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COM(2020) 622 final  
COM(2020) 623 final

## EXPLANATORY MEMORANDUM ON EUROPEAN UNION LEGISLATION

**Proposal for a DECISION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL empowering France to negotiate an agreement supplementing its existing bilateral Treaty with the United Kingdom concerning the construction and operation by private concessionaires of a Channel Fixed Link**

**Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL amending Directive (EU) 2016/798, as regards the application of railway safety and interoperability rules within the Channel Fixed Link**

Submitted by the Department for Transport

11 August 2020

### SUBJECT MATTER

#### The proposed Council Decision

1. The Commission's proposal for a Decision would empower France to negotiate and ratify an agreement with the UK, as a third country, regarding the application of EU railway safety and interoperability rules to the Channel Tunnel Fixed Link (hereafter "the Channel Tunnel"), and in particular the continued role of the Intergovernmental Commission (IGC) as the recognised 'national safety authority' for the entirety of the Channel Tunnel, within the meaning of EU law. This proposal stipulates requirements with which such an agreement must comply and stipulates that the agreement will be subject to Commission authorisation.
2. The proposal envisages an additional agreement made under the Treaty of Canterbury<sup>1</sup>, the Treaty which governs the operation of the Channel Tunnel. The IGC was set up under the Treaty of Canterbury to supervise the construction and operation of the Channel Tunnel on behalf of the UK and French governments, and its functions are laid down in Article 10 of the Treaty. The IGC is currently the recognised joint UK-French 'national safety authority' for the Channel Tunnel under EU legislation, and has the necessary regulatory powers to put in place a "unified safety regime" in the Channel Tunnel. It is also responsible for the related area of Channel Tunnel infrastructure and vehicle authorisations under the rail interoperability regime.
3. Under current arrangements, whilst maintaining a safety remit for the Channel Tunnel, the IGC will cease to be the recognised national safety authority for

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<sup>1</sup> The Treaty between France and the United Kingdom of Great Britain and Northern Ireland concerning the construction and operation by private concessionaires of a Channel Fixed Link, signed at Canterbury on 12 February 1986.

the part of the Channel Tunnel in French territory at the end of the Transition Period (31 December 2020) as it no longer satisfies the definition of an EU national safety authority from this date. The Commission has therefore made a proposal to empower France to conclude an agreement with the UK with the stated aim of ensuring the continued functioning of a unified safety regime for the Channel Tunnel and the continued role of the IGC as its joint safety authority, provided this agreement is consistent with EU law applicable to national safety authorities, in particular Directive (EU) 2016/798 on railway safety<sup>2</sup> (hereafter “the Rail Safety Directive”), Directive (EU) 2016/797 on railway interoperability<sup>3</sup> and Regulation (EU) 2016/796 on the European Union Agency for Railways<sup>4</sup>. The proposal specifies that any agreement must ensure that the provisions of EU law relevant to the tasks of the national safety authority apply to the whole of the Channel Tunnel and appears to envisage dynamic alignment with EU rail safety and interoperability law for the UK and French sections of the Channel Tunnel.

4. The proposed decision envisages an agreement which would enable the French national safety authority, in particular in cases of emergency or non-compliance with a decision of the arbitration tribunal, to unilaterally assume competence over the part of the Channel Tunnel in French territory in order to ensure the application of EU law. It also requires that a dispute before the arbitration tribunal set up under the Treaty of Canterbury relating to an interpretation of EU law should be referred to the Court of Justice of the European Union (CJEU) whose decision should be binding on the arbitration tribunal. This is a proposed addition to the existing dispute resolution mechanism under the Treaty of Canterbury.
5. The proposed decision also requires the agreement between France and the UK to provide that courts or tribunals to which Article 19(1) of the Treaty on the Functioning of the European Union (TFEU) applies shall be exclusively competent to decide on remedies sought by concessionaires and users of the Channel Tunnel against decisions of the IGC in relation to the tasks of the national safety authority under Directives 2016/797 (rail interoperability) and 2016/798/EU (rail safety) and Regulation 2016/796/EU, concerning the role of the European Union Agency for Railways. Article 19(1) TFEU refers to issues around discrimination against individuals with protected characteristics (race, sex, disability, etc.) so this seems likely to be a misprint, with the intended reference being to Article 19(1) of the Treaty on European Union (TEU), which refers to the CJEU.

### **The proposed Regulation**

6. The Commission also proposes amendments to the Rail Safety Directive to enable the above-mentioned arrangements in respect of the Channel Tunnel, including amendments to make these arrangements compatible with EU law.

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<sup>2</sup> Directive (EU) 2016/798 of the European Parliament and of the Council of 11 May 2016 on railway safety, (OJ L 138, 26.5.2016, p. 102).

<sup>3</sup> Directive (EU) 2016/797 of the European Parliament and of the Council of 11 May 2016 on the interoperability of the rail system within the European Union, (OJ L 138, 26.5.2016, p. 44).

<sup>4</sup> Regulation (EU) 2016/796 of the European Parliament and of the Council of 11 May 2016 on the European Union Agency for Railways and repealing Regulation (EC) No881/2004, (OJ L138, 26.5.2016, p. 1).

7. The proposed amendments cover two main areas: firstly, the ability for a joint safety authority between an EU Member State and a third country to be recognised as a national safety authority under EU law where particular conditions are met and secondly, the ability of a Member State to designate a safety authority competent for a single piece of engineering structure situated partly in a third country and partly in a Member State, provided this is underpinned by an international agreement concluded or authorised by the EU. In addition, the proposed Regulation stipulates that the Member State must take all measures at its disposal under that agreement to ensure that the safety authority complies with the applicable provisions of EU law and must, where necessary for reasons of rail safety, make use of the right to take back sole competence over the section of the infrastructure in its territory. It also sets out an obligation for the arbitration tribunal set up between the Member State and the third country to refer any disputes over interpretation of EU law to the CJEU. The proposal for a Regulation specifies in this regard that the third country, in this case the UK, may participate in any proceedings brought before the CJEU “in the same way as a Member State”. Failure to comply with any ruling of the CJEU in this context will also enable the Member State to assume sole competence over the section of infrastructure in its territory.
8. Under Article 3(7) of the Rail Safety Directive, a national safety authority can only be entrusted with tasks regarding railway safety by EU Member States. The proposed Regulation therefore provides for an amendment to Article 3(7) enabling a national safety authority to be entrusted with such tasks by an EU Member State and a third country, reflecting the UK’s status outside the EU. This amendment would enable the IGC to continue to be recognised as the joint safety authority for the Channel Tunnel under EU law at the end of the Transition Period.
9. Without the proposed amendment to Article 3(7) of the Rail Safety Directive, whilst the IGC could at least temporarily continue as the national safety authority for the part of the Channel Tunnel in UK territory at the end of the Transition Period, as a matter of EU law, the IGC could no longer act as an EU national safety authority for the French half of the Tunnel. Recent amendments to French legislation (specifically Article L 2221/1 of the French *Code des Transports*) confirm that the current position is that the French *Etablissement public de sécurité ferroviaire* (EPSF) will become the national safety authority for the part of the Channel Tunnel in French territory at this point.
10. This proposed Regulation applies only to the Channel Tunnel, as this is the only “single piece of engineering structure” linking the UK and EU. The proposal would not affect cross-border rail infrastructure on the island of Ireland.

## **SCRUTINY HISTORY**

11. There is no scrutiny history for this document. Directive (EU) 2016/798, Directive (EU) 2016/797 and Regulation (EU) 2016/796 on the European

Union Agency for Railways were 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.

## **MINISTERIAL RESPONSIBILITY**

12. The Secretary of State for Transport.

## **INTEREST OF THE DEVOLVED ADMINISTRATIONS**

13. 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 vehicle and infrastructure 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**

14. The following legal and procedural issues apply:
  - i. **Legal basis**

The legal basis for the proposed Decision is Article 91 of the Treaty of the Functioning of the European Union (TFEU), and the legal basis for the proposed Regulation is also Article 91. Article 91 TFEU 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. The proposed Regulation stipulates in Paragraph 9 of the Preamble that it should be adopted as a matter of urgency, so as to ensure that the necessary provisions are in place at the end of the Transition Period. The Commission notes that it therefore considers it 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 European Union.

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?**

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**

15. Under the Agreement on the Withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community<sup>5</sup>, EU law will continue to apply in the UK until the end of the Transition Period on 31 December 2020.
16. The Commission's proposals put in place some of the measures that it considers would be necessary for the IGC to continue its functions as the joint safety authority for the Channel Tunnel at the end of the Transition Period, particularly in relation to the IGC's continued recognition as the joint safety authority for the Channel Tunnel under EU law. The UK's position is that France is already able to conclude an agreement with the UK relating to the unified application of relevant EU safety and interoperability rules in the Channel Tunnel under the Treaty of Canterbury and, where required to satisfy French obligations under EU law, in reliance on Article 14 of Directive 2012/34/EU and, where relevant, Article 10(9)(a) of Directive 2016/798/EU.
17. The primary impact of this proposed legislation, should it come into effect, would be that the IGC could continue to be recognised as the joint safety authority for the Channel Tunnel under EU law from 1 January 2021, subject to an additional protocol under the Treaty of Canterbury being agreed between France and the UK. The legislation would also mean, however, that the CJEU would ultimately be able to rule on disputes between the UK and France over the interpretation of EU law in relation to safety regulation for the Tunnel, as well as remedies sought by concessionaires and users of the Channel Tunnel against decisions of the IGC in relation to safety regulation once the Transition Period has ended and EU law ceases to apply in the UK.

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<sup>5</sup> <https://www.gov.uk/government/publications/agreement-on-the-withdrawal-of-the-united-kingdom-of-great-britain-and-northern-ireland-from-the-european-union-and-the-european-atomic-energy-communi>

This provision is not consistent with the UK's objectives as an independent and sovereign nation outside the EU. The UK Government has been clear in its engagement with the Commission and France that any jurisdiction for the CJEU in UK territory from the end of the Transition Period is not compatible with the UK's red lines and does not reflect its status as a third country.

18. Further, a condition of authorisation of any agreement between the UK and France, as set out at Article 1(1) of the proposed Decision, is that it must comply with the following: the IGC must ensure the application to the Channel Tunnel of the 'provisions of Union law relevant to the tasks of National Safety Authorities within the meaning of... [Directive 2016/798/EU, Directive 2016/797/EU and Regulation 2016/796/EU] ... as amended or replaced, as well as of the acts adopted on their basis.' This effectively obliges the UK to make a commitment to dynamic alignment with these areas of EU legislation for the Channel Tunnel, including the tertiary legislation made under these Directives, as a condition of authorisation by the Commission of any bilateral agreement secured with the French establishing the IGC as safety authority for the Channel Tunnel. The UK Government has again been clear in its engagement with the Commission and France that any obligations involving dynamic alignment with EU law from the end of the Transition Period are not compatible with the UK's red lines and do not reflect its status as a third country.
19. Until the fourth package technical pillar transposition deadline of 31 October 2020, the IGC, as an EU national safety authority, is permitted to issue EU safety certificates and safety authorisations under the Rail Safety Directive (2004/49/EC on the safety of the Community's railways), and vehicle and infrastructure authorisations under the interoperability directive (Directive 2008/57/EC). From that date, under the new rail safety and interoperability directives (2016/798/EU and 2016/797/EU) the power to issue intra-EU cross-border safety certificates and vehicle authorisations passes to the European Union Agency for Railways. The IGC will retain the ability to issue safety authorisations for the Tunnel in its capacity as an EU national safety authority until 31 December 2020, at which point it will lose its status as an EU national safety authority altogether in the absence of a further Commission authorised agreement with the French. While the Commission's proposals make provision for the IGC to continue to be recognised as the joint safety authority for the Channel Tunnel, they do not address the important issue of the ongoing validity of safety certificates and authorisations issued by it. They also do not address the issue of whether it will continue to be able to grant safety certificates to UK-established operators as well as EU operators for use of the Channel Tunnel from 1 January 2021, which is a further important aspect of ensuring the continued smooth operation of cross-border services.
20. The proposed Decision and Regulation are also silent on the question of how certificates and authorisations issued to EU rail services and vehicles by the European Union Agency for Railways (EUAR) under the Rail Safety Directive (2016/798/EU) or Directive 2016/797/EU on rail interoperability are to be treated for the Channel Tunnel. This further undermines the ability of the IGC

to issue Tunnel-wide safety certificates and vehicle authorisations. The current position under EU law is that applicants must obtain an EUAR safety certificate or vehicle authorisation when running a cross-border intra-EU rail service/vehicle and may also apply to the EUAR rather than the relevant national safety authority to obtain this documentation for domestic-only journeys. Without further amendment to EU legislation, a rail service or vehicle will be able to reach the midpoint of the Channel Tunnel in reliance on only an EUAR safety certificate or vehicle authorisation, effectively bypassing the IGC in respect of the French half of the Tunnel but leaving the IGC with decision-making powers for the UK half of the Tunnel.

21. The IGC has been in place as a binational safety body for the Channel Tunnel since the Treaty of Canterbury and the Concession Agreement were signed in 1986, and has been recognised as the national safety authority for the UK and French sections of the Channel Tunnel, under EU law, since 2007. The Government considers that the binational unified safety regime for the Channel Tunnel has proven effective in maintaining safety standards, as well as ensuring effective cooperation between safety authorities, for this unique and shared piece of cross-border rail infrastructure.
22. The Government's priority in relation to the Channel Tunnel continues to be to ensure the smooth continuation of cross-border services and of a unified safety regime. The cross-border rail services that link the UK with the EU, including passenger and freight services through the Channel Tunnel, have greatly benefited citizens and businesses in both the UK and the EU. The Government 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. The Government is therefore keen to ensure that the benefits of this unified safety regime are maintained as far as possible, and in all scenarios, at the end of the Transition Period. The Government is committed to maintaining an effective, coherent safety regime for the Channel Tunnel and continues to work closely with other Member States on this issue. There are a range of means of securing this outcome, including a split regulation model.
23. The measures proposed by the Commission in relation to the continued recognition of the IGC as a national safety authority under EU law, alongside the bilateral agreements and arrangements the Government is negotiating, could contribute to the continued smooth functioning of services through the Channel Tunnel if amendments were secured to the proposed legislation to comply with UK red lines and areas such as the treatment of documentation issued by the EUAR and recognition of UK-issued safety certificates were addressed. The Government will continue to engage with France and the Commission to put in place arrangements which both secure these important services but also reflect the UK's objectives as a sovereign nation outside the EU.
24. The measures in the proposed Regulation relate to cross-border vehicles and services using a single piece of engineering structure partly situated in a third country and partly in a Member State, and specifically to the rail infrastructure

of the Channel Tunnel. They do not make provision in relation to rail infrastructure and cross-border services on the island of Ireland, as there is no such single piece of engineering structure on the island of Ireland. The proposed Decision refers specifically to the Channel Tunnel Fixed Link. These proposals therefore do not have an impact on the UK's obligations under the Northern Ireland Protocol.

## **CONSULTATION**

25. 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.
26. Feedback from engagement with relevant parties to date regarding arrangements for the Channel Tunnel, and in particular in relation to rail safety, suggests that stakeholders support maintaining a unified safety regime for the Channel Tunnel, which is currently overseen by the IGC, once the Transition Period has ended. As explained in paragraph 21, the unified safety regime for the Channel Tunnel has been in place for over 30 years and is generally perceived to have been an effective means of maintaining safety standards and high levels of binational cooperation on safety matters for the Channel Tunnel. The Government shares this view. 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**

27. The financial implications of these proposals are considered neutral. This is because the proposals would merely continue the current arrangements regarding the recognition of the IGC as the binational safety authority for the Channel Tunnel.



**Rachel Maclean MP**

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