EXPLANATORY MEMORANDUM TO

THE RAILWAYS AND OTHER GUIDED TRANSPORT SYSTEMS (SAFETY) (AMENDMENT) REGULATIONS 2023

2023 No. 540

1. Introduction

1.1 This explanatory memorandum has been prepared by the Department for Transport and is laid before Parliament by Command of His Majesty.

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

2. Purpose of the instrument

2.1 The purpose of this instrument is to end the recognition of EU certificates issued to entities responsible for the maintenance of domestic freight wagons in Great Britain (known as entities in charge of maintenance or "ECMs") on 30th June 2023. It will amend the Railways and Other Guided Transport Systems (Safety) Regulations 2006 ("ROGS") (S.I. 2006/599) to require that ECMs assigned to freight wagons being used in domestic traffic in Great Britain are certified by a UK certification body.

2.2 The instrument will also make two related amendments to ROGS to remove the requirement for ECM certification bodies to follow the EU sectoral accreditation scheme and the requirement for UK ECMs to obtain two separate ECM certificates when maintaining both domestic and international vehicles.

2.3 Finally, this instrument will amend ROGS to correct earlier minor errors in previous statutory instruments identified by the Joint Committee on Statutory Instruments and the Department for Transport.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

3.1 By a letter dated 16th September 2020 ("the Letter"), the Joint Committee on Statutory Instruments ("the Committee") requested a memorandum in relation to certain errors in regulations 5, 7(2)(f) and 8(2) in the Railways (Miscellaneous Amendments, Revocations and Transitional Provisions) (EU Exit) Regulations 2020 (S.I. 2020/786) ("the 2020 Regulations") which were laid on 23rd July 2020. The Department submitted a memorandum on 22nd September 2020 ("the Memorandum") stating that we would rectify errors found in regulations 8(2) and 7(2)(f) of the 2020 Regulations.

3.2 The Letter from the Committee asked why regulations 5 and 8(2) of the 2020 Regulations extend only to Great Britain given that the provisions they amend extend to the whole of the United Kingdom. In the Memorandum the Department acknowledged that these were errors and confirmed that the errors would have no material impact. With regard to regulation 5 of the 2020 Regulations that amended the Connecting Europe Facility (Revocation) (EU Exit) Regulations 2019 (S.I. 2019/477), the Department has not corrected this error as it considered there was no practical difference between the position for Great Britain and Northern Ireland and the current

EU Connecting Europe Facility to which this provision applied expired at the end of 2020. The error in regulation 8(2) of the 2020 Regulations will be dealt with in an instrument that the Department is currently drafting which implements the Northern Ireland Protocol for railway interoperability.

3.3 The Letter also asked the Department to confirm whether the reference in regulation 7(2)(f) of the 2020 Regulations amending the Rail Safety (Amendment etc.) (EU Exit) Regulations 2019 (S.I. 2019/837) ("the 2019 Regulations") to "regulation 18(A1)" should be a reference to "regulation 18A(1A)". In the Memorandum the Department confirmed that the reference to "regulation 18(A1)" of the 2020 Regulations should be a reference to "regulation 18A(1A)" and committed to make the necessary correction.

3.4 Regulation 3(2) of this instrument amends the error identified by the Committee at paragraph 5.3 of the Committee's Twenty-Fourth Report of Session 2019–21 dated 30th September 2020.

3.5 Separately, the Department has identified a separate error in paragraph 14 of Schedule 11 of the 2019 Regulations which was not reported by the Committee. This error concerns the table setting out the measurement units for national reference values and common safety targets, where the measurement units for the passenger and employee risk categories are erroneous. In the third row, second column, in sub-paragraph 1.2 for "train-km", the correct measurement unit should be "passenger-km". In the fourth row, second column, in sub-paragraph 2, for "passenger-km", the correct measurement unit should be "train-km".

3.6 Regulation 5 of this instrument corrects this error in paragraph 14 of Schedule 11 of the 2019 Regulations.

3.7 As this instrument includes provisions correcting errors in the 2019 and 2020 Regulations, this instrument is being issued free of charge to all known recipients of those statutory instruments.

4. Extent and Territorial Application

4.1 The extent of this instrument (that is, the jurisdictions which the instrument forms part of the law of) is England and Wales, and Scotland.

4.2 The territorial application of this instrument (that is, where the instrument produces a practical effect) is Great Britain.

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 Regulation 18A of ROGS established the regime for the maintenance of rail vehicles that are used on the mainline railway in Great Britain. All domestic rail vehicles are required to have an assigned ECM and, where the vehicle is a freight wagon, the ECM must also be certified by a certification body. The certification body has an ongoing supervision role over the ECMs it certifies to ensure their maintenance regimes remain safe and fit for purpose. They can revoke certification if this is found to be unsatisfactory.

6.2 This system of rail vehicle maintenance derives from Directive 2004/49/EC[1] ("the Rail Safety Directive") and Commission Regulation (EU) No 445/2011[2]. The latter was revoked and substantially reproduced in Schedules 9 and 10 of ROGS by the Rail Safety (Amendment etc.) (EU Exit) Regulations 2019 (S.I. 2019/837). The EU system has since evolved with Directive 2016/798[3] ("the Recast Safety Directive") and Commission Implementing Regulation (EU) 2019/779[4], which has established a new system of maintenance for rail vehicles, including expanding the scope of mandatory certification to all vehicles. The UK has not implemented this new system of maintenance for the mainline railway in Great Britain, which is still based on Commission Regulation (EU) No 445/2011, but Commission Implementing Regulation (EU) 2019/779 was preserved on the UK statute book to apply in the UK section of the Channel Tunnel at the point of EU Exit, so it is retained EU law (hereby referred to as 'the retained version of Commission Implementing Regulation (EU) 2019/779').

7. Policy background

What is being done and why?

7.1 The purpose of the instrument is to implement a safety recommendation made to the Department for Transport and the Office of Rail and Road ("the ORR") (the rail regulator) following the Llangennech freight train derailment and fire on 26th August 2020. This incident highlighted serious issues with the ORR's ability to supervise ECMs certified in the EU.

7.2 ECMs play an important safety role in the UK by ensuring that the vehicles they maintain are kept in a safe state of running. Since the UK left the EU, the UK has continued to recognise certificates issued to ECMs by EU certification bodies for domestic and international vehicles to support the smooth operation of freight services.

7.3 As a signatory of the Convention concerning International Carriage by Rail ("COTIF"), the UK is required to recognise ECM certificates issued by EU certification bodies, including under Commission Implementing Regulation (EU) 2019/779, for vehicles being used in international traffic.

7.4 On 13th January 2022, the Rail Accident Investigation Branch (RAIB) published the findings of its investigation into a freight train accident in Llangennech in Wales on 26th August 2020 leading to a derailment and a major fire[5]. These findings highlighted several issues associated with the maintenance procedures carried out by the ECM responsible for the vehicles that led to the accident. In its report, the RAIB expressed concerns about the ability of the ORR to supervise ECMs certified in the EU and recommended that the Department for Transport and the ORR review the arrangements for regulatory oversight of ECMs and EU certification bodies not based in the UK (see paragraph 7.13 and 7.14 for more detail).

[1] OJ L 164, 30.4.2004, p. 44–113
[2] OJ L 122, 11.5.2011, p. 22–46
[3] OJ L 138, 26.5.2016, p. 102–149
[4] OJ L 139I, 27.5.2019, p. 360–389
[5] Report 01/2022 - Derailment and fire at Llangennech: https://www.gov.uk/raib-reports/report-01-slash-2022-derailment-and-fire-at-llangennech. A hard copy of the report can be viewed in the library of the RAIB at The Wharf, Stores Road, Derby, UK, DE21 4BA.

7.5 EU certification bodies that issue certification to ECMs maintaining domestic freight wagons in the UK have no legal obligation to share information with the ORR now that the UK has left the EU. COTIF does provide a mechanism for the ORR to request information from EU certification bodies but, as this treaty only applies to international traffic, this mechanism excludes those ECMs maintaining vehicles being used in domestic traffic in the UK.

7.6 As a result, the Government considers it necessary to end the recognition of EU ECM certificates for domestic traffic from 30th June 2023 and to require ECMs involved in maintaining these vehicles to be certified under the UK's legal framework. This will ensure sufficient oversight of these ECMs and certification bodies by enabling the ORR, as the expert independent safety regulator, to request information from the relevant parties where there are concerns about the ongoing system of maintenance.

7.7 A transitional provision has also been included to enable ECMs with a certificate from an EU certification body, and which are in the process of applying for a UK ECM certificate, to continue to use the EU ECM certificate for the purposes of maintaining domestic freight wagons until 1st November 2023. Schedule 10 of ROGS requires the certification body to decide on an application for ECM certification within a period of four months. The transitional provision will, therefore, provide an equivalent amount of time for an ECM affected by these changes to obtain ECM certification from a UK certification body from 30th June 2023 when recognition of EU ECM certificates for domestic traffic ends.

7.8 This instrument will also make minor amendments to ROGS to extend the validity of ECM certificates issued in Great Britain under the retained version of Commission Implementing Regulation (EU) 2019/779 to cover both international and domestic traffic. Currently, an ECM certificate issued in accordance with the retained version of Commission Implementing Regulation (EU) 2019/779 is only valid for international traffic, and this results in ECMs having to obtain certification in accordance with both Schedules 9 and 10 of ROGS (for their domestic operations) and the retained version of Commission Implementing Regulation (EU) 2019/779 (for their international operations). These amendments will therefore avoid the need for ECMs to apply separately for a domestic and an international ECM certificate.

7.9 The instrument will also make a minor amendment to remove a requirement for ECM certification bodies to follow the EU sectoral accreditation scheme. Without this amendment, ECM certification bodies in Great Britain would be required to follow EU sectoral accreditation schemes that are no longer relevant now that the UK has left the EU.

7.10 Amendments are also made to ROGS to correct earlier minor errors identified by the Joint Committee on Statutory Instruments and the Department for Transport.

7.11 These amendments made by this instrument will not apply to Northern Ireland where railway safety is devolved.

Explanations

What did any law do before the changes to be made by this instrument?

7.12 The law allowed ECMs certified in the EU to maintain freight wagons being used in domestic traffic in Great Britain.

Why is it being changed?

7.13 The RAIB investigation into the derailment at Llangennech identified that the ECM involved was using an EU ECM certificate issued by an EU certification body that based outside of the UK. The role of the certification body is important in ensuring the overall safety of the regime, as they are responsible for having effective surveillance regimes in place with ECMs they certify, so that they can follow up on any concerns that relate to the condition of the rolling stock in service. In the case of the Llangennech incident, poor wagon maintenance was identified as a primary cause of the derailment and suggested that there were issues with the effectiveness of the certification body's surveillance arrangements. On further examination, the RAIB found that the system used by the certification body for inspection and maintenance was insufficiently detailed, particularly in relation to managing the safety risks associated with malfunctions of the braking system. These issues could have been detected, however the RAIB found that the ORR is constrained in its ability to monitor the adequacy of the surveillance arrangements established by certification bodies based outside the UK, as they are under no legal obligation to report to the ORR.

7.14 The RAIB report therefore recommended that the Department for Transport and the Office for Rail and Road undertake a joint review of the arrangements for regulatory oversight of ECMs and certification bodies that are not based in the UK. Following a review of the arrangements for regulatory oversight, the Department for Transport and ORR concluded that the most effective way of improving surveillance would be to end recognition of EU ECM certificates for ECMs with responsibility for freight wagons operating domestically in Great Britain. This is because it would require all ECMs operating domestically to hold certificates issued by UK certification bodies, who would then come under the direct oversight of ORR and would be required to report to them.

What will it now do?

7.15 The legislation will require ECMs assigned to freight wagons being used in domestic traffic to be certified by a UK certification body. This will ensure that the ORR has sufficient oversight of these ECMs.

8. European Union Withdrawal and Future Relationship

8.1 This instrument does not relate to withdrawal from the European Union / trigger the statement requirements under the European Union (Withdrawal) Act.

9. Consolidation

9.1 There are no plans to consolidate this legislation.

10. Consultation outcome

10.1 A formal consultation has not been completed for this instrument. The Department chose not to undertake a public consultation given that its provisions are concerned with implementing a safety recommendation made by the RAIB.

10.2 The Department has, however, undertaken extensive engagement with affected stakeholders, including the ORR, the three ECMs using EU ECM certification, certification bodies and rail freight industry trade associations. This engagement has included informing affected stakeholders of the proposed regulatory change in July

2022 to allow them time to obtain UK certification, ahead of publishing a formal notice detailing the policy change in September 2022[6]. The Department also hosted a series of workshops with affected stakeholders in autumn 2022 to help industry prepare for the proposed changes, inform policy and address concerns.

10.3 Three affected ECMs raised concerns about their ability to obtain UK certification by an original proposed deadline of 1st January 2023. The Department responded by extending this deadline by six months to provide sufficient time for the affected ECMs to obtain the required certification. All affected ECMs have either now obtained UK certification or are at an advanced stage of doing so.

11. Guidance

11.1 The Department for Transport has published guidance explaining the new requirements which can be accessed at: https://www.gov.uk/guidance/ending-the-recognition-of-eu-certification-for-rail-interoperability-constituents-subsystems-and-entities-in-charge-of-maintenance-for-domestic-freig. A hard copy of the guidance can be requested for inspection from the Department for Transport located at Great Minster House, 33 Horseferry Road, London, SW1P 4DR.

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 A full Impact Assessment has not been prepared for this instrument because the impact to businesses over a ten-year period is estimated to be £300,000 (the total cost for the affected ECMs to obtain UK certification). The change will also only affect a small number of ECMs responsible for maintaining domestic freight wagons in Great Britain and currently using EU certification. A de minimis assessment has been produced and is available alongside the instrument at legislation.gov.uk.

13. Regulating small business

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

13.2 No specific action is proposed to minimise the regulatory burdens on small business.

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. The Department will, nonetheless, continue to review ROGS every five years in accordance with Regulation 34A of ROGS. The most recent post implementation review of ROGS was published on 6 October 2021 and the next review is due to be published on 6 October 2026.

15. Contact

15.1 Bertie Bricusse at the Department for Transport, Telephone: 07970 335273, or email: bertie.bricusse@dft.gov.uk, or James Le Grice at the Department for Transport,

[6] Ending the recognition of EU certification for rail interoperability constituents, subsystems and entities in charge of maintenance for domestic freight wagons: https://www.gov.uk/guidance/ending-the-recognition-of-eu-certification-for-rail-interoperability-constituents-subsystems-and-entities-in-charge-of-maintenance-for-domestic-freig

Telephone: 07966511589, or email: james.legrice@dft.gov.uk, can be contacted with any queries regarding the instrument.

15.2 Jeremy Hotchkiss, Deputy Director, Rail Industry Standards and Capability, at the Department for Transport, can confirm that this Explanatory Memorandum meets the required standard.

15.3 The Minister of State for Transport, Huw Merriman MP, can confirm that this Explanatory Memorandum meets the required standard.