EXPLANATORY MEMORANDUM TO

THE RAILWAYS (ACCESS, MANAGEMENT AND LICENSING OF RAILWAY UNDERTAKINGS) (AMENDMENT) REGULATIONS 2019

2019 No. 82

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.

1.2 This memorandum contains information for the Joint Committee on Statutory Instruments.

2. Purpose of the instrument

2.1 This instrument implements for Great Britain Directive (EU) 2016/2370, known as the "Market Pillar Directive", which is part of the Fourth Railway Package of legislation (see paragraph 6.12 for further details).

2.2 The Market Pillar Directive's objective is to improve competition within the EU by extending access rights into domestic passenger services and to ensure the impartiality and independence of infrastructure managers of rail networks.

2.3 The instrument will implement the provisions of the Market Pillar Directive until 31 December 2020, after which time most of the changes made will cease to have effect. This "sunset" provision will provide greater flexibility to determine railway policy and legislation after the United Kingdom leaves the European Union. Preserving such flexibility is particularly relevant in the light of the ongoing review of the rail sector being led by Keith Williams (for more detail see the following website address: https://www.gov.uk/government/consultations/williams-rail-review).

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

3.1 This instrument is made under section 2(2) of the European Communities Act 1972 (the "ECA") which, among other things, enables regulations to be made for the purpose of implementing EU obligations of the United Kingdom. The United Kingdom's EU obligations to continue to give effect to the Market Pillar Directive will however cease at 11 pm on 29 March this year pursuant to the notice given by Her Majesty's Government under article 50 of the Treaty on European Union (OJ No C 326, 26.10.2012, p 13) and pursuant to the repeal of the ECA under the European Union (Withdrawal) Act 2018.

3.2 Under and subject to the terms of the proposed EU Withdrawal Agreement (the Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community – see https://www.gov.uk/government/publications/withdrawal-agreement-and-political-declaration), and subject to this Agreement being endorsed and ratified by the UK Parliament and the European Parliament, and necessary legislation being passed to give effect to that agreement, EU law will however continue to apply to the UK during an implementation or transition period lasting until 31 December 2020.

3.3 In view of the above, and reflecting the time limited nature of the UK's obligations with respect to EU law, it is considered appropriate to exercise the powers under section 2(2) of ECA so as to provide for the implementation of the Market Pillar Directive's provisions to cease to apply at the end of 31 December 2020 (see regulations 6 and 7 and Schedule 5).

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)

3.4 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 England and Wales and Scotland only.

4.2 The territorial application of this instrument is England and Wales and Scotland only.

5. European Convention on Human Rights

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

6. Legislative Context

6.1 To facilitate the liberalisation of EU rail markets, the EU has, since the early 1990s, introduced packages of measures aimed at boosting competition and opening up markets.

6.2 Three key pieces of EU legislation formed the basis of EU regulation of the railways in the 1990s ("the Initial EU Directives"). These were as follows:

- Council Directive 91/440/EEC on the development of the Community's railways, which required Member States to grant rail companies independence from government and introduce commercial rail management techniques, as well as separating the management of infrastructure from transport management;
- Directive 95/18/EC which standardised the licensing of railway undertakings;
- Directive 95/19/EC (since repealed) which dealt with infrastructure capacity allocation and the charging of infrastructure fees.

6.3 The Initial EU Directives were implemented in Great Britain largely by the Railways Regulations 1992 and subsequently by the Railways Regulations 1998 which revoked the 1992 Regulations.

6.4 The Initial EU Directives have been heavily amended and expanded since the late 1990s in four tranches of amending legislation known as "packages".

6.5 **First Railway Package:** The 2001 "First Railway Package" consisted of three directives (Directives 2001/12/EC amending Directive 91/440/EEC, Directive 2001/13/EC amending Directive 95/18/EC, and Directive 2001/14/EC repealing Directive 95/19/EC). These Directives made further changes aimed at stimulating fair competition in the rail market. Among other things this package included requirements for separate accounts for infrastructure managers and service operators

and for independent national regulatory bodies to guarantee fair access to rail infrastructure.

6.6 **Second Railway Package**: This package of legislation focused on rail freight markets. Directive 2004/51/EC further amended Directive 91/440/EEC to liberalise national and international freight services on the European network.

6.7 Changes required by the First Railway Package and some elements of the Second Railway Package were implemented by the following three instruments which replaced the Railways Regulations 1998:

- The Railways Infrastructure (Access and Management) Regulations 2005) ("the 2005 Access and Management Regulations), which implemented Directive 91/440/EEC, as amended, and Directive 2001/14/EC;

- The Railway (Licensing of Railway Undertakings) Regulations 2005 ("the 2005 Licensing Regulations"), which implemented Council Directive 95/18/EC, as amended, to provide for European licences for train operators; and

- The Channel Tunnel (International Arrangements) Order 2005 (S.I. 2005/3207) ("the 2005 Channel Tunnel Order").

6.8 **Third Railway Package:** The third railway package consisted of legislation that opened up the market for international passenger services and strengthened passenger rights for rail passengers in the EU and provided for licensing and certification of train drivers.

6.9 Key directives were Directive 2007/58/EC which was implemented into domestic legislation by the Railways Infrastructure (Access and Management) (Amendment) Regulations 2009 and Directive 2007/59/EC which was implemented by the Train Driving Licences and Certificates Regulations 2010. Passenger rights provisions were set out in Regulation (EC) 1371/2007. As this Regulation was directly applicable, it did not require implementation into domestic law but regulations were made for enforcement purposes, (the Rail Passengers' Rights and Obligations Regulations 2010) and for certain exemptions to be given effect to (the Rail Passengers' Rights and Obligations (Exemptions) Regulations 2009). A further directly applicable EU Regulation, Regulation (EC) 1370/2007 (which again did not require domestic legislative implementation) set out provisions applicable to the letting of rail franchises.

6.10 **The Recast Directive:** The Initial EU directives, and various of the subsequent amending directives detailed above were consolidated by Directive 2012/34/EU of 21 November 2012 establishing a single European railway area (recast) (the "Recast Directive"). It also harmonised terminology and eliminated the need to cross refer to different directives. In addition, it clarified and strengthened some substantive provisions.

6.11 The Recast Directive was implemented in Great Britain by the Railways (Access, Management and Licensing of Railway Undertakings) Regulations 2016 ("the 2016 Regulations") which repealed the 2005 Access and Management Regulations and amended the 2005 Licensing Regulations. There were separate implementing regulations in Northern Ireland (the Railways Infrastructure (Access, Management and Licensing of Undertakings) Regulations (Northern Ireland) 2016).

6.12 **Fourth Railway Package:** The Fourth Railway Package of EU legislation covers both rail markets ("the Market Pillar") and technical standards and safety (the "Technical Pillar"). The deadline for implementation of the Technical Pillar is June 2020. The Market Pillar comprises the Market Pillar directive and two directly applicable regulations – Regulation (EU) 2016/2338, which amends Regulation 1370/2007 (which relates to the awarding of public service contracts for domestic passenger services) and Regulation (EU) 2016/2337 (this repeals Regulation (EEC) 1192/69 on the normalisation of the accounts of railway undertakings).

6.13 This instrument implements for Great Britain the Market Pillar Directive, which amended the Recast Directive, by amending the 2016 Regulations and, in respect of one point explained in paragraph 7.10 below, by amending the 2005 Licensing Regulations. They also reflect the change made to the Annex VII of the Recast Directive by Commission Delegated Decision (EU) 2017/2075 (see paragraph 7.13). Separate regulations are required to implement the Market Pillar Directive for Northern Ireland.

6.14 A brief scrutiny history for the instrument is submitted with this memorandum at Annex A.

6.15 A Transposition Note is also submitted with this memorandum.

7. Policy background

What is being done and why?

7.1 Although the UK is set to exit the EU in March 2019, the Government has made it clear that while the UK remains a Member State we will continue to abide by EU law and implement EU legislation. Failure to do so risks the possibility of the Commission undertaking infraction proceedings and issuing a fine.

7.2 The Market Pillar Directive (referred to as "the Directive" throughout this section and in section 9) builds on the principles of the Recast Directive in seeking to improve competition within EU rail markets. The Directive facilitates the opening of rail markets through open access to domestic rail networks, subject to certain limitations. Open access enables new rail operators to bid for access to rail networks outside the franchising system. Examples of such "open access operators" in Great Britain include Grand Central and Hull Trains who operate services from London Kings Cross to Sunderland and Hull respectively.

7.3 As open access services have operated on the network in Great Britain since the 1990s and practices here are already aligned with those outlined in the Directive, it is anticipated that the Directive will have a limited impact in practice in Great Britain. Ultimately, the Directive is likely to bring rail markets in EU Member States more in line with existing practices here.

7.4 In addition, the Directive clarifies and strengthens the rules regarding the independence and impartiality of infrastructure managers (who are responsible for the operation, maintenance and renewal of railway infrastructure on rail networks). Network Rail is the infrastructure manager for most of the rail network in Great Britain but other infrastructure managers include High Speed 1 (HS1) and Heathrow Airport Limited (HAL).

7.5 The new independence and impartiality requirements for infrastructure managers are intended to ensure that decisions made in relation to essential functions of the

infrastructure manager relating to the allocation of, and charging for, capacity on the network are taken in a fair and transparent manner. These requirements do not prevent joined up working between train operators and infrastructure managers to improve performance of the network and provide benefits to customers.

7.6 The Directive also introduces new requirements relating to the financial management of infrastructure managers. These prevent loans between railway undertakings (known as train operating companies in the UK) and infrastructure managers and require that an infrastructure manager cannot use income from its infrastructure management activities to finance any other (non-infrastructure management) business.

7.7 The Directive also adds to existing requirements on coordination and cooperation between the infrastructure manager and railway undertakings. In addition to this, regulatory bodies are required to cooperate with their equivalents in other Member States in respect of international rail services. The Office of Rail and Road (ORR), the UK's regulatory body for rail, already cooperates with the French regulator in respect of international services through the Channel Tunnel.

7.8 The Directive also provides regulators with additional powers. Regulators are required to ensure that those applying for access to the rail network are not discriminated against and extends the circumstances in which applicants can appeal to the regulator if they feel they have been treated unfairly. As the ORR already operates an appeals process and our rail market is fair and open it is not anticipated that these requirements will have much of an impact.

7.9 The Directive extends the right to access the rail network to all passenger services (previously these rights only extended to freight services and international passenger services) unless the economic equilibrium of a franchised operator would be compromised by the proposed service. It also requires the regulator, where it has found that the economic equilibrium of a franchised operator would be compromised, to indicate changes to the intended passenger service provider which would ensure that these compromises can be avoided. Commission Implementing (EU) Regulation 2018/1795 sets out the procedure regulators are required to undertake to assess applications and has applied in Member States since 1 January 2019 (this replaces an earlier regulation, Implementing Regulation (EU) 869/2014 dealing with the economic equilibrium test in relation to freight and international passenger traffic). These practices are broadly consistent with the ORR's existing 'Not Primarily Abstractive' test by which the ORR currently assesses open access applications, with certain additions to provide protections to franchises, so it is expected that these changes will not have a significant impact in themselves.

7.10 One provision in the Directive relates to operator licences and requires an amendment to paragraph 2(c)(i) of Schedule 2 to the 2005 Licensing Regulations. The provision adds to the list of offences committed by a railway undertaking that would prohibit the ORR from concluding that the operator is of good repute for the purposes of deciding whether to grant them an operator licence. The additional offences are those relating to binding collective agreements between employers and employee representatives. Since collective agreements are not generally enforceable in the UK, this amendment is unlikely to have significant practical effect, but will ensure that the 2005 Licensing Regulations are in accordance with European law.

7.11 The Directive also includes some optional requirements. One of these, which was also included in the Recast Directive, allows Member States to exclude some types of

smaller networks, such as those intended only for the operation of urban and suburban services only from the requirements regarding independence and impartiality and financial transparency. This instrument gives effect to these exemptions and also introduces the same exemptions for local, low-traffic freight lines that do not exceed 100km.

7.12 Another optional requirement related to common information and through ticketing schemes. As such a scheme already operates domestically, it was not considered necessary to implement this part of the Directive as the requirements are already covered by the licensing and franchising regimes.

7.13 This instrument also updates the 2016 Regulations by inserting (by regulation 4 and schedule 1) a new Schedule 4 to reflect the introduction of Commission Delegated Decision (EU) 2017/2075. This Delegated Decision, which came into force in September 2017, replaced Annex VII of Directive 2012/34/EU. It sets out how infrastructure managers allocate access to the rail network and how the working timetable should be established. This amendment to the 2016 Regulations will not be subject to the sunset provision and will remain in effect after 31 December 2020. This is because it does not form part of the Market Pillar Directive itself and is required to bring the 2016 Regulations up to date.

7.14 With the exception of the new Schedule 4 mentioned above, and minor amendments dealing with the replacement of Commission references to Implementing Regulation (EU) 869/2014 with references to Commission Implementing Regulation (EU) 2018/1795, the instrument implements the Directive by means of transitory modifications to the 2016 Regulations and the 2005 Licensing Regulations. In respect of the 2016 Regulations the transitory modifications are set out in Schedule 2 to the instrument which inserts a new Schedule 6 into the 2016 Regulations. This schedule makes it clear that the modifications will have effect only until 31 December 2020. After that date, the 2016 Regulations amendments and the amendment to 2005 Licensing Regulations referred to above will (with the exception of the permanent changes referred to in paragraph 7.13 and above) revert to their current state. This provision will provide greater flexibility to determine railway policy and legislation after the United Kingdom leaves the European Union. This is particularly relevant in the context of the ongoing Williams Rail Review.

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

8.1 This instrument does not relate to withdrawal from the European Union.

9. Consolidation

9.1 The Department chose to amend the 2016 Regulations rather than revoke and re-enact them because this was considered the most straightforward approach given the limited changes which the Market Pillar makes to the provisions.

10. Consultation outcome

10.1 The Department conducted a public consultation from 24th April 2018 to 8th June 2018 to seek views from stakeholders on how the Directive should be implemented into domestic legislation. Stakeholders from within the rail sector were also consulted informally prior to the publication of the consultation in the form of bilateral meetings with officials.

10.2 To complement the consultation, two working groups were held to examine the issues raised in the consultation in more detail. Those invited included passenger and freight operators, providers of cross-border services and wider industry representatives.

10.3 Department for Transport officials also held meetings with colleagues from the Scottish and Welsh Governments to consider the consultation document in further detail. Department for Transport Officials have also met with Officials from the Northern Ireland Executive to ensure appropriate consistency of approach in the equivalent instrument in relation to Northern Ireland which is due to be laid before Parliament around the same time as this one. Since the consultation, drafts of this instrument have been shared with key stakeholders and officials in the Devolved Administrations providing them with the opportunity to comment on how the legislation may impact on them and offer alternative drafting options where appropriate.

10.4 The consultation split the Directive's implementation into seven themes. The first five related to the mandatory requirements. These focused on:

- New independence and impartiality requirements for infrastructure managers.
- New financial transparency requirements for infrastructure managers.
- New co-ordination and cooperation requirements between infrastructure managers and railway undertakings.
- Additional powers for regulatory bodies.
- Extending requirements to limit the right of access to railway infrastructure.

10.5 Many of these requirements are already broadly in line with practice in Great Britain so the impacts are expected to be minimal on stakeholders. The consultation responses the Department received largely reflected this view.

10.6 The final two themes of the consultation focused on the optional requirements within the Directive. The exercise of the options that allow Member States to exclude certain lines from some of the Directive's provisions received a mixed response from stakeholders as some felt that there was not a clear enough rationale for making use of them. Nevertheless, to ensure that burdens are reduced on industry wherever possible, these optional requirements have been included in the instrument in occurrences where no further permission from the Commission is required.

10.7 In respect of the optional requirement to adopt the common information and through ticketing scheme, stakeholders largely supported our view that it would not be appropriate to adopt this as through ticketing is already covered in Great Britain by the National Conditions of Travel. Furthermore, the relevant part of the Directive refers to the possibility that the Commission may consider legislative proposals on through ticketing. If this was implemented domestically, there is a risk that future legislative proposals by the Commission may not be compatible with our existing schemes (although the impact of this would depend on the extent to which domestic legislation remains aligned to EU legislation after the United Kingdom has left the EU).

10.8 A total of nine responses to the consultation were received. Apart from one response from a member of the public, all others were received from the rail industry. These were from Network Rail, The Office of Rail and Road, Rail Delivery Group, Arriva, Eurostar, Trainline, ASLEF and Transport for London. Few stakeholders responded to

all questions within the consultation, instead focusing on areas which impacted them specifically. However, there was general support for the Government's plans for implementation and the view that it would have a limited impact on rail in Great Britain.

10.9 The consultation can be found at the following website address: https://www.gov.uk/government/consultations/rail-markets-implementing-the-market-pillar. The Government response to the consultation was published on 21 January 2019 and can be found at the same website address as above.

10.10 Prior to finalising the instrument, drafts were shared with some key stakeholders to enable them to comment on whether they felt there were any problems with what was proposed. By using the expertise of stakeholders, some minor drafting changes were made and we believe that any unforeseen consequences have been resolved in the final legislation.

10.11 10.11 The sunsetting of the provisions was not included in the April 2018 consultation as the decision to implement the Directive in this way had not been taken at that time. The sunsetting proposal, has, however, been raised with two key stakeholders, the Office of Rail and Road and Network Rail who understood the reasons for the approach taken. They were advised that following careful consideration, the Government is satisfied that it is appropriate to sunset the legislation to provide opportunities to shape domestic rail legislation. Any subsequent changes will follow close consultation with stakeholders.

11. Guidance

11.1 Due to the limited changes that this instrument introduces and that it contains a sunset clause, no formal guidance has been prepared by the Department.

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 consultation we are satisfied that the impact of the Directive will be limited to the extent that the overall costs or benefits to business will be below £5m per year.

13. Regulating small business

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

13.2 To minimise the impact of the requirements on small businesses (employing up to 50 people), the approach taken is to take advantage of derogations available within the Directive. Small businesses cannot be entirely excluded from the scope of the 2018 Regulations because the proposals are of EU origin but all available derogations have been applied.

14. Monitoring & review

14.1 The approach to monitoring of this legislation is that the instrument will be sunset in order to provide greater flexibility from EU law as the UK leaves the EU.

14.2 A sunset provision has been included within the instrument. This means that the provisions within Schedule 2 will not apply after 31 December 2020.

15. Contact

15.1 Jonathan Gay at the Department for Transport Telephone: 07988513257 or email: jonathan.gay@dft.gov.uk can be contacted with any queries regarding the instrument

15.2 Peter Lovitt at the Department for Transport Telephone: 07970312085 or email: peter.lovitt@dft.gov.uk can be contacted with any queries regarding this instrument.

15.3 Dan Moore, Director for Rail EU Exit, at the Department for Transport can confirm that this Explanatory Memorandum meets the required standard.

15.4 Andrew Jones, Parliamentary Under-Secretary of State, at the Department for Transport can confirm that this Explanatory Memorandum meets the required standard.

Annex A

Scrutiny History

The proposal that resulted in Directive 2016/2370 was the subject of combined Explanatory Memorandum 5960/13, 5985/13 & 6020/13. The House of Commons European Scrutiny Committee considered the EM on 27 February 2013. The Committee recommended that the documents were politically important and recommended them for debate on the floor of the House (Report 33, Session 2012/2013, Committee references 34666, 34672, 34675). The debate took place on 25 April 2013, and cleared the documents from scrutiny in the Commons. Ministerial letters were sent to the Chairman on 4 June 2014, 18 March 2015, 15 July 2015, 23 November 2015, 15 March 2016 and 3 May 2016 to keep the Committee informed of subsequent progress.

The House of Lords Select Committee on the European Union referred the EMs to its Sub-Committee B at the 1497th sift on 26 February 2013. The Chairman wrote to the Minister on 7 June 2013, holding the documents under scrutiny. Ministerial letters were sent to the Chairman on 18 June 2013, 7 July 2013, 3 October 2013, 18 December 2013, 6 March 2014, 4 June 2014, 18 March 2015, 15 July 2015, 2 October 2015, 2 November 2015, 15 March 2016, and 3 May 2016 to keep the Committee informed of subsequent progress. The Committee cleared the documents from scrutiny on 5 May 2016.