

EXPLANATORY MEMORANDUM TO
THE ROAD TUNNEL SAFETY (AMENDMENT) REGULATIONS 2021
2021 No. [XXXX]

1. Introduction

- 1.1 This explanatory memorandum has been prepared by the Department for Transport and is laid before Parliament by Act.
- 1.2 This memorandum contains information for the Sifting Committees.

2. Purpose of the instrument

- 2.1 This statutory instrument is being made using powers in the European Union (Withdrawal) Act 2018 (“the Withdrawal Act”) in order to address deficiencies in retained EU law with regard to long road tunnels. It makes amendments to the Road Tunnel Safety Regulations 2007 (SI 2007/1520) (“2007 Regulations”) as amended by the Road Tunnel Safety (Amendment) Regulations 2009 (SI 2009/64), which transpose into UK law Directive No. 2004/54/EC (“the Directive”). The amendments arise from the withdrawal of the United Kingdom from the European Union (the “EU”). Further details are set out in the explanations in paragraph 2.2.

Explanations

What did any relevant EU law do before exit day?

- 2.2 The Road Tunnel Safety Regulations 2007 transpose into UK law Directive 2004/54/EC of the European Parliament and of the Council on minimum safety requirements for tunnels in the Trans-European Road Network (the “TERN”).
- 2.3 The Directive sets out to improve safety conditions for all users of long road tunnels (over 500 metres) on the TERN defined in Decision No 1692/96/EC of the European Parliament and of the Council of 23 July 1996. It was implemented in the UK through the 2007 Regulations.
- 2.4 The legacy of the former TERN in the UK is that eight road tunnels remain in scope under the 2007 Regulations. They are A282 Dartford Tunnel, A1(M) Hatfield Tunnel, M25 Bell Common Tunnel, M25 Holmesdale Tunnel, A299 Ramsgate Tunnel, A55 Conwy Tunnel, A55 Pen-y-Clip Tunnel, and A55 Penmaenbach Tunnel. The 2007 Regulations apply to TERN tunnels in the UK whether they are in operation, under construction, or at the design stage. All eight tunnels are in operation. The instrument deals with the legacy of these eight TERN tunnels, therefore it will not apply to any further tunnels over 500 metres in length constructed in the UK.

Why is it being changed?

- 2.5 The Regulation will become retained EU law after the end of the transition period and will be amended at that time by the Road Tunnel Safety (Amendment) Regulations 2021. These changes are necessary to reflect that the UK is no longer required to seek approval from the EU Commission or the Commission’s Article 17 Committee in respect of a request from a Tunnel Manager for a derogation from the requirements of

the Regulations. The instrument will give clarity to Tunnel Managers regarding their duties to ensure safety in the road tunnels in scope.

What will it now do?

- 2.6 The instrument deals with the legacy of the former TERN routes in the UK to ports, in particular from Kent to north Wales, so most of the amendments are minor. The most significant change is to the derogation process by which a Tunnel Manager applies for a derogation from the requirements of the Regulations in relation to the installation and use of innovative safety equipment or the use of innovative safety procedures in a tunnel which is in scope of the Regulations. This is in the context of serious fires which have taken place in long road tunnels.
- 2.7 The instrument removes the role of the EU Commission and the Article 17 Committee from the derogation process. In place of those an administrative process is established so that the national authority, which is the Secretary of State for Transport in England, the Welsh Ministers in Wales, or the Scottish Ministers in Scotland, may consider derogation requests from Tunnel Managers instead of the EU Commission and the Committee.
- 2.8 In considering a derogation request, the national authority may seek specialist advice. The Department for Transport chairs and contributes to industry bodies including the UK Roads Liaison Group (UKRLG), which is a group within the Chartered Institution of Highways & Transportation (CIHT) and the funding partners of the Department of Transport, Highways England, Transport Scotland, the Welsh Government, Northern Ireland Roads Service and Transport for London. The Department for Transport also contributes to the Association of Directors of Environment, Economy, Planning and Transport (ADEPT) forum which represents Place Directors from county, unitary and metropolitan authorities.
- 2.9 The national authority may also seek external advice regarding derogation requests through local highway authorities representing their road users, or it may procure advice from transport consultants as it considers necessary. The use of the industry bodies named above and other external bodies provides a level of technical expertise to consider derogation requests without recourse to any further external public facing process. The instrument does not specify a process to be followed as this may vary depending on the location and design of the tunnel. It makes no change to the position regarding tunnel safety, as the derogation, if granted, must provide an equivalent or higher level of protection than those of current technologies as prescribed in the Regulations.
- 2.10 Where expertise is sought from an external body the role of that body is advisory. The national authority may draw on technical expertise and best practice in order to consider a derogation request from a Tunnel Manager.
- 2.11 The instrument provides continuity for tunnel safety managers regarding operational matters for the five road tunnels in England and the three road tunnels in Wales which are in scope of the 2007 Regulations.

3. Matters of special interest to Parliament

Matters of special interest to the Sifting Committees

- 3.1 This instrument is being laid for sifting using the ‘negative’ procedure. Further information is provided in the Ministerial statement in Part 2 of the Annex to this Explanatory Memorandum.

Matters relevant to Standing Orders Nos. 83P and 83T of the Standing Orders of the House of Commons relating to Public Business (English Votes for English Laws)

- 3.2 None.

4. Extent and Territorial Application

- 4.1 The territorial extent of this instrument is the United Kingdom.
- 4.2 The territorial application of this instrument is the United Kingdom.

5. European Convention on Human Rights

- 5.1 The Parliamentary Under Secretary of State, Rachel Maclean MP, has made the following statement regarding Human Rights:

“In my view the provisions of the Road Tunnel Safety (Amendment) Regulations 2021 are compatible with the Convention rights”.

6. Legislative Context

- 6.1 The instrument is made in exercise of powers in section 8 of, and paragraph 21 of Schedule 7 to the European Union (Withdrawal) Act 2018 (“EU Withdrawal Act”).
- 6.2 The Withdrawal Act (as amended by the European Union (Withdrawal Agreement) Act 2020) makes provision for repealing the European Communities Act 1972 and will preserve EU law, as it stands at the end of the transition period, in United Kingdom law. It enables the creation of a new body of domestic legislation by bringing the texts of directly applicable EU legislation into domestic legislation, as well as saving EU-derived domestic legislation which was made to implement the UK’s obligations as a member of the EU.
- 6.3 The Act also contains temporary powers to make secondary legislation to enable Ministers and the devolved administrations to make secondary legislation to correct legislation that no longer operates appropriately after EU exit and the end of the transition period, so that the domestic legal system continues to function correctly after the end of that period.
- 6.4 Directive No. 2004/54/EC of the European Parliament and of the Council of 29th April 2004 (“the Road Tunnel Directive”) specifies the minimum safety requirements for road tunnels in the TERN. The 2007 Regulations make reference to Annex I and Annex II of the Road Tunnel Directive. The Schedule to the 2007 Regulations is a modified form of Annex III of the Road Tunnel Directive.
- 6.5 The Directive is based on Article 71 (common transport policy) of the Treaty establishing the European Union. It applies to all EU member States. The 2007 Regulations transpose the requirements of the Directive, but do not introduce further obligations or broaden its application to tunnels other than those on the TERN. In the

UK it applies to eight road tunnels, five of which are in England and three of which are in Wales, on former TERN routes.

- 6.6 This instrument proposes that, in place of the EU Commission and the Commission's Article 17 Committee, the national authority may consider a derogation request from a Tunnel Manager regarding the installation and use of innovative safety equipment or safety procedures in the eight tunnels in scope in the UK.
- 6.7 The instrument modifies the requirements of regulation 19 of the 2007 Regulations, which provides for Tunnel Managers to apply for a derogation regarding the safety requirements in the eight road tunnels in scope by means of a written request to the Administrative authority (the local highway authority) from the requirements of the 2007 Regulations. The purpose of seeking a derogation is to provide an equivalent or higher level of safety from the requirements of the Regulations. To date, no applications for a derogation have been made by a Tunnel Manager in the UK.
- 6.8 The Regulations also remove the requirement of regulation 21 of the 2007 Regulations for the Secretary of State to send tunnel safety reports to the Commission.

7. Policy background

What is being done and why?

- 7.1 This instrument is intended to allow the status quo to continue regarding management of the eight road tunnels in scope in the UK, with the bare minimum of change. Without the changes provided for in the instrument, following the UK's exit from the EU there could be uncertainty for managers of the tunnels in scope regarding the process to seek a derogation.
- 7.2 Concern about tunnel safety arose because of fires in the Mont Blanc and Tauern tunnels in 1999 and the St Gotthard tunnel in 2001. In a confined environment the breakout of fire can have fatal consequences. The EU Directive is a response to those events. The UK has a good road safety record in road tunnels and the Government wishes to uphold this. The provisions of the Directive provide a flexible approach to ensure tunnel safety, to allow tunnel owners to take a pragmatic, risk based view of which safety provisions are appropriate. The instrument retains this approach and does not place any new burdens or an undue burden on tunnel owners.
- 7.3 Although the Directive applies to TERN road tunnels which are longer than 500 metres in length, its preamble encourages member States to implement comparable safety levels for other road tunnels. The 2007 Regulations provide an impetus for other tunnel owners to adopt those standards but no specific arrangements are required for tunnels outside of the scope of the 2007 Regulations. For tunnels and other structures on public roads, under the Highways Act 1980 (as amended), highway authorities have a duty to maintain highways maintainable at public expense.
- 7.4 This is a devolved policy area. The Welsh Ministers are designated under section 2(2) of the European Communities Act 1972 in respect of Measures relating to road tunnel safety and the safety of roads accessing road tunnels and this matter is also within the legislative competence of the National Assembly for Wales. Three of the tunnels in scope of the 2007 Regulations in the UK are in Wales; the A55 Conwy Tunnel, A55 Pen-y-Clip Tunnel, and A55 Penmaenbach Tunnel. Scotland and Northern Ireland do not have any road tunnels in scope of the Regulations. The Department for Transport

will continue to work closely with the Welsh Ministers with regard to the three A55 tunnels.

- 7.5 The instrument places no new burdens or costs on the bodies which manage the tunnels in scope. It is not envisaged that local highway authorities would have any additional duties regarding tunnel safety.
- 7.6 The Highways Act 1980 (as amended) places a duty on local highway authorities to maintain their highways, including structures such as road tunnels, at public expense. In Wales, each unitary authority retains existing powers as a traffic authority defined by the Road Traffic Regulation Act 1984. The instrument does not change this.

8. European Union (Withdrawal) Act 2018/Withdrawal of the United Kingdom from the European Union

- 8.1 This instrument is being made using the power in section 8 of the Withdrawal Act in order to address failures of retained EU law to operate effectively or other deficiencies arising from the withdrawal of the United Kingdom from the European Union. In accordance with the requirements of that Act the Minister has made the relevant statements as detailed in Part 2 of the Annex to this Explanatory Memorandum.

9. Consolidation

- 9.1 There are no plans to consolidate this legislation.

10. Consultation outcome

- 10.1 A light touch consultation was carried out by the Department for Transport with Welsh Government officials, The UK Roads Liaison Group (UKRLG) and the Office for Rail and Road (ORR). The Department for Transport approached UKRLG to ask its Secretariat, the Chartered Institution for Highways and Transportation (CIHT), for its members' views on the proposals for considering derogation requests through the UKRLG forum. As a non-statutory body, CIHT expressed concerns regarding the potential liability of its members with regard to taking on that role.
- 10.2 Government officials in Wales also raised concerns about the propriety of a non-statutory body, UKRLG, taking the decision-making function for granting a derogation request. The Department for Transport then approached ORR with a similar proposal as ORR has statutory powers in England, although it has none for roads in Wales. ORR responded that it did not wish to take on the role, partly because of its limited remit in Wales, but in principle because the decision-making function would require additional resources.
- 10.3 The Department for Transport considered that the practical solution was to specify that the national authority takes the former role of the EU Commission for the process for consideration of derogation requests for the tunnels in scope in the UK. This decision took into account that the national authority can designate itself as the Administrative authority. Therefore, in practical terms, it is possible that the same body could apply for and consider a derogation request, and in such cases appropriate administrative separation should be put in place.
- 10.4 The instrument does not propose any changes to the operation of the road tunnels in scope. The expectation is that the net cost of the regulation of the eight tunnels which

are in scope to the UK sector would remain well below the £5 million per annum threshold.

11. Guidance

- 11.1 The Department is not producing guidance on the amendments provided for in this instrument as they are minor and technical in nature.

12. Impact

- 12.1 The impact on business, charities or voluntary bodies in respect of the changes to the 2007 Regulations are negligible.
- 12.2 An Impact Assessment has not been prepared for this instrument because, following the light touch consultation, the Department for Transport is satisfied that the overall costs or benefits to business will be below £5 million net per year.
- 12.3 There is no, or no significant, impact on the public sector.

13. Regulating small business

- 13.1 The legislation does not apply to activities that are undertaken by small businesses.

14. Monitoring & review

- 14.1 The approach to monitoring this legislation is for it to be monitored in the course of normal departmental business. This instrument amends the Road Tunnel Safety Regulations 2007. As this instrument is made under the Withdrawal Act, no review clause is required.

15. Contact

- 15.1 Paul O'Hara at the Department for Transport, telephone: 07500 542895 or email: Paul.O'Hara@dft.gov.uk, and Matthew Eglinton, telephone 07584 614546 or email: Matthew.Eglinton@dft.gov.uk can be contacted with any queries regarding the instrument.
- 15.2 Jennifer Raynor, Deputy Director for Local Infrastructure at the Department for Transport, can confirm that this Explanatory Memorandum meets the required standard.
- 15.3 Rachel Maclean MP, Parliamentary Under Secretary of State at the Department for Transport, can confirm that this Explanatory Memorandum meets the required standard.

Annex

Statements under the European Union (Withdrawal) Act 2018

Part 1

Table of Statements under the 2018 Act

This table sets out the statements that may be required under the 2018 Act.

Statement	Where the requirement sits	To whom it applies	What it requires
Sifting	Paragraphs 3(3), 3(7) and 17(3) and 17(7) of Schedule 7	Ministers of the Crown exercising sections 8(1), 9 and 23(1) to make a Negative SI	Explain why the instrument should be subject to the negative procedure and, if applicable, why they disagree with the recommendation(s) of the SLSC/Sifting Committees
Appropriate-ness	Sub-paragraph (2) of paragraph 28, Schedule 7	Ministers of the Crown exercising sections 8(1), 9 and 23(1) or jointly exercising powers in Schedule 2	A statement that the SI does no more than is appropriate.
Good Reasons	Sub-paragraph (3) of paragraph 28, Schedule 7	Ministers of the Crown exercising sections 8(1), 9 and 23(1) or jointly exercising powers in Schedule 2	Explain the good reasons for making the instrument and that what is being done is a reasonable course of action.
Equalities	Sub-paragraphs (4) and (5) of paragraph 28, Schedule 7	Ministers of the Crown exercising sections 8(1), 9 and 23(1) or jointly exercising powers in Schedule 2	Explain what, if any, amendment, repeals or revocations are being made to the Equalities Acts 2006 and 2010 and legislation made under them. State that the Minister has had due regard to the need to eliminate discrimination and other conduct prohibited under the Equality Act 2010.
Explanations	Sub-paragraph (6) of paragraph 28, Schedule 7	Ministers of the Crown exercising sections 8(1), 9 and 23(1) or jointly exercising powers in Schedule 2 In addition to the statutory obligation the Government has made a political commitment to include these statements alongside all EUWA SIs	Explain the instrument, identify the relevant law before exit day, explain the instrument's effect on retained EU law and give information about the purpose of the instrument, e.g., whether minor or technical changes only are intended to the EU retained law.

Criminal offences	Sub-paragraphs (3) and (7) of paragraph 28, Schedule 7	Ministers of the Crown exercising sections 8(1), 9, and 23(1) or jointly exercising powers in Schedule 2 to create a criminal offence	Set out the ‘good reasons’ for creating a criminal offence, and the penalty attached.
Sub-delegation	Paragraph 30, Schedule 7	Ministers of the Crown exercising sections 10(1), 12 and part 1 of Schedule 4 to create a legislative power exercisable not by a Minister of the Crown or a Devolved Authority by Statutory Instrument.	State why it is appropriate to create such a sub-delegated power.
Urgency	Paragraph 34, Schedule 7	Ministers of the Crown using the urgent procedure in paragraphs 4 or 14, Schedule 7.	Statement of the reasons for the Minister’s opinion that the SI is urgent.
Explanations where amending regulations under 2(2) ECA 1972	Paragraph 13, Schedule 8	Anybody making an SI after exit day under powers outside the European Union (Withdrawal) Act 2018 which modifies subordinate legislation made under s. 2(2) ECA	Statement explaining the good reasons for modifying the instrument made under s. 2(2) ECA, identifying the relevant law before exit day, and explaining the instrument’s effect on retained EU law.
Scrutiny statement where amending regulations under 2(2) ECA 1972	Paragraph 16, Schedule 8	Anybody making an SI after exit day under powers outside the European Union (Withdrawal) Act 2018 which modifies subordinate legislation made under s. 2(2) ECA	Statement setting out: a) the steps which the relevant authority has taken to make the draft instrument published in accordance with paragraph 16(2), Schedule 8 available to each House of Parliament, b) containing information about the relevant authority’s response to— (i) any recommendations made by a committee of either House of Parliament about the published draft instrument, and (ii) any other representations made to the relevant authority about the published draft instrument, and, c) containing any other information that the relevant authority considers appropriate in relation to the scrutiny of the instrument or draft instrument which is to be laid.

Part 2

Statements required when using enabling powers under the European Union (Withdrawal) Act 2018

1. Sifting statement(s)

- 1.1 The Parliamentary Under Secretary of State at the Department for Transport, Rachel Maclean MP, has made the following statement regarding use of legislative powers in the European Union (Withdrawal) Act 2018:

“In my view the Road Tunnel Safety (Amendment) Regulations 2021 should be subject to annulment in pursuance of a resolution of either House of Parliament (i.e. the negative procedure)”.

- 1.2 This is the case because the instrument does not confer any additional powers on the Secretary of State or require any further obligations regarding enforcement.

2. Appropriateness statement

- 2.1 The Parliamentary Under Secretary of State at the Department for Transport, Rachel Maclean MP, has made the following statement regarding use of legislative powers in the European Union (Withdrawal) Act 2018:

“In my view the Road Tunnel Safety (Amendment) Regulations 2021 do no more than is appropriate”.

- 2.2 This is the case because the instrument only corrects those deficiencies and makes those amendments necessary to ensure that the legislation functions correctly after the end of the transition period.

3. Good reasons

- 3.1 The Parliamentary Under Secretary of State at the Department for Transport, Rachel Maclean MP, has made the following statement regarding use of legislative powers in the European Union (Withdrawal) Act 2018:

“In my view there are good reasons for the provisions in this instrument, and I have concluded they are a reasonable course of action”.

- 3.2 These are to ensure that Tunnel Managers for the eight tunnels in scope in the UK may continue to operate and maintain them without disruption after the end of the transition period. This is important to the UK economy as most of the tunnels are on strategic national highway routes.

4. Equalities

- 4.1 The Parliamentary Under Secretary of State at the Department for Transport, Rachel Maclean MP, has made the following statement regarding use of legislative powers in the European Union (Withdrawal) Act 2018:

“The instrument does not amend, repeal or revoke a provision or provisions in the Equality Act 2006 or the Equality Act 2010 or subordinate legislation made under those Acts”.

4.2 The Parliamentary Under Secretary of State at the Department for Transport, Rachel Maclean MP, has made the following statement regarding use of legislative powers in the European Union (Withdrawal) Act 2018:

“In relation to the instrument, I, Rachel Maclean, have had due regard to the need to eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under the Equality Act 2010”.

5. Explanations

5.1 The explanations statement has been made in section 2 of the main body of this Explanatory Memorandum.