



Department
for Transport

Transposition of Directive 2012/34/EU:

Establishing a Single European Railway Area (Recast)

March 2015

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Foreword

This consultation seeks your views on the Department for Transport's ("the Department's") proposals to transpose European Directive (2012/34/EU) on establishing a Single European Railway Area (Recast) ("the Directive") for the UK.

EU rail legislation has consistently encouraged competitiveness and market opening, with the first major law in this direction dating back to 1991. Opening up national freight and passenger markets to cross-border competition has been a major step towards the creation of an integrated European railway area and of a genuine EU internal market for rail. Greater competition will help to create a more efficient and customer-responsive industry.

The relevant areas of EU legislation in place prior to the Directive are currently implemented in Great Britain by: the Railways Infrastructure (Access and Management) Regulations 2005 and the Railway (Licensing of Railway Undertakings) Regulations 2005 ("the 2005 Regulations"); the regulatory and funding provisions that were put in place during GB rail privatisation via the 1993 Railways Act and subsequently the Railways Act 2005; and legislation relating to the Channel Tunnel. Although the Directive repeals and re-enacts a large amount of EU law in a consolidated form, much of this involves no substantive change in the law. This Consultation Document does not cover areas where the existing EU legislation remains the same (and is therefore already implemented in the UK). This also applies where optional provisions remain the same.

Executive summary

- 1.1 The draft Railways Infrastructure (Access and Management) and Railways (Licensing of Railway Undertakings) (Amendment) Regulations 2015 at Annex Y (“the 2015 Regulations”) are designed to implement the Directive.
- 1.2 The Directive repeals and consolidates a number of previous European Directives which have already been transposed in the UK by the following:
 - a) The Railways Infrastructure (Access and Management) Regulations 2005¹
 - b) The Railway (Licensing of Railway Undertakings) Regulations 2005²
 - c) The Channel Tunnel (International Arrangements) Order 2005 (as amended)³, which implements the relevant legislation applicable to the Channel Tunnel.
- 1.3 Once made, the 2015 Regulations will apply to England, Scotland and Wales. Northern Ireland will implement the Directive separately.
- 1.4 Previous EU Directives, which the present Directive repeals and consolidates, were implemented for the Channel Tunnel through bi-national regulations made by the UK/French Intergovernmental Commission (the IGC) established under the Treaty of Canterbury⁴. For the UK these were given effect by orders made under the Channel Tunnel Act 1987.
- 1.5 In December last year, the Department consulted on proposals to transfer the function of economic regulation for the UK side of Tunnel from the IGC to the Office of Rail Regulation (responsibility for the French side would transfer to its national rail regulator,

¹ S.I. 2005/3049 (available from http://www.legislation.gov.uk/uksi/2005/3049/pdfs/uksi_20053049_en.pdf)

² S.I. 2005/3050 (available from http://www.legislation.gov.uk/uksi/2005/3050/pdfs/uksi_20053050_en.pdf)

³ S.I. 2005/3207 (available from <http://www.legislation.gov.uk/uksi/2005/3207/contents/made>), amended by SI 2008/2366 (available from <http://www.legislation.gov.uk/uksi/2008/2366/contents/made>), and SI 2009/2081 (available from <http://www.legislation.gov.uk/uksi/2009/2081/contents/made>)

⁴ Reference to be inserted

ARAF).⁵ Under these proposals, the instrument at c) above will be revoked and replaced by a new order, the Channel Tunnel (International Arrangements) (Charging Framework and Transfer of Economic Regulation Functions) Order 2015 and this will transfer economic regulation functions to the ORR and ARAF. In parallel, the Railways Infrastructure (Access and Management) Regulations 2005 will be amended, to extend their scope (including the powers of the ORR) to the UK side of the Tunnel. There will however continue to be arrangements in place for close collaboration and coordination between the two national regulators as regards the Tunnel.

- 1.6 The Government expects shortly to respond to the outcome of this consultation. Provided the proposals as consulted on are carried through, the intention would then be for the 2015 Regulations to consolidate those amendments in the new regulations. This will mean that the 2015 Regulations would therefore extend to the Channel Tunnel as well as mainland Great Britain with the ORR continuing to regulate both for mainland Great Britain as well as the UK side of the Channel Tunnel. .
- 1.7 It is the Government's policy to adopt a "copy out" approach to the transposition of European requirements wherever possible, to avoid placing any additional regulatory burdens or costs on UK business. The Department regards a provision as being copied out if it is implemented by cross-reference or the language of the Directive is used with modifications only where necessary. However, a strict copy out approach was not followed in the 2005 Regulations by the UK Government, and the same is true of the bi-national regulation for the Channel Tunnel. This means that following a copy out approach to implement the relatively minor changes made by this Directive would involve revoking the 2005 Regulations and replacing them with a single document containing new and unfamiliar terminology and structure, often where no change in meaning was intended. Therefore to reduce the burden and costs on businesses of adapting to new copy-out regulations, on this occasion the Department is opting not to use copy-out, and has based the 2015 Regulations on the existing 2005 Regulations.
- 1.8 A Transposition Table which explains where copy out has not been followed can be found at Annex Z. Although the Department would

⁵ <https://www.gov.uk/government/consultations/channel-tunnel-legislation-to-transfer-economic-regulation> .

welcome comments on any aspect of the draft 2015 Regulations, respondents should bear in mind that because the 2005 Regulations fully transposed the previous EU legislation which the Directive repeals and then consolidates, most of these provisions are already part of UK law. Respondents are also reminded that the UK is required to implement into national law the additional mandatory requirements that the Directive introduces.

- 1.9 The draft 2015 Regulations make amendments to existing policy which relate to the access and management of railway infrastructure (including services), the licensing of railway undertakings and the role of the Office of Rail Regulation. These changes are highly likely to be of interest to all passenger and freight railway operators, all infrastructure managers, operators of service facilities, and the rail regulator.

Legal Disclaimer

- 1.10 This consultation document is intended to explain how the UK intends to transpose the requirements of the Directive to the UK (including the Channel Tunnel). However, it is not a legal document and should not be relied upon as a primary source of rights or obligations, nor as an interpretative tool. Consultees should refer to the source legislation and take their own legal advice concerning interpretation

How to respond

- 2.1 The consultation period began on 24 March 2015 and will run until 18 May 2015. Please ensure that your response reaches us before the closing date. If you would like further copies of this consultation document, it can be found at www.dft.gov.uk/consultations or you can contact Michelle Cole if you would like alternative formats (Braille, audio CD, etc).

Please send consultation responses to:

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- 2.2 When responding, please state whether you are responding as an individual or representing the views of an organisation. If responding on behalf of a larger organisation, please make it clear who the organisation represents and, where applicable, how the views of members were assembled.
- 2.3 If you have any suggestions of others who may wish to be involved in this process please contact us.
- 2.4 We would like to take this opportunity to thank those who have considered and responded to the Department's consultation in advance. We do not intend to acknowledge individual responses unless by request.

Freedom of Information

- 2.5 Information provided in response to this consultation, including personal information, may be subject to publication or disclosure in accordance with the Freedom of Information Act 2000 (FOIA) or the Environmental Information Regulations 2004.
- 2.6 If you want information that you provide to be treated as confidential, please be aware that, under the FOIA, there is a statutory Code of Practice with which public authorities must comply and which deals, amongst other things, with obligations of confidence.
- 2.7 In view of this it would be helpful if you could explain to us why you regard the information you have provided as confidential. If we receive a request for disclosure of the information, we will take full account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstances. An automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded as binding on the Department.
- 2.8 The Department will process your personal data in accordance with the Data Protection Act (DPA) and in the majority of circumstances this will mean that your personal data will not be disclosed to third parties.

The proposals

Background

- 3.1 Directive 2012/34/EU, which the draft 2015 Regulations are designed to implement, repeals and consolidates (“recasts”) a tranche of previous EU legislation (known as the 1st Railway Package) into one place, for ease of reference, but also makes changes to substantive law in some places. These changes are designed to address several issues in the EU railway market such as: low levels of competition within rail; low levels of public and private investment in railways; and inadequate regulatory oversight by national authorities within EU Member States.
- 3.2 The Directive aims to address these issues by: increasing the responsibilities for service facility operators and infrastructure managers; improving transparency for access to rail related services; and requiring cross-border communications between infrastructure managers on charging and access, to foster competition and non-discriminatory behaviour. Member states are required to publish an infrastructure development strategy and have in place an agreement to show investment in the railway and require the infrastructure manager to reduce costs. These requirements are aimed at encouraging public and private investment in the railways. Regulatory body competence and powers are enhanced and their independence increased to ensure regulatory oversight is fair and non-discriminatory.
- 3.3 Under provisions included in the Directive, the European Commission is required to adopt a number of “implementing or delegated acts” (i.e. tertiary legislation applicable in the UK and other EU Member States) which, broadly, may set out further detail regarding the implementation of provisions in the Directive. Implementing Acts and Delegated Acts are separately negotiated by the European Commission and Member States. They have a direct effect in GB and therefore do not form a part of this consultation.

Impact Analysis Data Collection

- 3.4 The Consultation Questions section asks some specific questions about the chosen implementation method, the decision to keep the optional derogations which were previously transposed and the regulatory body's powers to fine.
- 3.5 In drafting the impact assessment there were a number of areas where quantitative information was not available to inform the Department's assessment. Consultees are therefore provided with the opportunity to advise whether they believe they will be affected by the individual measures. Where assertions are made that there will be a cost impact, consultees are asked to provide information to support these assertions.
- 3.6 The impact assessment at Annex W groups together the changes which the Directive brings about into themes which are numbered 1 – 10. The changes are summarised in a table in the following section; however, it is recommended that the table is read in conjunction with the corresponding theme in the impact assessment which provides more in depth information about the change and details the Department's qualitative analysis.
- 3.7 The impact assessment (in Theme 4B and Theme 8) details the provisions which have been added to the Directive on the differentiation of track access charges on ETCS corridors specified in Commission Decision 2009/561/EC. Because this Decision does not specify any ETCS corridors in the UK, the Department has assumed that both of these provisions will not apply in the UK. Therefore both Theme 4A and Theme 8 have been assessed in the impact assessment as having zero impact and for simplification have been removed from the table in the section below.

Consultation questions

4.1 Small and Micro Businesses

4.1.1 Section 1.6.1 of the Better Regulation Framework Manual describes a small business as a business with up to 49 full-time equivalent employees. A micro business is described as having up to 10 employees.

Question 1: *Are you considered to be a small or micro business according to the Better Regulation Framework Manual?*

4.2 Implementation of the Directive - draft Railways Infrastructure (Access and Management) and Railway (Licensing of Railway Undertakings) Regulations 2015

4.2.1 As outlined in paragraph 1.4 above the Department has based the draft 2015 Regulations on the existing 2005 Regulations, rather than following a strict “copy out” approach to transpose the Directive. This is because many of the requirements of the Directive are contained in existing EU legislation and have already been transposed into national UK law. Using copy out would introduce completely new and unfamiliar drafting which would impose additional and unnecessary burdens on industry.

4.2.2 The majority of provisions which were originally transposed have not changed and therefore have not been amended. The proposed new drafting, uses copy out wherever possible. Where it has not been possible to use copy out for new provisions, the reasoning is explained in the transposition table which can be found at Annex Z.

4.2.3 Please note that, although the draft 2015 Regulations accurately reflect the policy intention, minor changes may be made to the final text as a result of the comments received during this consultation, and final legal checks.

Question 2: *The Department has assessed the approach of not using copy out described in 1.4 and 4.2.1 of this document as being the least burdensome and the least costly to businesses. Do you agree with this assessment?*

If you do not agree with this assessment the Department would like to invite consultees to provide evidence on the likely benefits that would be incurred as a result of using a copy out approach to transpose the Directive.

4.3 Derogations

4.3.1 Article 2(2) and (3) of the Directive allows Member States an optional derogation to exclude some railway undertakings from the scope of certain parts of the Directive. The optional exclusions are not new and were previously transposed into national UK law. The Department has taken the decision to retain the optional derogation in the Regulations. We have assumed that this will keep the cost and burden on businesses as low as possible.

Question 3: *Do you agree with the Department's decision to retain the derogations in the Regulations?*

If you do not agree please provide further detail.

4.4 Regulatory body power of enforcement

4.4.1 Article 56(9) of the Directive provides that regulatory bodies shall have the power to enforce their decisions with appropriate penalties, including fines.

4.4.2 At present the ORR does not have the power to impose a civil fine for a breach of the 2005 Regulations. Regulation 36 of the 2005 Regulations enables the ORR to bring civil proceedings, seeking interdict, injunction or any other relief, in respect of a person's failure to comply with the specific regulations listed. If the court order obtained is not complied with, the court may impose a fine

for contempt. However, whether a fine is imposed in these circumstances is at the discretion of the court, not the ORR.

4.4.3 Three possibilities have been considered to implement this additional enforcement mechanism for the 2015 Regulations.

- a) The first option is to leave the enforcement mechanism as it is, however this may be seen as inadequate implementation of the Directive and may put the UK at risk of infraction.
- b) The second option is to put in place a penalties regime akin to sections 55-57 of the Railways Act 1993, which would apply to breaches of the Directive and enable the ORR to impose civil fines to enforce their decisions. This is considered to be the most effective and proportionate option.
- c) The third option is to put in place a wholly new criminal regime. However the Department considers this to be disproportionate and, as this option would result in the power to fine being with the courts rather than the ORR, this may raise questions regarding compliance with the Directive.

4.4.4 As the Department considers that the second option fulfils the requirements of the Directive the most effectively, we intend that the 2015 Regulations will give effect to that option. Legal drafting on this is not in the current draft 2015 Regulations. Drafting will be finalised following the consideration of consultation responses.

Question 4: *Do you think that applying a penalties regime akin to sections 55-57A of the Railways Act 1993 in relation to breaches of requirements under the 2015 Regulations would give the ORR appropriate and adequate powers to enforce its decisions under the Directive?
If not please provide details, including a suggested alternative approach.*

4.5 The changes implemented by the Directive

4.5.1 The Directive introduces a number of new provisions, which have been summarised in the table below. The Department has

assessed these in further detail in the impact assessment, and each of the new provisions are set out as themes 1 – 10.

Question 5: *Do you believe that any of the new provisions will impact on your business?*

If yes, please fill out the table below. Where you indicate a cost to your business, please ensure this is quantified.

Theme	Mandatory / Optional	Summary of change	Estimated Cost (£)	Benefit
1 (1A, 1B and 1C)	Mandatory	Additional service facilities have been added to Annex II paragraphs 2, 3 and 4.		
1D	Mandatory	Additional requirements placed upon a service facility operator where they refuse an access request to a service facility which they operate.		
1E	Mandatory	Additional obligations for a service facility operator that is also considered to hold a dominant position in the national railway transport services market.		
1F	Mandatory	The criteria which service facility operators can take into account when setting charges for access to service facilities and for the infrastructure connecting them has been amended by the Directive.		
1G	Mandatory	Adds the requirement for a service facility operator to advertise a service facility from Annex II para 2 for lease or rent where it has not been used for at least 2 consecutive years.		
1H	Mandatory	The Directive now requires railway undertakings which operate both rail freight and rail passenger services to keep separate profit and loss accounts for each of these services.		

1I	Mandatory	The Directive amends the levy of an optional non-usage charge on applicants which were allocated a train path to mandatory in the event of their <i>regular failure</i> to use allocated paths or part of them. The criteria for the application of this charge must be published in the network statements.		
2A	Mandatory	Infrastructure managers are now explicitly required to establish a method apportioning costs to the <i>different categories</i> of services offered to train operators.		
2B	Mandatory	The Network Statement must now be published on an online portal, be published in at least 2 EU languages, and be subject to scrutiny by the regulatory body for discriminatory clauses. It is also now required to include an additional 7 elements.		
2C	Mandatory	The Directive states that mark-ups may be levied “to obtain full recovery of the costs incurred by the infrastructure manager”, “while guaranteeing optimal competitiveness of rail market segments”. Previously the requirement was “while guaranteeing optimum competitiveness in particular of international rail freight”. The infrastructure manager is required to evaluate the relevance of mark-ups for different market segments considering at least the pairs listed in Annex VI and retaining the relevant ones.		
3A	Mandatory	Regulatory bodies will be required to cooperate with regulatory bodies in other Member States.		
3B	Mandatory	Infrastructure managers will be required to cooperate with one another and with infrastructure managers in other member states.		

		Specifically in areas of charging, performance, and capacity allocation.		
3C	Mandatory	Member States are now required to ensure cross-border agreements do not discriminate between railway undertakings or restrict their freedom to operate cross-border services. Member States are required to notify the European Commission before concluding any new cross border agreement with other Member States or amending any existing cross border agreement.		
4A	Mandatory	There are new obligations for Member States and infrastructure manager to have in place an infrastructure development strategy and contractual agreement.		
5A	Mandatory	Additional requirements have been added to ensure the independence of the regulatory body from Government, infrastructure managers and railway undertakings.		
5B	Mandatory	Additional powers have been added to give the regulatory body more responsibilities to ensure non-discriminatory behaviour, competitiveness in the market, co-operation with safety authorities and an amended process for appeals and information requests.		
6	Mandatory	Minor changes to the requirements for the licencing of a railway undertaking.		
7A	Mandatory	The Directive allows certain railway undertakings to be excluded from Chapter II. Those railway undertakings are: railway undertakings which only operate urban, suburban or regional services on local and regional stand-alone networks, for transport services on railway infrastructure or on networks intended only for the		

		operation of urban or suburban rail services.		
7B	Mandatory	the Directive as a whole is now not applicable to “undertakings the business of which is limited to providing solely shuttle services for road vehicles through undersea tunnels or to transport operations in the form of shuttle services for road vehicles through such tunnels except Article 6(1) and (4) and Articles 10, 11, 12 and 28.		
9	Optional	The Directive gives Member States the option of taking the risk profile of different types of rail services into account in determining insurance requirements for railway undertakings.		
10	Optional	The Directive allows Member States to extend ETCS-differentiated charging beyond ETCS corridors to railways lines which were not specified in Commission Decision 2009/561/EC.		

Question 6: *Are there any areas which we have not covered where you believe your business will be impacted, either positively or negatively? If so please cover this here. If you make assertions that your business will impacted financially, please provide analysis to evidence your assertion.*

5 Statutory Review

- 5.1** It is the Government’s policy that, unless a relevant exemption applies, regulations transposing European Union legislation should include a statutory obligation on the Secretary of State to review

them every five years. We will consider, in light of information gathered as part of the consultation exercise, whether a statutory review clause should be included in the 2015 Regulations.

What will happen next

A summary of responses, including the next steps, will be published within three months of the consultation closing on www.dft.gov.uk/consultations. Paper copies will be available on request.

Annex W Impact Assessment

When responding to the consultation, please comment on the analysis of costs and benefits, giving supporting evidence wherever possible.

Please also suggest any alternative methods for reaching the objective and highlight any possible unintended consequences of the policy, and practical enforcement or implementation issues.

Annex X Consultation principles

The consultation is being conducted in line with the Government's key consultation principles which are listed below. Further information is available on the Better Regulation Executive website at <https://www.gov.uk/government/publications/consultation-principles-guidance>

If you have any comments about the consultation process please contact:

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Email consultation@dft.gsi.gov.uk

Please do not send consultation responses to this address.

Annex Y The Railways
Infrastructure (Access and
Management) and Railway
(Licensing of Railway Undertakings)
(Amendment) Regulations 2015

Annex Z Transposition table