EXPLANATORY MEMORANDUM TO

THE CROSS-BORDER RAILWAY SERVICES (WORKING TIME) (AMENDMENT) (EU EXIT) ORDER 2018

2018 No. 874

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 This instrument will amend the Cross-border Railway Services (Working Time) Regulations 2008 (S.I. 2008/1660) (the "Principal Regulations"), which transposed into domestic law the provisions on working conditions for railway workers engaged in interoperable cross-border railway services (see paragraph 6 for further details). It amends the definition of 'interoperable cross-border services', to ensure that the legislation continues to operate effectively as the UK exits the European Union (EU). Like the Principal Regulations, the present instrument will extend to Great Britain only.

2.2 Explanations

What did any relevant EU law do before exit day?

The Principal Regulations implement Council Directive 2005/47/EC in Great Britain. They provide for stricter requirements on operators of cross-border rail services for the timing and duration of rest periods and breaks, limits on driving time and the need to keep records compared to those specified in the general Working Time Directive 93/104/EC (as implemented by the Working Time Regulations 1998 (S.I. 1998/1833). For further information, please see paragraph 6 below which sets out the legislative context.

Why is it being changed?

Following the UK's withdrawal from the EU, there is a risk that the definition of 'interoperable cross-border services' will no longer capture certain cross-border services. To mitigate the risk of this deficiency arising and to provide certainty to workers and operators, the Government considers it appropriate to amend the definition to ensure the working time provisions continue to apply to all cross-borders services currently captured by Directive 2005/47/EC and the existing UK legislation after exit day. For further information, please see paragraph 7 below.

What will it now do?

We are amending the definition of "interoperable cross-border services" so that it continues to operate effectively as the UK exits the EU. The definition will no longer refer to the EU safety certificate system but will instead achieve the same effect going forward by referring just to the services travelling on the Channel Tunnel system, as defined in the Channel Tunnel Act 1987. This amendment ensures that the same cohort of rail cross-border workers continue to be covered by the same rights and

protections in the Principal Regulations before and after exit day. For further detail, please see paragraphs 6 and 7 below.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments, the Select Committee on Statutory Instruments or the Committees on the UK's exit from the European Union

3.1 None.

3.2 This instrument is being made under the negative procedure because it makes a single, purely technical drafting amendment to the definition of 'interoperable cross-border services' in the Principal Regulations, in order to ensure that the effect of those Regulations is preserved, following the UK's exit from the EU.

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)

3.3 As the instrument is subject to negative resolution procedure there are no matters relevant to Standing Orders Nos. 83P and 83T of the Standing Orders of the House of Commons relating to Public Business at this stage.

4. Extent and Territorial Application

4.1 The territorial extent of this instrument is Great Britain only.

4.2 The territorial application of this instrument is Great Britain only.

4.3 There are working time provisions for cross-border rail services between Northern Ireland and the Republic of Ireland, provided for in the Cross-border Railway Services (Working Time) Regulations (Northern Ireland) 2008 (SR 2008/315). These will be corrected as appropriate by separate legislation.

5. European Convention on Human Rights

5.1 As the instrument is subject to the negative resolution procedure and does not amend primary legislation, no statement is required.

6. Legislative Context

6.1 Council Directive 2005/47/EC on the Agreement between the Community of European Railways (CER) and the European Transport Workers' Federation (ETF) on certain aspects of the working conditions of mobile workers engaged in interoperable cross-border services in the railway sector entered into force on 27th July 2005. The Cross-Border Railway Services (Working Time) Regulations 2008 (S.I. 2008/1660, as amended by S.I. 2013/1956, S.I. 2014/386 and S.I. 2015/1682) implemented Directive 2005/47/EC in Great Britain.

6.2 The Working Time Directive 93/104/EC, implemented in Great Britain by the Working Time Regulations 1998 (S.I. 1998/1833, as amended by S.I. 2003/1684), has applied to the railway sector, including cross-border train crews, since 1st August 2003.

6.3 Directive 2005/47/EC placed stricter requirements on operators of cross-border services for the timing and duration of rest periods and breaks, limits on driving time

and the need to keep records compared to those specified in the general Working Time Directive 93/104/EC.

6.4 The Principal Regulations define cross-border services as those services running through the Channel Tunnel system in respect of which at least two network safety certifications are required, as stipulated by Article 10(2)(b) and (4) of Directive 2004/49/EC of the European Parliament and the Council of 29th April 2004 on safety on the Community's railways. Articles 10(2)(b) and (4) of Directive 2004/49/EC specifically concern the requirement to obtain Part B safety certificates.

6.5 Directive 2004/49/EC requires cross-border services travelling through the EU to obtain a Part A safety certificate, issued by the country in which they are first established, as well as a Part B safety certificate for each Member State or specialised cross-border infrastructure (such as the Channel Tunnel Fixed Link), which the service travels through. All Eurostar services travelling to or from the UK, for example, currently require at least three Part B safety certificates, as stipulated by the relevant articles of Directive 2004/49/EC: one issued by the UK safety authority, one by the Intergovernmental Commission who act as the safety authority for the Channel Tunnel and one by the French safety authority.

6.6 When the UK exits the EU, the existing safety certificate system stipulated by Directive 2004/49/EC will be retained in domestic law with the relevant safety standards remaining unchanged. However, the validity of a Part A EU safety certificate (and the associated Part B safety certificate/s) is contingent on the applicant railway undertaking obtaining the Part A safety certificate from the EU Member State in which they were first established. As the UK will no longer be a Member State following exit, some cross-border services, in particular services first established in the UK, may therefore be considered no longer to fall within the definition of 'interoperable cross-border services' for the purposes of the Principal Regulations. This is because, when the UK exits the EU, these services may be considered no longer to hold two or more Part B safety certificates, as required by Directive 2004/49/EC. In these circumstances, a deficiency arises in the definition of cross-border services under the Principal Regulations, which requires amendment. If this definition is not amended to remove the reference to Part B safety certificates, some cross-border rail workers may not have access to the same rights they had prior to exit.

6.7 In addition, Directive 2004/49/EC is due to be replaced by Directive (EU) 2016/798. Among other things, this will replace the requirement (in Directive 2004/49/EC) for there to be Part A and Part B safety certificates with a requirement for a single part certificate instead. Directive 2016/798 is due to be implemented by EU member states by 16 June 2019, with a possibility of extension of that date to 16 June 2020. Other member states (principally France, Belgium and the Netherlands for these purposes) can be expected to have implemented by this date therefore regardless of the position of the UK following exit from the EU. This again may therefore mean that a definition of "interoperable cross-border services" based on the existence of multiple Part B safety certificates required under Directive 2004/49/EC may no longer work to cover all groups of cross-border rail workers.

6.8 This instrument remedies the deficiency by amending the definition of cross-border services to replace the reference to Directive 2004/49/EC with a reference to services travelling by way of the tunnel system, as defined in the Channel Tunnel Act 1987. The new definition will ensure that the same cohort of rail cross-border workers

continue to be covered by the same rights and protections in the Principal Regulations before and after exit day.

6.9 This instrument will be made under section 11 of the Channel Tunnel Act 1987. The Channel Tunnel Act 1987 gives the Secretary of State powers to enact orders to ensure the application and enforcement of law in relation to, and otherwise for the regulation of, the tunnel system. In particular, section 11(1)(c) enables the Secretary of State to enact orders in relation to persons employed or engaged in work within the system, whilst section 11(1)(f) makes similar provision in relation to persons employed or engaged in work outside of the tunnel system on any train engaged on an international service. This amendment to the definition of "interoperable cross-border services" impacts on the definitions of both 'driver' and 'cross-border worker', which are used throughout the Principal Regulations.

6.10 It was considered appropriate also to make the instrument under section 11 of the Channel Tunnel Act 1987 because there was felt to be some doubt as to whether the amendment needed here fell sufficiently within the scope of the power, in section 8 of the European Union (Withdrawal) Act 2018 (EUWA), to remedy deficiencies arising from the UK's withdrawal from the European Union. The need to amend the current definition of "interoperable cross-border services" relates, in part, (as noted at paragraph 6.7 above) to changes to EU legislation due to be implemented after the UK leaves the EU. It was considered that while there was an indirect link here with the UK's exit from the EU, this link might not however be direct enough to be able to rely on section 8 of the EUWA.

7. Policy background

What is being done and why?

7.1 The main objectives of Directive 2005/47/EC were to develop safe cross-border traffic and protect the health and safety of mobile workers engaged in interoperable cross-border services. The Directive therefore places requirements on the timing and duration of rest periods and breaks, limits on driving time and the need to keep records for cross-border workers (over and above those requirements in the original Working Time Directive 93/104/EC). These requirements were implemented in full by the Principal Regulations.

7.2 However, the Principal Regulations define cross-border services according to the number of Part B safety certificates required by a service. Under a separate EU Directive, operators of cross-border services are required to obtain a Part A certificate from the Member State in which they are established, as well as a Part B certificate for each jurisdiction a cross-border service travels through. So, for example, a Eurostar service travelling from London to Paris would require a Part A certificate from the UK, and three Part B certificates: a Part B issued by the Office of Rail and Road (ORR) for the section of the journey from St Pancras to the Channel Tunnel; a Part B issued by the Channel Tunnel Intergovernmental Commission (IGC) for the section through the Channel Tunnel itself (the IGC is the 'national safety authority' for the tunnel itself for the purposes of EU legislation, the IGC binational Regulation on the safety of the Channel Fixed Link and the Channel Tunnel (Safety) Order (S.I. 2007/3531)); and a Part B issued by EPSF (the French national safety authority) for the French section between Coquelles and Paris.

7.3 The Principal Regulations define cross-border services as those in respect of which at least two Part B certificates are required. All Eurostar services therefore currently fall within this definition.

7.4 In addition to Eurostar services, there are two other operators that fall within this definition, and to whom therefore the Principal Regulations apply. These are DB Cargo and GB Freightliner, both of which are rail freight operators. There is a relatively low volume of cross-border rail freight services through the Channel Tunnel each year.

7.5 Eurotunnel Le Shuttle workers (the shuttles which carry both passenger vehicles and heavy goods vehicles (HGVs) through the Channel Tunnel) are not captured by this definition. This is due to the fact that the original cross-border working time provisions in EU Directive 2005/47/EC, which the Principal Regulations transpose, do not capture this cohort. However, the shuttle's journey time is comparatively short when contrasted with the journey times of rail cross-border workers captured by the Principal Regulations and these workers are already covered by the general Working Time Regulations 1998.

7.6 Following the UK's withdrawal from the EU, the UK will retain the existing safety certification system, continuing to issue Part A and Part B safety certificates. However, technically these will no longer be certificates issued and required under Directive 2004/49/EC and there is therefore a risk that this definition of 'interoperable cross-border services' will no longer capture certain cross-border services. To mitigate the risk of this deficiency arising and to provide certainty to workers and operators, the Government considers it appropriate to amend the definition to ensure the working time provisions continue to apply to all cross-borders services currently captured by Directive 2005/47/EC and the existing UK legislation after exit day.

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

8.1 This instrument is not being made under the European Union (Withdrawal) Act but relates to the withdrawal of the United Kingdom from the European Union, because it seeks to ensure that the definition of cross-border services in the Principal Regulations will continue to work following the UK's withdrawal from the EU.

9. Consolidation

9.1 The Department for Transport has no current plans to consolidate.

10. Consultation outcome

10.1 As this amendment is being made to avoid a deficiency arising as a result of the UK's withdrawal from the European Union, and therefore does not provide for any material change, the Department for Transport considers that this does not require formal consultation.

11. Guidance

11.1 The Department for Transport is not producing any specific guidance on this amendment as it is only amending a deficiency arising from the UK's withdrawal from the EU in order to maintain the current position.

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 produced for this instrument because no, or no significant, impact on the private or voluntary sector is foreseen. This measure will merely preserve the status quo by ensuring that the same services are captured within the definition of cross-border railway services as prior to the UK's withdrawal from the EU. Therefore, this measure is expected to be cost neutral, with any costs or benefits falling well below £5 million in any one year.

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 as set out in paragraph 14.2.

14.2 This instrument does not include a statutory review clause and, in line with the requirements of the Small Business, Enterprise and Employment Act 2015, the Minister of State for Transport Jo Johnson has made the following statement:

"Having had regard to the Small Business, Enterprise and Employment Act 2015 and the Statutory Review Guidance for Departments published under section 31(3) of that Act, I have decided that it is not appropriate to make a provision for review in this instrument because it would be disproportionate taking into account the economic impact of the amendment made by this instrument There are no substantive policy changes and the amendment to legislation is being made to ensure that the existing position is maintained. Furthermore, as this is an EU Exit instrument relating to deficiencies and is made under existing legislative powers, a review clause would not be appropriate. This is because the measure is cost neutral and the government takes the view that the inclusion of a review clause in such a correcting order would be impractical and any benefits would be outweighed by the costs and use of resource."

15. Contact

15.1 Benn Hall at the Department for Transport Telephone: 07771 974128 or email: benn.hall@dft.gsi.gov.uk can be contacted with any queries regarding the instrument.

15.2 Jeremy Hotchkiss at the Department for Transport can confirm that this Explanatory Memorandum meets the required standard.

15.3 The Minister of State, Jo Johnson at the Department for Transport, can confirm that this Explanatory Memorandum meets the required standard.