



Department
for Transport

Consultation Response Report

Draft legislation to transfer economic regulation of the Channel Tunnel from the Intergovernmental Commission (IGC) to the Office of Rail Regulation (ORR) and establishing a streamlined and unified charging framework

March 2015

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Introduction

The Department for Transport's consultation began on 12 December 2014 and closed on 23 January 2015 and sought views on proposals to transfer economic regulation of the Channel Tunnel from the Intergovernmental Commission (IGC) to the Office of Rail Regulation (ORR) and put in place a unified and streamlined charging framework by 31 March 2015.

The consultation document is available on the Department's website at: <https://www.gov.uk/government/consultations/channel-tunnel-legislation-to-transfer-economic-regulation>

The Department is grateful for the feedback received in the consultation. The responses have been helpful in deciding the Department's next steps.

Overview

A total of 6 responses were received including 3 from freight or passenger operators with the remainder being made up of Infrastructure Managers and concessionaire. The breakdown of responses include:

Response	Total
Passenger Operator	1
Freight Operator	2
Infrastructure Manager	2
Infrastructure Concessionaire	1
Grand Total	6

The full list of respondents is at **Annex A**.

Consultation questions

Bi-national Regulation

The draft bi-national regulation will be made under the Treaty of Canterbury. It will apply to both the British and the French sides of the Tunnel. It removes the IGC's function as economic regulator under EU law, and puts in place a unified and streamlined charging framework (which appears in its Annex).

Question 1: Do you have any comments on the draft binational regulation? Please explain your reasons and add any additional comments you wish to make.

Question 2: Do you have any comments on the role of the IGC after the transfer of functions? Article 4 expressly provides that the bi-national regulation is without prejudice to the IGC's general role, under Article 10 of the Treaty of Canterbury, of supervising, in the name and on behalf of both Governments, all matters relating to the construction and operation of the Tunnel. Please explain your reasons and add any additional comments you wish to make.

Article 3 of the draft bi-national regulation requires co-operation between the two regulators, and makes provisions as to the processes to achieve

that result, taking into account the specific trans-border nature of the Channel Tunnel.

Question 3: Do you agree that arrangements to prevent conflicting decisions are best left to the regulators themselves? If not, please explain your reasons and what alternative method you consider would achieve this which would not be inconsistent with EU law, which does not allow disagreements between regulators to be settled by a third body. Please add any additional comments you wish to make.

The Recast Directive (like the First Package Directives which it replaces) provides for Member States to establish a Charging Framework. The draft Charging Framework in the Annex to the bi-national regulation, does, among other things, the following:

- it covers public funding for the Tunnel;*
- it deals with long-term costs. The Recast Directive includes provisions allowing infrastructure managers to recover the long-term costs of an infrastructure project through the charges, but they do not provide a definition of long-term costs. The Charging Framework is seeking to provide greater certainty for the infrastructure manager and its customers by providing a non-exhaustive list of the costs that can be considered to be “long-term costs” and making clear that long-term costs need to be spread over the life of the Concession.*
- it authorises the levying of mark-ups, should the infrastructure manager wish to do so and the conditions laid down in European legislation be fulfilled.*
- it requires the year-on-year decrease of certain categories of costs.*
- it prohibits double-recovery of costs.*

Question 4: Do you have any comments on Article 4(2) of the Charging Framework on what is considered “long term” costs? Please explain your reasons and add any additional comments you wish to make.

Question 5: Do you have any comments on the provision in Article 4(5) of the Charging Framework which provides for a year-on-year decrease, in real terms, of the charges levied to recover long-term costs? Please explain your reasons and add any additional comments you wish to make.

Question 6: Do you have any other additional comments on the bi-national regulation, including the charging framework?

The Railways Infrastructure (Access and Management) (Amendment) Regulations 2015

The proposed Railways Infrastructure (Access and Management) (Amendment) Regulations 2015 (the “amendment Regulations”) are intended to amend the existing 2005 Regulations¹ which implement the existing First Rail Package Directives². The amendment Regulations will amend the scope of the 2005 Regulations so as to include the Tunnel, which at present is outside scope. This will have the effect of extending the ORR’s jurisdiction to the Tunnel. The amendment Regulations will also enhance the ORR’s enforcement powers, so as to put beyond doubt the issues the Commission raised about the regulator’s independence and powers. The ORR will be given the power to issue directions, enforceable by court injunctions, when negotiations between infrastructure and applicant are likely to contravene the Regulations. Its power to obtain information will also be enhanced. Compliance with charging frameworks and the charging principles will also become enforceable by the ORR through court injunctions. These changes are intended to give effect to

¹ The Railways Infrastructure (Access and Management) Regulations 2005 (S.I. 2005/3049)

² i.e. Directives 1991/440/EEC and 2001/14/EC, both as amended. These are now replaced by the Recast Directive which is required to be implemented by Member States by 16 June 2015.

the commitments made in the agreement reached with the Commission on the infraction action.

Further regulations (on which there will be a separate consultation) are expected to be made later in 2015 to implement the Recast Directive more generally for Great Britain as a whole (including the Tunnel). (There will be separate regulations for Northern Ireland).

Question 7: Do you have any comments on the provisions in the draft amendment Regulations extending the ORR's jurisdiction to the Tunnel? If so, please explain your reasons and add any additional comments you wish to make.

Question 8: Do you have any comments on the provisions in the amendment Regulations enhancing enforcement powers? If so, please explain your reasons and add any additional comments you wish to make.

Question 9: Do you have any other additional comments on the draft Regulations?

The Channel Tunnel (International Arrangements) (Charging Framework and Transfer of Economic Regulation Functions) Order 2015

The proposed Channel Tunnel (International Arrangements) (Charging Framework and Transfer of Economic Regulation Functions) Order 2015 will give the force of law, in the UK, to the bi-national regulation. The Order will make supplemental provisions and savings, to ensure that the changes do not affect things done, or in the process of being done, at the time it enters into force, more than is necessary.

Question 10: Do you have any comments on Article 5, on supplemental provisions and savings? If so, please explain your reasons and add any additional comments you wish to make.

Question 11: Do you have any other additional comments on the draft Order?

Initial Assessment of Costs

Question 12: After considering the initial analysis of costs and benefits at **Annex A**, do you believe that the proposals will have a cost impact on your business? If so, please provide a quantitative analysis showing the cost on your business.

Question 13: Do you have any other comments on the costs or benefits associated with these proposals? If so, please explain your reasons and add any additional comments you wish to make.

Any other comments

Question 14: Do you have any other additional comments or points you wish to make on the proposals?

Summary of responses to consultation

Question 1: Do you have any comments on the draft binational regulation? Please explain your reasons and add any additional comments you wish to make.

While the majority of respondents had no specific comments on the draft binational regulation there were a couple of points raised. The enhancement of obligations on ORR and ARAF from 'mutual assistance' to 'close cooperation' was particularly welcomed. It was said that the existing EU legislation was designed for national state owned infrastructure managers, and that, therefore, the requirement to have one regulator per Member State may not have been designed for the situation where there might be several infrastructure managers in one Member State, particular when one runs a cross-border, indivisible piece of infrastructure. Applying European legislation could thus, it was said, lead to two regulators not acting in unison.

Question 2: Do you have any comments on the role of the IGC after the transfer of functions? Article 4 expressly provides that the bi-national regulation is without prejudice to the IGC's general role, under Article 10 of the Treaty of Canterbury, of supervising, in the name and on behalf of both Governments, all matters relating to the construction and operation

of the Tunnel. Please explain your reasons and add any additional comments you wish to make.

Overall respondents were supportive of the IGC retaining its functions and of the fact that its general supervisory role for the Tunnel would continue, which would enable it to perform its role more explicitly.

Specific comments included requests for confirmation that the IGC would keep its roles in safety and security, and questions about how these, which were linked to economic aspects, would be co-ordinated as they affected operational performance in the Tunnel. Concern was raised about any continuing role of the IGC in economic regulation, and consideration being given towards the costs IGC activities add to the rail industry which should bear some relation to the benefits delivered.

Article 3 of the draft bi-national regulation requires co-operation between the two regulators, and makes provisions as to the processes to achieve that result, taking into account the specific trans-border nature of the Channel Tunnel.

Question 3: Do you agree that arrangements to prevent conflicting decisions are best left to the regulators themselves? If not, please explain your reasons and what alternative method you consider would achieve this which would not be inconsistent with EU law, which does not allow disagreements between regulators to be settled by a third body. Please add any additional comments you wish to make.

All respondents commented on this question. The text in Article 3

compelling the two regulators to co-ordinate their decisions to avoid negative outcomes was broadly welcomed as the best approach and seen as a pragmatic solution meeting EU requirements by the majority. One respondent sought clarification of the legislative mechanisms supporting cooperation between the regulators, and sought confirmation that the regulatory bodies would be able to consult the IGC on any issues. Two respondents were particularly concerned that having two regulators of the Tunnel would be in contradiction of the spirit of the existing EU legislation, and would have the potential for divergent and contradictory opinions. Furthermore, the respondent argued that, under the Treaty of Canterbury and the Concession Agreement, there should be a single regulator applicable to the Fixed Link.

The Recast Directive (like the First Package Directives which it replaces) provides for Member States to establish a Charging Framework. The draft Charging Framework in the Annex to the bi-national regulation, does, among other things, the following:

- *it covers public funding for the Tunnel;*
- *it deals with long-term costs. The Recast Directive includes provisions allowing infrastructure managers to recover the long-term costs of an infrastructure project through the charges, but they do not provide a definition of long-term costs. the Charging Framework is seeking to provide greater certainty for the infrastructure manager and its customers by providing a non-exhaustive list of the costs that can be considered to be “long-term costs” and making clear that long-term costs need to be spread over the life of the Concession.*
- *it authorises the levying of mark-ups, should the infrastructure manager wish to do so and the conditions laid down in European legislation be fulfilled.*
- *it requires the year-on-year decrease of certain categories of costs.*

- it prohibits double-recovery of costs.

Question 4: Do you have any comments on Article 4(2) of the Charging Framework on what is considered “long term” costs? Please explain your reasons and add any additional comments you wish to make.

There were a wide variety of comments from respondents. One respondent was broadly content, but noted that since the original construction there had been changes to the existing debt that needed to be recognised in the assessment of long terms costs. Another noted that there was no widely accepted definition of “long term costs” but considered it reasonable to include enhancements costs in the definition.

Other comments included: concern about the statement that the framework was designed to reflect what the Government believed were existing practices, particularly in view of the fact that there are ongoing disputes as to what they are and whether they are compliant with EU law. Linked to this the respondent also considered that reference to “construction costs” should be deleted from the text. One respondent also questioned the provision requiring the infrastructure manager to balance its accounts, and said that the wording of the provision restricting public funding of the Tunnel did not correct reflect the Treaty of Canterbury. Finally, a respondent said that Articles 31 and 32 should be referenced in the bi-national regulation, on the grounds that they are called a “charging framework” by article 8(4).

Question 5: Do you have any comments on the provision in Article 4(5) of the Charging Framework which provides for a year-on-year decrease, in real terms, of the charges levied to recover long-term costs? Please

explain your reasons and add any additional comments you wish to make.

One respondent considered that a year on year increase of the charges at a rate inferior to inflation was a well established way of incentivising efficiency improvements but could not comment further on Article 4(5) as they were not close to the detail while another supported it as drafted.

Two respondents considered reference to the 1.1% reduction should be deleted for differing reasons: one thought the 1.1% reduction should be deleted because there can be other types of incentives than real-term price reductions, while the other considered that there could not be a reduction of the portion of charges levied to recover the long-term costs which, by essence, are those incurred initially, and which cannot be reduced.

Question 6: Do you have any other additional comments on the bi-national regulation, including the charging framework?

A number of additional comments were made by respondents: confirmation that the Implementing Act on the calculation of Direct Costs under the Recast of the First Railway Package would apply to Article 4(1); the need for the charging framework to consider infrastructure activity in neighbouring infrastructures to support efficient and optimal use of whole network capacity, and a provision requiring infrastructure managers to cooperate with each other, as per Article 37 of the Directive. Two respondents specifically sought clarification that the allocation of costs would be fair between “railways” and Shuttle services, and one suggested amending the wording to make this explicit.

The Railways Infrastructure (Access and Management) (Amendment) Regulations 2015

The proposed Railways Infrastructure (Access and Management) (Amendment) Regulations 2015 (the “amendment Regulations”) are intended to amend the existing 2005 Regulations³ which implement the existing First Rail Package Directives⁴. The amendment Regulations will amend the scope of the 2005 Regulations so as to include the Tunnel, which at present is outside scope. This will have the effect of extending the ORR’s jurisdiction to the Tunnel. The amendment Regulations will also enhance the ORR’s enforcement powers, so as to put beyond doubt the issues the Commission raised about the regulator’s independence and powers. The ORR will be given the power to issue directions, enforceable by court injunctions, when negotiations between infrastructure and applicant are likely to contravene the Regulations. Its power to obtain information will also be enhanced. Compliance with charging frameworks and the charging principles will also become enforceable by the ORR through court injunctions. These changes are intended to give effect to the commitments made in the agreement reached with the Commission on the infraction action.

Further regulations (on which there will be a separate consultation) are expected to be made later in 2015 to implement the Recast Directive more generally for Great Britain as a whole (including the Tunnel). (There will be separate regulations for Northern Ireland).

Question 7: Do you have any comments on the provisions in the draft amendment Regulations extending the ORR’s jurisdiction to the Tunnel?

³ The Railways Infrastructure (Access and Management) Regulations 2005 (S.I. 2005/3049)

⁴ i.e. Directives 1991/440/EEC and 2001/14/EC, both as amended. These are now replaced by the Recast Directive which is required to be implemented by Member States by 16 June 2015.

If so, please explain your reasons and add any additional comments you wish to make.

There were two responses to this question. One considered that the extension may trigger divergences in interpretation with ORR's French counterpart and as such there should only be one regulator for the Tunnel. The other respondent sought clarification of the regulatory impact of the changes for the period from 31 March 2015 to 16 June 2015. They state that not all provisions of the 2009 bi-national regulation are mirrored in the 2005 Regulation and that they are not sighted on the French arrangements. They would like a sliding transition, with the old provisions of the existing IGC regulations being repealed as the successor provisions in the new Regulations come into effect.

Question 8: Do you have any comments on the provisions in the amendment Regulations enhancing enforcement powers? If so, please explain your reasons and add any additional comments you wish to make.

There were only two responses to this question. One respondent considered that the approach proposed was appropriate. The other sought further clarification of whether the proposed amendment in Article 8, specifying a particular manner in which the regulator may exercise its existing duty to intervene in already supervised discussions on infrastructure charges, is necessary. It was considered that perhaps given the scope of the change for the proposal to be more clearly identified in the wider changes to the forthcoming Access and Management Regulations.

Question 9: Do you have any other additional comments on the draft Regulations?

Respondents did not have any additional comments over and above those already made.

The Channel Tunnel (International Arrangements) (Charging Framework and Transfer of Economic Regulation Functions) Order 2015

The proposed Channel Tunnel (International Arrangements) (Charging Framework and Transfer of Economic Regulation Functions) Order 2015 will give the force of law, in the UK, to the bi-national regulation. The Order will make supplemental provisions and savings, to ensure that the changes do not affect things done, or in the process of being done, at the time it enters into force, more than is necessary.

Question 10: Do you have any comments on Article 5, on supplemental provisions and savings? If so, please explain your reasons and add any additional comments you wish to make.

Apart from one respondent considering there was a material risk that the proposed on-going jurisdiction of the IGC in the policy and handling of the live appeals before the Paris Court of Appeals may cut across the regulatory jurisdiction and decision making of the independent regulators, there were no comments.

Question 11: Do you have any other additional comments on the draft Order?

Apart from one respondent querying the numbering protocol in the draft Order there were no additional comments over and above those already made.

Initial Assessment of Costs

Question 12: After considering the initial analysis of costs and benefits at **Annex A**, do you believe that the proposals will have a cost impact on your business? If so, please provide a quantitative analysis showing the cost on your business.

No respondents provided a quantitative analysis of the potential costs on their business. One respondent hoped that the effect of the proposals would be to continue to reduce and simplify charges for using the Tunnel, thereby helping to stimulate additional rail freight traffic.

Question 13: Do you have any other comments on the costs or benefits associated with these proposals? If so, please explain your reasons and add any additional comments you wish to make.

Respondents did not have any additional comments on the costs and benefits over and above those already made.

Any other comments

Question 14: Do you have any other additional comments or points you wish to make on the proposals?

None of the respondents had any additional comments or points they wanted to make.

Government Response

In the light of the responses received the Department will be making a number of changes to its draft legislation. The specific changes are highlighted below.

General Comments

The Government can confirm that the IGC will keep its roles in safety and security. Cooperation between economic regulators and safety authorities will be governed by the national provisions implementing the Directive in this respect. The proposed legislation does not affect those. Regarding economic regulation, before consultation, the proposed legislation already stated that it was without prejudice to the IGC's general supervisory function, but that the IGC had to respect to the independence of the relevant regulatory bodies. The draft now makes it clear that the regulatory bodies and the IGC may consult one another on any issue and at any point in their decision-making processes.

We introduced express references to Article 32 of the Directive in the bi-national regulation. On the other hand, we did not consider it necessary to refer to Article 31: that Article is not a "charging framework" in the sense of Article 29, since the framework to be established under that Article is to be established by Member States.

Regarding the suggestion for a "sliding transition", this would be difficult to draft and would probably create legal uncertainty. It would not be necessary: the Government considers that the current Access and Management Regulations of 2005 correctly reflect EU law. Therefore there will be no regulatory impact for that period.

The Channel Tunnel (International Arrangements) (Charging Framework and Transfer of Economic Regulation Functions) Order 2015

The changes we made concern the IGC regulation in the Schedule to that Order.

The bi-national regulation

Article 3(1)

We have now re-drafted this provision so that where an appeal concerning the Channel Fixed Link is made to one of the regulatory bodies, a corresponding appeal must also be made to the other regulatory body.

Article 3(2)

Under this provision as redrafted, one of the considerations which the regulatory bodies must have in mind when to have adopting their decisions or opinion is the need to coordinate and to be consistent with one another. The purpose of the change is to meet the concerns about the possibility of inconsistent decisions being reached, while complying with the Directive.

Article 3(3)

This provision has been re-drafted to ensure that the working arrangements put in place by the regulatory bodies permit the adoption of aligned decisions or opinions by the regulatory bodies.

Article 3(4)

This provision now requires the regulatory bodies to publish their working arrangements.

Article 3(5)

This provision now provides for the regulatory bodies to consult all interested parties where it appears that there is a risk that they may adopt inconsistent decisions or opinions. This is, again, a way of reducing the risk of conflicting decisions being adopted.

Article 5

The provision no longer leaves to the IGC the function of dealing with challenges to its decisions that were taken before the transfer of economic regulation functions.

The draft Charging Framework in the Annex to the bi-national regulation

In drafting the charging framework, we used only as a reference known practices, and were mindful of the need to comply with EU law. It is drafted in terms which it believes would allow industry to depart from current practices should the regulators consider they are not in line with EU law. It also gives flexibility to depart from those practices should they become undesirable for any other reason.

Article 2

The provision on the restrictions on public funding being used to finance the Tunnel has been redrafted in order to make it closer to the wording of the Treaty of Canterbury. The provision requiring the infrastructure manager to balance its accounts has been deleted: the implementation of the corresponding Directive provision can be dealt with through national legislation.

Article 4(3)

We have deleted reference to “construction costs” and redrafted the provision to make it closer to Article 32(3) of the Directive.

Article 4(5)

The provision requiring a 1.1% reduction, in real terms, of the charges levied to recover long-term costs has been deleted.

Article 4(6), 4(7) and 4(8)

This provisions have been re-drafted to follow more closely the language of the Directive.

Articles 5 and 6

We did not think it necessary to refer to Shuttles: the requirement that the allocation of costs and the charges must be “fair” already means that non-Shuttle activities must not be allocated costs incurred in relation to Shuttle ones.

Next Steps

The Department will now revoke and replace the existing Channel Tunnel (International Arrangements) Order 2005 (as amended). This will give effect to a binational regulation made by the UK/French Intergovernmental Commission (the “IGC”) under the Treaty of Canterbury (which governs the Tunnel) (a) to remove the IGC’s function as economic regulator; and (b) to put in place a unified and streamlined charging framework.

We will also amend the Railways Infrastructure (Access and Management) Regulations 2005 to extend the ORR’s jurisdiction to the Tunnel.

These changes are intended to be superseded, from 16 June 2015, by further national regulations implementing the Recast First Rail Package (i.e. Directive 2012/34/EU, the “Recast Directive”) for Great Britain generally (including the Tunnel). The Recast Directive replaces (with a number of amendments) the existing First Rail Package Directives (Directives 1991/440/EEC and 2001/14/EC, both as amended). (There will be separate regulations for Northern Ireland)

The further regulations to implement the Recast will retain the role of the ORR as the economic regulator for the UK side of the Channel Tunnel.

Consultation principles

The consultation was conducted in line with the Government's key consultation principles. 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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Please do not send your consultation response to this address.

Annex A

List of respondents

DB Schenker

Europorte

Eurostar

Eurotunnel

HS1

Network Rail

