2F503,(Text%20with%20EEA%20relevance.))

sovereign country and this will guide our approach to negotiations. The two-month extension period provided for in relation to safety authorisations differs from the aforementioned periods for operator licences and safety certificates, and reflects the time needed for the French safety regulator, EPSF, to issue a new safety authorisation to Eurotunnel. This is a matter for the French authorities, but the Government will continue to monitor progress closely with both Eurotunnel and French counterparts given the relatively compressed timeframe provided for by the proposed Regulation.

CONSULTATION

31. The Government has engaged closely with cross-border rail operators, infrastructure managers and the relevant authorities regarding preparations for the end of the Transition Period, to ensure that affected parties are as prepared as possible for all scenarios.
32. Feedback from engagement with the relevant parties to date regarding this proposal has been positive, with the relevant operators expressing support for the objectives of this legislation and recognising the need for it to enable the continued smooth operation of Channel Tunnel services from 1 January 2021. Some stakeholders have expressed concern that proposed Regulation includes differing validity periods and the Government has communicated these concerns to French counterparts.
33. The Government will continue to engage closely with all relevant parties regarding preparations for the end of the Transition Period, including any action required as a result of these proposals.

FINANCIAL IMPLICATIONS

34. The financial implications of these proposals are considered neutral. This is because the proposals would merely continue current arrangements regarding the recognition and validity of safety authorisations, safety certificates and operator licences for cross-border rail services through the Channel Tunnel.



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