

Government response to consultation on the Channel Tunnel (Safety) (Amendment) Order 2013

Summary

i) On 15 November 2012, the Department for Transport (“the Department”) published a consultation paper on a draft Channel Tunnel (Safety) (Amendment) Order (“the Order”). The consultation, which closed on 14 December 2012, outlined proposals to amend the Channel Tunnel (Safety) Order 2007 [S.I. 2007/3531] (“the 2007 Order”) which are necessary to transpose:

- **Directive 2008/110/EC** which requires an entity in charge of maintenance (“ECM”) to be identified in the National Vehicle Register (“NVR”) and to establish an appropriate maintenance regime for all rail vehicles;
- **Directive 2009/149/EC** which includes a revised methodology to calculate common safety indicators (“CSIs”); and
- **Directive 2008/57/EC** in respect of the additional authorisation of rail vehicles for operation in the Channel Tunnel.

ii) The Railways and Other Guided Transport Systems (Safety) Regulations 2011 [S.I. 2011/1860] have already transposed those provisions in respect of safety requirements in mainland Great Britain (the Railways (Safety Management) (Amendment) Regulations (Northern Ireland) 2011 [S.I. 2011/261] implemented these provisions in Northern Ireland) and the Railways (Interoperability) Regulations 2011 [S.I. 2011/3066], which also cover the British section of the Channel Tunnel for all other purposes, in respect of interoperability.

iii) Due to its cross-border nature, implementation for the Channel Tunnel (“the Tunnel”) first has to be agreed between the United Kingdom and France Governments. The mechanism for doing this is through a bi-national regulation made by the Channel Tunnel Intergovernmental Commission (“IGC”) under the authority of the Treaty of Canterbury 1986¹ (“the Treaty”). Under the Treaty, the IGC has the function of supervising all matters concerning the construction of the Tunnel, for and on behalf of both Governments, and serves as the relevant safety authority. Once a bi-national regulation is made by the IGC, it then has to be given legal effect in accordance with the Treaty in both national jurisdictions. The Order will therefore give legal effect in the United Kingdom to a bi-national regulation made by the IGC to implement the above directives.

iv) Eleven responses were received to the consultation and **Table 1** outlines a breakdown of the sectors from which these were received (a list of

¹ Available from www.channeltunneligc.co.uk/Essential-texts,24.html?lang=en.

responding organisations can be found at **page 10**). A majority were supportive of the proposals although some organisations provided detailed drafting suggestions to which the Government's response, which included making a number of minor amendments to the text of the Order, is outlined below. Several respondents also raised broader issues surrounding the governance structure of the Tunnel, and in particular, the transparency of procedures and rules. Although these were beyond the scope of the consultation exercise, where appropriate, the Government's response is also noted below.

Table 1: Responding Organisations

Industry	8
Government	2
Other	1
Total	11

v) The Government would like to take this opportunity to thank all those who have considered and responded to the consultation. There follows a summary of those responses which indicates where stakeholder proposals have been accepted or rejected and also notes any other additional drafting amendments which have been made to the Order post-consultation.

vi) The amending bi-national safety regulation, which was signed by the British and French delegations to the IGC in Paris on 6 February 2013, will come into force simultaneously in both the United Kingdom and France once both countries have completed their respective administrative and Parliamentary procedures in due course.

The consultation asked six questions:

Question 1: Do stakeholders agree with the amendments proposed to the definitions in Chapter 1 [Definitions]?

1.1 A majority of respondents who expressed a preference (nine) agreed with the proposed amendments.

1.2 Only two respondents suggested any revisions and these were both in relation to the definition of “ECM”. Both indicated that, in their view, the text was not consistent with Directive 2004/49/EC (“the Railway Safety Directive”) since it did not explicitly state that a railway undertaking, infrastructure manager or keeper or any other entity could perform this function. However, the Government believes that the proposed definition is sufficiently clear in this respect and notes that it copies out the definition of an “entity in charge of maintenance” at article 3(t) of Directive 2004/49/EC, combined with the provisions of article 14a(2) of that Directive, as inserted by Directive 2008/110/EC. The existing definition does not preclude any entity from becoming an ECM and further amendments have therefore been rejected. The IGC will make this position clear in its guidance on the revisions.

Question 2: Do stakeholders agree with the amendments proposed to the duties and responsibilities in Chapter 2 [Duties & Responsibilities]?

2.1 Of those who expressed a preference (eight) a majority agreed with the proposed amendments although several respondents made detailed drafting comments or sought clarification on specific proposals. These are outlined below together with the Government’s response.

Article 4(iii)

Proposal: The cross reference to Article 10 of Directive 2008/57/EC was queried in relation to the supervision of the compliance of interoperability constituents with essential requirements.

Response: This has now been corrected to refer to Article 14 of Directive 2008/57/EC which concerns the non-compliance of interoperability constituents with essential requirements.

Article 4(v)

Proposal: Clarification was requested that the authorisation of any vehicles in relation to this Article would be in accordance with the provisions of Directive 2008/57/EC.

Response: The Government considers that the amendments do not alter the existing provisions in place concerning the authorisation of such vehicles in accordance with Article 4(v).

Article 4(x)

Proposal: Clarification was requested on whether an NVR existed for the Fixed Link (the NVR is a non-operational database containing basic details, such as the owner and keeper, of all rail vehicles operated within the United Kingdom).

Response: The United Kingdom has established a single NVR which is managed by Network Rail Infrastructure Limited on behalf of the Secretary of State. Vehicles should be recorded in the country in which they were first authorised and the Government has written to the IGC to ask that they seek the Concessionaires assurance that vehicles which operate solely within the fixed link be registered in the NVR of either the United Kingdom or France.

Article 5A

Proposal: One respondent noted that the text differed between the English and French translations of this Article.

Response: It is considered that the two texts had the same meaning but they have nevertheless now been brought closer together.

Article 15

Proposal: One respondent suggested that the text did not adequately transpose the requirements of the Railway Safety Directive and that there should be a more explicit boundary between the responsibilities of the railway undertaking and the ECM although no evidence was supplied to support this position.

Response: It is noted that these provisions have been replicated in full without amendment from the 2007 Order (save for the consolidation of Articles 15(iv) and 15(v)). This is not, therefore, a transposition issue and following further consideration the proposal has not been taken forward.

Article 17

Proposal: The list of bodies which are able to see the binding unified safety rules applicable to the Tunnel should include “*applicants for a vehicle authorisation*” as well as the other bodies listed.

Response: The Government accepts that such bodies which may, for example, include vehicle manufacturers should have a legal right to have access to these rules. In practice, it notes that Article 8(1) of the Railway Safety Directive places a statutory obligation on European Union Member States to ensure that such rules are “...*published and made available...*”

Following a comprehensive review of the unified rules for the Tunnel, including public consultation and a technical opinion from the European Railway Agency, the IGC has updated and significantly reduced the specific safety and technical requirements for the Tunnel. The IGC plans to publish the updated rules on its web site (www.channeltunneligc.co.uk) by the time the Order comes into force. These rules have also been supplied for inclusion

in the European Railway Agency's "Reference Document" database of rail vehicle authorisation rules (more details about the database are available from www.era.europa.eu/Core-Activities/Cross-Acceptance/Pages/Reference-Document-Database.aspx).

Question 3: Do stakeholders agree with the amendments proposed to safety management and certification in Chapter 3 [Safety Management Systems, Safety authorisation of Concessionaires and Part B certification of railway undertakings, Entity in charge of maintenance of a vehicle operated only within the limits of the Fixed Link]?

3.1 Of those who expressed a preference (ten) a majority agreed with the proposed amendments although several respondents made detailed drafting comments or sought clarification on specific proposals. These are outlined below together with the Government's response.

Article 34(a)

Proposal: Clarification on the scope of this Article was requested to indicate to which vehicles it is applicable.

Response: The Article is only applicable to the Concessionaires, who operate vehicles only within the limits of the Fixed Link. It is noted that no amendments have been made to the scope of these provisions by the Order.

Proposal: To include the word "trackside" in front of signalling for the purposes of this Article.

Response: This has been rejected since it is clear that its scope refers to any issues covered by the Safety Management System of the Concessionaires. These may include signalling systems, such as on-board CCS subsystems, installed in any vehicles operated by the Concessionaires.

Article 34(c)

Proposal: Should the issue concern the modification of a Tunnel shuttle vehicle, the Order should be amended to apply the provisions of Article 4(v).

Response: This suggestion has been rejected since the Article in question refers to safety authorisation and not the process for placing in service which is the preserve of Article 4(v).

Article 42(ii)(c) and (d)

Proposal: To remove the wording "other rules" from this Article.

Response: The text of this Article is copied out from Annex IV of the Railway Safety Directive and the proposal has therefore been rejected. However, the Government is clear that the only national rules which are applicable to the Tunnel in this context are those made in accordance with the Railway Safety Directive or Directive 2008/57/EC, and that neither the IGC or infrastructure manager may introduce "other rules" which go beyond these.

Article 48

Proposal: To reinstate this Article which required the IGC to seek the Concessionaires' opinion should it receive an application from a railway undertaking for a Part B safety certificate.

Response: While the Government agrees that consultation between the IGC and the Concessionaires is important in such circumstances, it does not consider that it is necessary or proper to retain a specific statutory obligation since the Railway Safety Directive does not provide for one. Retention of this Article would therefore be considered "gold plating". In practical terms, railway undertakings will have to work closely with the infrastructure manager in order to gain the understanding required to meet the network-specific requirements for a Part B (safety) certificate, and in particular, the operating rules and procedures. The IGC will make this expectation clear in its guidance on the revisions.

Article 52(c)

Proposal: To add an additional cross-reference to this Article referring to Article 4(iv) of the Order.

Response: This proposal has been rejected since the provisions of Article 52(c) relate to the IGC's procedures for considering amendment to a railway undertaking's safety certificate whenever it proposes to alter substantially the type or extent of its operations. Article 4(iv) indicates that one of the IGC's roles is to authorise the placing in service of any new or substantially modified vehicle within the boundaries of the Fixed Link. This authorisation process is already provided for by Directive 2008/57/EC.

Article 55A

Proposal: The provisions of Article 55A(ii) should be amended to recognise the transitional provisions in Article 12 of Commission Regulation 445/2011 (in relation to the certification of freight wagon ECMs).

Response: An amendment has been made to recognise these transitional provisions through a change to the definition of "ECM Certificate" in Article 1 of the Order which now covers "...a certificate or self-declaration recognised as being equivalent for those purposes in accordance with Article 12(3) to 12(7) of the ECM Regulation."

Article 55B

Proposal: The text should be amended to refer to ensuring that vehicles are in a "...safe state of running" rather than "...in safe working order" to bring it into line with the wording used in Directive 2008/110/EC.

Response: This amendment has been made.

One respondent suggested removing both Articles 55A and 55B on the basis that these would only apply to vehicles operated within the limits of the Fixed Link and it believed that these were the subject of a separate legal regime referred to in the Article 1 definition of “Railway undertaking” although other respondents supported their inclusion.

These Articles have been retained, incorporating the amendments noted above, since they are required in order to transpose the requirements of Directive 2008/110/EC to the Tunnel (which they copy out).

Question 4: Do stakeholders agree with the amendments proposed to staff training in Chapter 4?

4.1 All responses which expressed a preference (seven) agreed that the minor amendments would achieve their purpose of enhancing regulatory clarity with no further changes being proposed.

Question 5: Do stakeholders agree with the amendments proposed to the rolling stock provisions in Chapter 5?

5.1 Of those who expressed a preference (ten) a majority agreed with the proposed amendment although several respondents made detailed drafting comments or sought clarification on the proposals. These are outlined below together with the Government’s responses.

Article 62

Proposal: The French translation of the text adds the following additional material to the end of the last sentence “...or if the vehicle runs complying with the requirements of the concerned TSIs” (TSIs are technical specifications for interoperability). If this addition is retained, the “or” should be changed to an “and.”

Response: This addition has been made to the English text which now reads “...or if the vehicles run under the conditions specified in any corresponding TSIs.” The use of the word “or” in this context has been copied out from Article 23(1) of Directive 2008/57/EC and has therefore been retained.

A further proposal to amend this Article to reflect the current non-conformity of the Tunnel with TSIs was rejected since no supporting evidence of a need for it or suggestions as to how this should be implemented were supplied. For the sake of clarity, these provisions have been added to the bi-national regulation to transpose the requirements of Directive 2008/57/EC which ensure that, should the Tunnel become fully TSI compliant (without specific cases and without open points) in future, or should the vehicles run under the conditions specified in any corresponding TSIs, fully TSI compliant vehicles must not be subjected to any additional authorisation procedures.

Article 63

Proposal: The removal of the provision requiring the IGC to seek the advice of the Concessionaires on the application for a vehicle authorisation was queried since one respondent indicated that these were essential to maintaining technical co-ordination on these matters.

Response: While the Government agrees that consultation between the IGC and the Concessionaires is in practice clearly indispensable, it does not consider that a specific legal obligation is necessary since Directive 2008/57/EC, implemented in this respect by specific cross-references in the proposed amendments, already defines the procedure which must be followed by the IGC for the authorisation of TSI-conforming and non-TSI conforming vehicles.

In all circumstances until the Tunnel is fully TSI-compliant, the IGC (as the relevant safety authority) is required to check the technical compatibility between the vehicle and the infrastructure. In order to effectively carry out its functions the IGC will therefore have to consult, for example, with the relevant infrastructure manager and the Government expects that the Concessionaires will necessarily be included in this process (indeed, in developing the technical file required to support the authorisation process, the applicant will need to work closely with the Concessionaires). Retaining a specific legal obligation on the IGC to consult with the Concessionaires could therefore be construed as “gold plating” and the Government sees no cogent reason why the procedures or requirements for consultation in relation to authorisation for the Tunnel should differ from those which are applied in similar circumstances across the rest of the European rail network and in the rest of the United Kingdom.

Question 6: Do stakeholders agree that a reference to Annex 1 of the Railway Safety Directive (Common Safety Indicators) is more appropriate than replicating Annex 1 in its entirety as an Annex to the bi-national regulation?

6.1 Of those respondents who expressed a preference (nine), a majority (seven) agreed that a cross (ambulatory) reference to Annex 1 of the Railway Safety Directive, which contains those CSIs which must be reported by national safety authorities, was appropriate.

6.2 Two respondents noted that the 2007 Order included a provision which allowed the IGC to require additional, Tunnel-specific, indicators and queried whether these would be perpetuated. The Government has considered whether the inclusion of additional indicators beyond those required for the rest of the European railway network can be justified. No supporting evidence was supplied by respondents as to the rationale behind this provision, which additional indicators might be required, or their purpose.

6.3 Perpetuation of this requirement would open the infrastructure manager and any railway undertakings operating through the Tunnel to

additional regulatory burdens and costs and would represent “gold plating” of the requirements of the Railway Safety Directive. The Government notes that the IGC already has powers to obtain information and conduct investigations, for example, under the bi-national regulation and the Concession. The Government has therefore confirmed its view that these powers should be removed from the Order.

Question 7: Do stakeholders agree with the analysis of the costs and benefits in the Impact Assessment?

7.1 Of those respondents who expressed a preference (three), all agreed that the analysis of costs and benefits in the impact assessment were accurate. One respondent suggested that further costs may arise from the Tunnel’s current governance structure but indicated that these could not be accurately quantified. Accordingly, no amendments have been made to the impact assessment as a result of consultation responses.

7.2 The Government has noted that several respondents indicated that they did not feel confident enough to comment on the impact assessment since they did not have the necessary economic expertise available.

8 Other Post-Consultation Drafting Amendments

8.1 Aside from the amendments noted in the sections above which have been made to pick up issues raised in consultation responses, as indicated in **Paragraph 3.1.5** of the consultation paper, a number of additional revisions have been made to the Schedule to the Order following further consideration to improve readability and clarity of the legislative provisions. No amendments of substance have been made, but for completeness, the main changes are listed below:

Preamble

A number of the references to relevant European Directives and Regulations has been clarified and a new paragraph added to explicitly refer to European Commission Regulation 445/2011 which prescribes a system of certification of ECMs for freight wagons. This Regulation is referred to in the Order as “*the ECM Regulation*”.

Definitions

The definition of “*Accident*” in Article 1(i) has been amended to bring it further into line with the definition in Article 3 of the Railway Safety Directive.

The definition of “*Railway system*” in Article 1(xix)(a) has been amended to bring it into line with the definition in Article 2(o) of Directive 2008/57/EC replacing the word “tracks” with “*lines*” and “equipment” with “*installations*”.

9 List of Responding Organisations

London Sleeper Company
Transport Scotland
Department for Regional Development Northern Ireland
Passenger Focus / London TravelWatch
Alstom
Private Wagon Federation
Railfuture
Eurostar
Eurotunnel
Association of Train Operating Companies (ATOC)
Société Nationale des Chemins de fer Français (SNCF)