

## EXPLANATORY MEMORANDUM TO

### THE RAILWAY (LICENSING OF RAILWAY UNDERTAKINGS) (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 Command of Her Majesty.

#### 2. Purpose of the instrument

- 2.1 The purpose of this Statutory Instrument is to make the necessary amendments to the Railway (Licensing of Railway Undertakings) Regulations 2005 (“the 2005 Regulations”) and the Railway (Licensing of Railway Undertakings) (Amendment etc.) (EU Exit) Regulations 2019 (“the 2019 Regulations”) to provide for the continued recognition of EEA issued rail operator licences (“European licences”) for the Channel Tunnel and the cross-border area. This will enable the implementation and ratification of a bilateral agreement, which has been agreed at technical level but is subject to final legal checks and ratification, between the UK and France on the mutual recognition of rail operator licences for the Channel Tunnel and cross-border area, providing long-term certainty, clarity and confidence to cross-border operators, both current and prospective, regarding the future operator licensing framework for the Channel Tunnel and reducing administrative burdens on them.

#### 3. Matters of special interest to Parliament

##### *Matters of special interest to the Joint Committee on Statutory Instruments*

- 3.1 None.

##### *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 The territorial application of this instrument varies between provisions.
- 3.3 While the territorial application of the instrument is largely related to the recognition of European licences within the UK half of the Channel Tunnel and the immediate cross-border area up to Ashford International station and Dollands Moor Freight Yard, provisions related to information sharing by the Office of Rail and Road (the “ORR”) in respect of holders of railway undertaking licences issued by the ORR could have application in relation to other parts of Great Britain.

#### 4. Extent and Territorial Application

- 4.1 The territorial extent of this instrument is England and Wales and Scotland.
- 4.2 The territorial application of this instrument is set out in Section 3 under “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)”.

## **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 Railway (Licensing of Railway Undertakings) (Amendment) Regulations 2021 are compatible with the Convention rights.”

## **6. Legislative Context**

- 6.1 The Railway (Licensing of Railway Undertakings) (Amendment) Regulations 2021 (“the Regulations”) are made in exercise of the powers conferred by the Channel Tunnel Act 1987, section 11(1)(a), (c), (d) and (g) and (2)(a) and (b).
- 6.2 The Regulations amend the 2005 Regulations, which updated the rules for the licensing of passenger and freight train operators in Great Britain established under the Railways Act 1993 by introducing a new EU form of licence and transposed into domestic law three EU Directives that were introduced in order to establish a “single European Railway Area” (Council Directive 95/18/EC, as amended by Directives 2001/13/EC and 2004/49/EC, both of the European Parliament and of the Council).
- 6.3 The 2005 Regulations introduced the requirement for operators running services on the basis of the new EU form of licence in Great Britain to hold a Statement of National Regulatory Provisions (“SNRP” - Part 3 of the 2005 Regulations). SNRPs supplement licensing requirements, for example setting out specific third-party insurance requirements over and above the general licensing requirement for adequate insurance to be maintained.
- 6.4 The Regulations also amend the 2019 Regulations, which were introduced to correct deficiencies in the 2005 Regulations arising from the UK’s exit from the European Union, to ensure that they continued to operate effectively post exit. The 2019 Regulations, as well as converting the EU form of licences issued by the ORR to “railway undertaking licences”, provided for the continued recognition in Great Britain of European licences (i.e. licences issued by EEA states) for a period of two years from Exit Day, i.e. until 11pm on 31 January 2022.
- 6.5 On 23 December the EU adopted Regulation (EU) 2020/2222 of the European Parliament and of the Council, which provides for the continued recognition of GB operator licences in the French half of the Channel Tunnel and up to Calais-Fréthun freight and passenger terminals until 30 September 2021. This supports the continuation of cross-border traffic through the Channel Tunnel for a limited period following the end of the Transition Period while the necessary long-term bilateral arrangements are implemented between the UK and France.

## **7. Policy background**

### *What is being done and why?*

- 7.1 The policy intention of the Regulations is to make the necessary amendments to domestic rail legislation to support the implementation of a UK-France bilateral agreement on the mutual recognition of rail operator licences for the Channel Tunnel and cross-border area. This will support the continued smooth operation of Channel Tunnel traffic, which provides significant economic and social benefits to the UK, when the current EU contingency legislation expires on 30 September 2021, and will

provide long-term certainty, clarity and confidence to cross-border operators regarding the operator licensing framework for the Channel Tunnel.

### *Explanations*

- 7.2 The Regulations amend the 2005 Regulations by introducing the concept of a “Channel Tunnel service”. This concept is underpinned by what is in the related bilateral agreement. It has been agreed in the bilateral agreement that rail operators in the Channel Tunnel holding a European licence or (UK issued) railway undertaking licence are authorised to operate within the respective national parts of the Channel Tunnel and up to the first border crossing station in French or UK territory (for passenger traffic between Calais-Fréthun passenger station in France and Ashford International station in the United Kingdom; and for freight traffic between Calais-Fréthun freight yard in France and Dollands Moor in the United Kingdom).
- 7.3 The requirement introduced by the 2005 Regulations for operators running services on the basis of a European licence to hold a SNRP will be disapplied by the Regulations for operators relying on such licences to operate services through the Channel Tunnel and up to (but not beyond) Dollands Moor or Ashford International station. This approach has been developed in close consultation with the independent regulator, the Office of Rail and Road (the “ORR”), and is deemed necessary to support the mutual recognition of licences on a fully reciprocal basis. The impact of disapplying this requirement, if any, is expected to be very limited in practice given the very limited geographical scope of the exemption and given that all cross-border operators currently running services through the Channel Tunnel do so on the basis of a UK licence. It should also be noted that any future EEA operator of rail services running beyond Dollands Moor or Ashford International station will in any event need to have an ORR issued railway undertaking licence and will also be subject to the SNRP requirement. This will also ensure a level playing field for the licensing requirements for operators on the UK and French sides of the Channel Tunnel and cross-border area, as no additional licensing requirements will be in place for UK licensed operators on the French side.
- 7.4 The Regulations will provide for the continued recognition of European licences to operate a Channel Tunnel service on an indefinite basis. This will facilitate the ratification of the above-mentioned bilateral agreement on the mutual recognition of rail operator licences for the Channel Tunnel, which is contingent upon the amendments made by these Regulations. The provision made by the Regulations for the continued recognition of European licences to operate a Channel Tunnel service, and the related bilateral agreement this recognition supports, will have a significant positive impact on cross-border operators by providing long-term certainty on the licensing requirements for the Channel Tunnel. It will also reduce the administrative burdens on them by enabling them to operate within the Channel Tunnel and cross-border area without the need to hold two separate licences (one issued in Great Britain and one in the EEA).
- 7.5 The Regulations will also amend the transitory provisions in the 2019 Regulations, which provide for the continued recognition of European licences in Great Britain as a whole until they expire at 11pm on 31 January 2022.
- 7.6 The amendments to the transitory provisions in the 2019 Regulations will change how the 2005 Regulations apply to holders of European licences operating a Channel Tunnel service. These amendments to the transitory provisions relate to arrangements

on information sharing by the ORR and provide for the disapplication of the SNRP regime for the remainder of the transitory period, but only in relation to Channel Tunnel services (it will continue to apply to holders of European licences, in the same way as for ORR issued railway undertaking licences, for any services running beyond Ashford International station or Dollands Moor). However, how the amendments apply to the transitory provisions will depend on the timing of the related bilateral agreement coming into force. At the time of the preparation of this Explanatory Memorandum, it is not known when the bilateral agreement will be ratified by both parties and so come into force. As such, the Regulations necessarily provide for the possibility of ratification and entry into force both before and after the end of the transitory period (at 11pm on 31 January 2022).

- 7.7 Assuming the bilateral agreement is ratified by both sides before the transitory period expires, as would be expected, the transitory provisions will continue in force until 11pm on 31 January 2022 but with the amendments made to them by the Regulations. These provide for information sharing by the ORR and for the disapplication of the SNRP requirement for operators of Channel Tunnel services relying on European licences but otherwise any such operators will continue to be able to operate throughout the rest of Great Britain on the same basis as before. So, for the remainder of the time-limited transitory period, the SNRP requirement will continue to apply for example to any operators (although currently there are none) operating beyond Ashford International or Dollands Moor in reliance on a European licence. Thereafter operators will not of course be able to operate beyond Ashford International or Dollands Moor at all without an ORR issued operator licence and SNRP.
- 7.8 If, however, the bilateral agreement is only ratified by both sides after the expiry period of the transitory provisions, the Regulations provide for the amendments to the transitory provisions not to take effect, as the transitory provisions will themselves be spent by that point.
- 7.9 The amendment of the transitory provisions in the 2019 Regulations is not expected to have an operational impact, as there are currently no operators providing rail services in Great Britain on the basis of a European licence for either domestic or cross-border operations. At the time that the 2019 Regulations were made, Europorte Channel SAS could potentially have had an interest in operating freight services in Great Britain on the basis of a European licence. However, the related SNRP was revoked by the ORR in December 2020 at Europorte's request. The purpose of the amendments to the transitory provisions is however to ensure that proper effect is given to the bilateral agreement in the event the agreement is ratified and comes into force before the transitory provisions expire.
- 7.10 The Regulations will also make minor consequential amendments to five pieces of primary legislation and one further piece of secondary legislation to track through the changes made to the 2005 Regulations and the 2019 Regulations. The primary legislation is: the Railways Fires Act 1905; the Insolvency Act 1986; the Railways Act 1993; the Civil Contingencies Act 2004; and the Railways Act 2005. The other piece of secondary legislation is the British Transport Police (Police Services Agreement) Order 2004.
- 7.11 The Regulations will not apply to Eurotunnel as there is an exemption from the requirement to hold an operator licence in order to run services under Article 2(9) of Directive 2012/34/EU and Regulation 4(2)(e) of the 2005 Regulations for operators providing shuttle services for road vehicles through the Channel Tunnel.

7.12 In the absence of this legislation, it would not be possible to implement the bilateral agreement referred to above, which would lead to the cessation of rail freight services (excluding Eurotunnel shuttle services) and potentially Eurostar passenger services through the Channel Tunnel once the current EU contingency legislation expires on 30 September 2021, unless that EU regulation were to be renewed. UK issued operator licences belonging to Eurostar International Limited, DB Cargo International Limited and GB Railfreight would become invalid in the territory of the EU from that date, including in the French half of the Channel Tunnel. This would mean those services could not legally run, which would have significant economic and social repercussions for the UK and industry, causing serious knock-on impacts on cross-border trade.

## **8. European Union Withdrawal and Future Relationship**

8.1 This instrument is not being made under the European Union (Withdrawal) Act 2018 but relates to the withdrawal of the United Kingdom from the European Union only in so far as Part 2 of the Regulations make amendments to the 2005 Regulations which are within the definition of retained EU law in the European Union (Withdrawal) Act 2018. The Minister has made any relevant statements 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 The amendments proposed by this Instrument apply only to the Channel Tunnel and the cross-border area up to Ashford International station (for passenger services) and Dollands Moor (for freight services). They affect a very limited number of cross-border operators and will not introduce any new requirements on those operators or require any new licences to be granted, hence DfT officials considered that there was no requirement for formal consultation on the proposed amendments. In addition, the measures introduced by the Instrument will have a significant positive impact on the affected cross-border operators as they will support the continued smooth operation of services through the Channel Tunnel and provide long-term certainty, clarity and confidence to operators, both current and prospective, on the operator licensing requirements for the Channel Tunnel. They will also considerably reduce administrative burdens on cross-border rail freight operators, who will only need to hold one operator licence in order to continue to run services in the Channel Tunnel and cross-border area. Therefore, it is expected that the relevant operators will be supportive of the changes implemented by the Instrument.

10.2 The Department has worked closely with the ORR in developing this instrument, recognising ORR's status and expertise as the independent licensing authority and safety regulator.

10.3 The Department considers that the least costly and disruptive approach is to correct, rather than revoke the 2005 Regulations and the 2019 Regulations, for the following reasons:

- No formal consultation has taken place on the possible revocation of the 2005 or 2019 Regulations, and there would be insufficient time to undertake and act upon a full consultation before 30 September 2021.

- Any delay beyond that date to the implementation of this Instrument and the related bilateral agreement would lead to the cessation of important cross-border rail services.
- In the absence of a full consultation with stakeholders who would be affected, revoking the 2019 Regulations would be likely to create uncertainty and confusion by removing the corrections made to the domestic statute book by that instrument, and deliver no tangible benefit.
- No current operators will be affected by the decision to disapply the requirement for operators running services on the basis of a European licence in the Channel Tunnel and cross-border area to hold a SNRP.
- The Instrument will contribute to supporting the continuation of cross-border rail services through the Channel Tunnel, providing certainty, clarity and confidence to operators.
- The Department has been engaging very regularly with all affected stakeholders whilst developing the 2021 Regulations, keeping them updated on the bilateral negotiations with France, which this legislation supports, and the expected outcome. Stakeholders have been very supportive of the policy objectives being pursued in these negotiations.
- It is unlikely the powers used to make this Instrument in the Channel Tunnel Act 1987 would in any event support wider amendments or consolidation.

## **11. Guidance**

- 11.1 The Department is not producing guidance on the specific amendments provided for in this Instrument as they affect only a limited number of stakeholders, with whom the Department engages on a very regular basis.
- 11.2 The Department issued a Technical Notice on 4 January 2021 explaining that European licences would be valid in Great Britain until 31 January 2022 and that there would be no impact on the validity of operator licences in the UK for UK-based domestic operators that already held an ORR-issued licence.
- 11.3 This Technical Notice will be updated to reflect the changes made by the Regulations and the affected operators have been closely consulted.

## **12. Impact**

- 12.1 There is no, or no significant, impact on business, charities or voluntary bodies.
- 12.2 There is no, or no significant impact on the public sector.
- 12.3 An Impact Assessment has not been prepared for this instrument because, following analysis and informal consultation, the Department for Transport is satisfied that the impact will be limited to the extent that the overall costs or benefits to business will be below £5 million per year. This is because the proposed amendments will not introduce any new requirements on the affected operators or require any new licences to be granted, and will therefore not have any substantive operational impact.

## **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 of this legislation is for it to be monitored in the course of normal departmental business.
- 14.2 This Instrument amends the 2005 Regulations and the 2019 Regulations.
- 14.3 A statutory review clause is included in Regulation 21 of the 2005 Regulations, which are due for review by July 2021. This legislation will be subject to a light-touch review given the ongoing rail reform agenda, which may see a more comprehensive review of existing domestic rail legislation.

#### **15. Contact**

- 15.1 Alexander Drake, Senior Policy Advisor at the Department for Transport, Telephone: 07812 482 562 or email: alexander.drake@dft.gov.uk can be contacted with any queries regarding the instrument.
- 15.2 Andrea Pearson, Deputy Director for International Rail, at the Department for Transport can confirm that this Explanatory Memorandum meets the required standard.
- 15.3 The Parliamentary Under Secretary of State, Rachel Maclean MP, can confirm that this Explanatory Memorandum meets the required standard.

# Annex

## Statements under the European Union (Withdrawal) Act 2018 and the European Union (Future Relationship) Act 2020

### Part 1A

#### 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) or 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
Appropriateness	Sub-paragraph (2) of paragraph 28, Schedule 7	Ministers of the Crown exercising sections 8(1) or 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) or 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) or 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) or 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 IP completion 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) or 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 section 8 or 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 5 or 19, Schedule 7.	Statement of the reasons for the Minister's opinion that the SI is urgent.
Scrutiny statement where amending regulations under 2(2) ECA 1972	Paragraph 14, Schedule 8	Anybody making an SI after IP completion day under powers conferred before the start of the 2017-19 session of Parliament 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.
Explanations where amending regulations under 2(2) ECA 1972	Paragraph 15, Schedule 8	Anybody making an SI after IP completion 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 IP completion day, and explaining the instrument's effect on retained EU law.

## Part 1B

### Table of Statements under the 2020 Act

This table sets out the statements that may be required under the 2020 Act.

Statement	Where the requirement sits	To whom it applies	What it requires
Sifting	Paragraph 8 Schedule 5	Ministers of the Crown exercising section 31 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

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## Part 2

### Statements required under the European Union (Withdrawal) 2018 Act or the European Union (Future Relationship) Act 2020

#### 1. **Scrutiny statement where amending or revoking regulations etc. made under section 2(2) of the European Communities Act 1972**

1.1 The Parliamentary Under Secretary of State Rachel Maclean MP has made the following statement regarding this instrument:

“I have taken the following steps to make the draft instrument published in accordance with paragraph 14(2) of Schedule 8 of the European Union (Withdrawal) Act 2018 available to each House of Parliament: a draft of the Railway (Licensing of Railway Undertakings) (Amendment) Regulations 2021 was published on the Gov.UK website on [date] and a Written Ministerial Statement was tabled in the House of Commons on [date]. Copies of the draft instrument were also deposited in the libraries of both Houses of Parliament on [date]. The clerks to the European Scrutiny Committee, the Transport Select Committee and the House of Lords Secondary Legislation Scrutiny Committee were also notified of the publication of the draft of the Regulations.

1.2 [The following recommendations and representations were received and responded to as follows.]”

#### 2. **Explanations where amending or revoking regulations etc. made under section 2(2) of the European Communities Act 1972**

2.1 The Parliamentary Under Secretary of State Rachel Maclean MP has made the following statement regarding regulations made under the European Communities Act 1972:

“In my opinion there are good reasons for the Railway (Licensing of Railway Undertakings) (Amendment) Regulations 2021 to amend the Railway (Licensing of Railway Undertakings) Regulations 2005 (S.I. 2005/3050). This is because of the essential need to implement the bilateral agreement reached with France for the mutual recognition of railway undertaking licences in the Channel Tunnel and cross-border areas and so to secure the future of Channel Tunnel services. Without these amendments, the UK would be unable to ratify the related bilateral agreement and certain Channel Tunnel passenger and freight services would cease to operate. This would have a severe economic and political impact on both the United Kingdom and France.

2.2 Requirements relating to railway undertaking licences are currently contained in the Railway (Licensing of Railway Undertakings) Regulations 2005 (S.I. 2005/3050) (the “2005 Regulations”). The 2005 Regulations were made under section 2(2) of the European Communities Act 1972, and therefore constitute EU-derived domestic legislation (which is retained EU law) within the meaning of the European Union (Withdrawal) Act 2018. The 2005 Regulations implemented into domestic law the requirements of EU Directives (Council Directive 95/18/EC as amended by Directives 2001/13/EC and 2004/49/EC, both of the European Parliament and Council) which set out the conditions regarding professional competence, financial fitness and insurance cover for being granted a licence to operate a rail service. The 2005 Regulations were

amended by SI 2016/645, which implemented Directive 2012/34/EU of the European Parliament and Council (the rail recast Directive), and by SI 2019/700 which corrected deficiencies in the 2005 Regulations arising from the UK's exit from the European Union. In particular the 2019 Regulations provided that, after a transitory period ending at 11pm on 31st January 2022, EEA operator licences would no longer be valid for the operation of train services in Great Britain.

- 2.3 The effect of the amendments on retained EU law, as set out in the 2005 Regulations, which are introduced by these Regulations means that there will be permanent recognition in Great Britain for holders of EEA operator licences issued under the 1995 and 2012 Directives (both as amended) up to Ashford International station (for passenger services) and Dollands Moor (for freight services) after transitory provisions set out in the 2019 Regulations, which give continued recognition to EEA issued licences in Great Britain as a whole, expire at 11.00 pm on 31 January 2022. There will also be no need for railway undertakings which hold a European licence and are operating a Channel Tunnel service to hold a Statement of National Regulatory Provisions (“SNRP”) in respect of that service. A SNRP will continue to be required however for rail services going beyond Ashford International station or Dollands Moor. In accordance with the bilateral agreement the Regulations also put in place an information sharing requirement for the ORR to notify the French licensing authority where it has a serious doubt as to whether a railway undertaking with an EEA operator licence and operating a Channel Tunnel service complies with requirements of the 1995 or 2012 Directives (e.g. as regards good repute, financial fitness, professional competence and cover for civil liability). The ORR is also required, again in implementation of the bilateral agreement, to share information with the French licensing authority if there are similar doubts or concerns relating to a railway operator operating in the French part of the Channel Tunnel in reliance on its ORR issued railway undertaking licences. The bilateral agreement imposes equivalent information sharing obligations on the French licensing authority.”