EXPLANATORY MEMORANDUM TO

THE CONSUMER RIGHTS (RAIL PASSENGER SERVICE EXEMPTION, ENFORCEMENT AND AMENDMENTS) ORDER 2016

2016 No. XXXX

1. Introduction

1.1 This explanatory memorandum has been prepared by the Department for Business, Innovation and Skills and is laid before Parliament by Command of Her Majesty.

2. Purpose of the instrument

2.1 The Consumer Rights (Rail Passenger Service Exemption, Enforcement and Amendments) Order 2016 ("the Order") temporarily exempts EU licensed rail passenger operators from section 57(3) of the Consumer Rights Act 2015 ("the 2015 Act"), in respect of their liability to consumers under Chapter 4 of Part 1 ("the Services Chapter") of that 2015 Act arising from the delay or cancellation of railway passenger services. The Order will have effect from 1st October 2016, for a period of 12 months.

2.2 The Order also amends primary legislation relating to enforcement of consumer law consequent to the 2015 Act, and makes amendments to Schedule 5 to the 2015 Act on enforcement.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

3.1 None.

Other matters of interest to the House of Commons

3.2 Disregarding minor or consequential changes, the territorial application of this instrument includes Scotland and Northern Ireland.

4. Legislative Context

4.1 The 2015 Act brings together consumers' and businesses' rights and obligations and the investigatory powers of consumer law enforcers. This simplifies the legislative framework for businesses, consumers and enforcers which was considered as burdensome and confusing.

4.2 When the bulk of the 2015 Act was brought into force on 1st October 2015, commencement of certain provisions ("the deferred provisions") was deferred until 6th April 2016 by the Consumer Rights Act 2015 (Commencement No. 3, Transitional Provisions, Savings and Consequential Amendments) Order 2015 (SI 2015/1630). The deferred provisions are: in Part 1, the Services Chapter and certain parts of Chapter 5 (which contains general and supplementary provisions), and certain parts of Schedule 4 which amended the Unfair Contract Terms Act 1977 as a consequence of the provisions in the Services Chapter and Chapter 5 of Part 1, in so far as they applied to the aviation, maritime and EU-licensed rail passenger sectors. In April 2016 commencement of these provisions of the 2015 Act was further

deferred until 1st October 2016 by the Consumer Rights Act 2015 (Commencement No. 3, Transitional Provisions, Savings and Consequential Amendments) (Amendment) Order 2016 (SI 2016/484).

4.3 Section 57 of the 2015 Act concerns liability of a trader that cannot be excluded or restricted, and subsection (3) provides that traders providing services to consumers cannot limit their liability to refund consumers for breach of any of the statutory rights provided under sections 49, 50 and, where they apply, 51 and 52 of the Services Chapter of the 2015 Act, to less than the price paid. The relevant statutory rights provided under the Services Chapter are that the trader must perform the service with reasonable care and skill, that information given about the trader or the service which is taken into account by the consumer is binding and, if no price or time is fixed for the service, the service will be provided at a reasonable price or within a reasonable time.

4.4 The Order exempts EU licensed rail passenger operators from 1st October 2016 to the end of 30th September 2017 from section 57(3) of the 2015 Act in respect of delayed or cancelled railway passenger services. Such operators are required to provide compensation to passengers for delays or cancellations to services, which may be limited to less than the price of the ticket. EU licensed rail passenger operators are those operating mainline services in the UK pursuant to a licence under Directive 2012/34/EU of the European Parliament and of the Council establishing a single European railway area (recast) or Council Directive 1995/18/EC dated 19th June 1995 on the licensing of railway undertakings (an "EU Rail Licence").

4.5 Operators providing rail passenger services on only local and regional standalone infrastructure and operators providing only urban or suburban rail passenger services are excluded from the EU licensing regime. Therefore the railway exemption will not apply to the London Underground and other metro services, for example, Glasgow subway, trams and tramways including the Greater Manchester Metrolink and heritage/tourist rail passenger services. The 2015 Act has applied to these services (like other services) from 1st October 2015.

4.6 Note, however, that the exemption would apply to London Overground rail services operated by Transport for London as these are operated under an EU Rail Licence.

4.7 The effects of removing limits on liability to transport consumers were discussed in Parliament during the passage of the Bill. During the passage of the Bill, members of the Public Bill Committee were assured that if rail consumers were exempted from any rights in the 2015 Act, they would instead be given equivalent protection to the 2015 Act under rail sector compensation schemes. While the delay compensation provided by the compensation schemes is not identical to the remedies available under the 2015 Act, the schemes offer consumers a balanced, targeted package of rights and remedies to address the specific problems that arise from disrupted journeys. The schemes are not limited to full or partial refund of the ticket price, but go further in protecting consumers by providing a range of measures (which vary between schemes), including practical care and assistance, such as re-routing or overnight accommodation in cases of severe disruption. The schemes also go further than the 2015 Act by including the right to a refund even in cases where delays or cancellations have been caused by factors beyond the train operator's control.

4.8 Article 5 and the Schedule to the Order make certain amendments to primary legislation in consequence of the effect of Schedule 5 (Investigatory powers etc) to

the 2015 Act, together with Schedule 6 (Investigatory Powers: Consequential Amendments). The Schedule also makes other amendments to Schedule 5 to the 2015 Act, adding provisions which amend paragraph 10 so that it applies to The Tobacco and Related Products Regulations 2016 (S.I. 2016/507) and The Standardised Packaging of Tobacco Regulations 2015 (S.I. 2015/829). Finally, Schedule 5 is amended to add another item of "enforcer's legislation" to the table in paragraph 11 and, as a consequence, that legislation is itself amended.

5. Extent and Territorial Application

5.1 This instrument extends to the United Kingdom.

5.2 This instrument applies to the United Kingdom.

6. European Convention on Human Rights

6.1 Nick Boles MP, Minister of State for Skills, has made the following statement regarding Human Rights:

"In my view the provisions of the Consumer Rights (Consumer Transport Service Exemptions and Amendments) Order 2016 are compatible with the Convention rights."

7. Policy background

7.1 In order to simplify consumer law, the 2015 Act consolidates various provisions in existing legislation. These consumer law reforms constitute a fundamental reform of UK consumer rights and are predicted to boost the economy by £4 billion over the next decade. This will contribute to markets working more effectively, thereby driving economic growth.

What is being done and why

7.2 EU licensed rail passenger operators currently provide compensation to consumers when services are delayed or cancelled. The current minimum requirements for passenger compensation are part of a wider package of measures set out in the National Rail Conditions of Carriage (NRCoC). They include, for example, the right to an immediate full refund from a ticket office if a customer decides not to travel when the train they intended to use is cancelled or delayed, or help where necessary in cases of travel disruption such as re-routing or overnight accommodation. In addition, some train operators, including those recently awarded franchises by the Secretary of State for Transport, provide more generous "Delay Repay" compensation to passengers.

7.3 Both the schemes include some limits on the train operators' liability to passengers for this compensation, mainly linked to the length of the delay:

- under the NRCoC, where the delay is within the control of the rail industry (not just the train operator but others including Network Rail), if passengers arrive more than 60 minutes late at their destination station they are entitled as a minimum to: (i) 50% of the fare paid where the passenger holds a single ticket or a return ticket when the delay occurs on both legs of the journey, or (ii) 50% of the fare paid for the relevant portion of the journey where the passenger holds a return ticket and there is a delay on only one leg of the

journey. The compensation is payable in rail vouchers or in cash if the passenger requests this; and

- under Delay Repay, all passengers are entitled to claim compensation for each delay of 30 minutes or more, whatever the cause, on effectively a "no fault" basis: there are no exclusions for delays outside the control of the rail industry. The entitlement is 50% of the single fare for delays between 30 and 59 minutes, and 100% of the single fare for delays between 60 and 119 minutes. For delays of 2 hours of more, the entitlement is 100% of the return fare.

7.4 The existing rail compensation schemes will continue to be available when the 2015 Act is fully in force, and are expected to remain the main means of redress for passengers when things go wrong. This will enable consumers to access compensation easily, without the need to show fault on the part of the train operator, and pursue their rights through the courts or by complaining to a regulator.

7.5 The effect of the exemption in the Order will be that, for 12 months from 1st October 2016, EU licensed rail passenger operators will be able to continue to rely on terms in their contracts for carriage that limit their liability for delays or cancellations to the level set out in the rail compensation regimes in those limited situations where there is a breach of the rights granted by the Services Chapter of the 2015 Act. This will help rail operators to reduce the risk of confusion and new costs, by allowing time for them to put in place more consistent compensation arrangements and consider how they can be improved to better reflect the rights granted by the 2015 Act, without having to handle compensation claims under the 2015 Act. This Order is limited to 12 months because a longer or permanent exemption for rail or for other transport sectors from any of the provisions of the 2015 Act would not be in the best interests of consumers. After 30th September 2017, EU licensed rail passenger operators will be able to rely on terms in their contracts for carriage that limit their liability for delays or cancellations to the level set out in the rail compensation regimes only where there is no breach of the rights granted by the Services Chapter of the 2015 Act.

7.6 There has been considerable interest in this policy from consumer groups such as Which? and in the media. Consumer groups raised concerns with the Government and in the media about the original proposal to permanently exempt aviation, maritime and rail services from provisions of the 2015 Act in cases of delay and cancellation. There has also been some critical press coverage of the Government's decision to allow the rail industry a limited exemption from section 57(3) of the 2015 Act to allow them extra time to move to more consistent compensation arrangements.

Amendments to Primary Legislation

7.7 Schedule 5 to the 2015 Act sets out in one place the investigatory powers of public enforcers of consumer law ("domestic enforcers"), such as local authority Trading Standards Services, in one place so that these powers are more transparent. The enforcers' powers now include a requirement for these enforcers to give two days' written notice for routine inspections. The powers and safeguards are designed so that, taken together, they provide a greater level of protection.

7.8 Schedule 5 also sets out the circumstances which are considered not to be routine inspections, such as where giving notice would defeat the purpose if the inspection.

7.9 This Order makes consequential changes so as to give effect to the enforcers' powers in the Weights and Measures (Northern Ireland) Order 1981.

7.10 Under the London Local Authorities Act 2007 ("the 2007 Act"), mail forwarding services are regulated, and London borough councils are empowered to enforce the regulations. This Order adds the 2007 Act to the list of "enforcer's legislation", thereby giving to London borough councils the investigatory powers under Schedule 5, and makes a consequential amendment to the 2007 Act.

7.11 The Order also amends paragraph 10 of Schedule 5 to the 2015 Act so as to apply the enforcement provisions in Part 3 and Schedule 5 to the Consumer Rights Act to The Tobacco and Related Products Regulations 2016 and The Standardised Packaging of Tobacco Regulations 2015.

Consolidation

7.12 None.

8. Consultation outcome

8.1 The Department for Transport held a series of informal discussions with industry and consumer stakeholders during 2015, and ran a public consultation exercise on the proposed exemption between 29th October and 30th November 2015. The original proposal on which the Department consulted was for a permanent exemption from sections 57(3) and 57(4)(a) of the 2015 Act, and extended to aviation and maritime services, as well as rail.

8.2 The Department ran a relatively short period of formal consultation given the earlier engagement with stakeholders, and the relatively contained subject matter.

8.3 A total of 31 responses was received from industry bodies, regulators, consumer bodies and transport consumer representative groups. Industry bodies supported the proposal, and there was general agreement that there were significant benefits to consumers in principle from having well-designed compensation arrangements with clear and equitable remedies in the event of cancellations and delays. However, regulators and consumer groups raised significant concerns about the implementation and effectiveness of some of the transport sector schemes in practice. Consumer groups also objected to exempting parts of the transport sector from such a recent Act.

8.4 The Government has concluded that consumer interests are best served if the transport sector as a whole is not exempted from the services provisions, and has decided not to grant a permanent exemption for the aviation, maritime and rail sectors from the 2015 Act. The sector-specific schemes that exist in the three transport modes remain available, and are the main means of redress for passengers when things go wrong. Consumers will also be entitled to seek redress under the 2015 Act however if transport operators fail to provide a passenger service with reasonable care and skill, or breach other consumer rights provided under the 2015 Act. In aviation, this will be subject to the operation of international conventions.

8.5 The Government decided not to exempt EU licensed rail passenger operators from section 57(4)(a) of the 2015 Act, which provides that a term of a contract to supply services is not binding if it excludes or restricts a consumer's right or remedy for breach of any of the statutory rights. This was to avoid uncertainty as to whether the exemption applied to the obligations in section 56 of the 2015 Act to pay compensation:

- without undue delay, and in any event within 14 days beginning with the day on which the trader agrees that the consumer is entitled to a refund;

- using the same means of payment as the consumer used to pay for the service, unless the consumer expressly agrees otherwise;
- without imposing a fee on the consumer.

8.6 The obligations in section 56 of the 2015 Act will apply to EU licensed rail passenger operators in full from 1 October 2016. The exemption (from section 57(3) of the 2015 Act) to be provided by this Order only applies to the amount of compensation that may be payable for breach of the rights in the Services Chapter of the 2015 Act.

8.7 The Government's full response to the consultation can be found at: https://www.gov.uk/government/consultations/rail-aviation-and-maritime-applying-the-consumer-rights-act.

8.8 In terms of the consequential and other amendments in this Order, no formal consultation has taken place on the provisions included in this Order

9. Guidance

9.1 There is no Government guidance associated with the exemption in this instrument. No new obligations are being created.

9.2 Guidance has been produced for the 2015 Act, which includes 'investigatory powers of consumer law enforcers'[1], which can be viewed here: http://www.businesscompanion.info/. No guidance is required for the consequential amendments included in this Order.

10. Impact

10.1 There is no impact on business, charities or voluntary bodies.

10.2 There is no impact on the public sector.

10.3 A validation stage impact assessment in relation to the exemption from the application of the 2015 Act is submitted with this memorandum and will be published alongside it on the legislation.gov.uk website.

11. Regulating small business

11.1 The legislation applies to activities that are undertaken by small businesses.

11.2 No specific action is proposed to minimise regulatory burdens on small businesses.

11.3 The legislation will not impose any new or increased burdens on small businesses.

12. Monitoring & review

12.1 The provisions of Article 3 of the Order, exempting EU licensed rail passenger operators from section 57(3) of the 2015 Act, will cease to have effect at the end of 30th September 2017. The Order is therefore outside the scope of the duty in section 28 of the Small Business, Enterprise and Employment Act 2015 to include a review clause.

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1 https://www.businesscompanion.info/sites/default/files/Trading%20standards%20visits%20and%20inspections_BIS_INVESTIGATORY_POWERS_GUIDANCE_OCT15.pdf

13. Contact

13.1 Elaine Barley at the Department for Business, Innovation and Skills (telephone: 020 7215 0028 or email: Elaine.Barley@bis.gsi.gov.uk) can answer any queries regarding the Consumer Rights Act 2015.