

EXPLANATORY MEMORANDUM TO
THE ROAD TRANSPORT OPERATOR REGULATIONS 2011

2011 No. 2632

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

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

2. Purpose of the instrument

2.1 The purpose of the Road Transport Operator Regulations 2011 (“the regulations”) is to implement in domestic legislation provisions of Regulation (EC) No 1071/2009 of the European Parliament and of the Council establishing common rules concerning the conditions to be complied with to pursue the occupation of road transport operator and repealing Council Directive 96/26/EC (“Regulation 1071/2009”).

2.2 Regulation 1071/2009 entered into force in November 2009 and will apply with effect from 4th December 2011. It relates only to ‘hire or reward’ operators – i.e. haulage companies that carry goods belonging to their clients and bus and coach companies that receive payment for providing the transport service to passengers.

2.3 These regulations implement Regulation 1071/2009 mainly by amending the two Acts which currently regulate domestic goods and passenger licensing. However, they also make other, self-standing provisions.

3. Matters of special interest to the Joint Committee on Statutory Instruments

3.1 The regulations are made under the European Communities Act 1972 which permits use of either the affirmative or negative resolution procedure. The regulations have been made subject to the negative procedure because, although they make substantial amendments to primary legislation, these are mainly intended to ensure that the domestic legislation is consistent with the Regulation, which will have direct effect. The substantive provisions of the Regulation largely reflect those of the existing domestic legislation.

4. Legislative context

4.1 Regulation 1071/2009 applies to ‘all undertakings established in the Community which are engaged in the occupation of road transport operator’ (Article 1.2). Road transport operators may be road haulage operators or road passenger transport operators (see Article 2). The Regulation provides for a system under which

road transport operators must be authorised to act by the Member State in which they are established.

4.2 Article 3.1 and Chapter 2 of the Regulation set out the four criteria which must be met by an undertaking engaged in the occupation of road transport operator. These are cast in general terms (at Articles 5 to 8). Member States have some discretion as to how the criteria are to be applied in the case of the conditions relating to the requirement of establishment (see Article 5(a)), the requirement of financial standing (see Article 7.2) and the requirement of professional competence (see Article 8). In the case of the requirement that road transport operators are of good repute, the Regulation provides that each Member State is to determine the conditions to be met in order to satisfy this requirement (see Article 6.1).

4.3 Chapter 3 of the Regulation contains provision about the granting and monitoring of authorisations, and about their suspension and withdrawal. These take a fairly broad-brush approach, leaving most of the detail to be settled by Member States.

4.4 Chapter 4 of the Regulation is about administrative co-operation between national authorities, containing provision about, for example, national electronic registers of operators, data protection and administrative co-operation between Member States.

4.5 Chapter 5 contains provisions about the mutual recognition of certificates and other documents, so that an operator who is authorised in one Member State may operate in another without hindrance.

4.6 The Select Committee on the European Union and the European Scrutiny Committee considered the draft regulation in July 2007. However, they held it under scrutiny until negotiations in the Council Working Group dealt with the effect that the Regulation would have on small companies and how serious offences were to be determined. The Committees therefore requested to be kept informed of progress in the negotiations. Following further negotiations in Council Working Group and further letters updating the Committees, dated 15 and 28 May 2008, the Regulation was cleared from scrutiny by the Select Committee on the European Union on 2 June 2008, and by the European Scrutiny Committee on 4 June 2008. A further letter and report on the negotiations were sent to the Committees on 26 June 2009 to inform them of the final outcome of the negotiations.

4.7 Other timelines:

- 2006 - Consultation by the European Commission on the principles underlying the three new Regulations.
- May 2007 - Draft Regulation published by the European Commission
- December 2007 – DfT Consultation on proposed negotiation stance for forthcoming negotiations by EU member states.
- April 2008 – Summary of Responses to consultation published.

- July 2007-September 2009 – Detailed negotiations between member states in Brussels.

4.8 As explained above, Regulation 1071/2009 repeals and replaces existing Council Directive 96/26/EC (as amended by Council Directive 98/76/EC and 2004/66/EC) which lays down the existing EU rules for licensing the operators of goods and passenger carrying vehicles. The requirements of the Council Directive 96/26/EC are implemented in Great Britain by the Public Passenger Vehicles Act 1981 ('the 1981 Act') and the Goods Vehicle (Licensing of Operators) Act 1995 ('the 1995 Act'). However, those Acts cover a wider range of operations than the Directive or Regulation 1071/2009. In particular, they provide for the licensing of operations otherwise than for "hire or reward".

4.9 Article 10.1 of Regulation 1071/2009 requires member states to designate competent authorities to ensure the correct implementation of the Regulation. These Regulations (see regulation 4(1)) designate traffic commissioners to act as the Competent Authority in Great Britain. They are currently responsible for enforcing the operator licensing system established under domestic legislation. The 1981 Act (sections 4 to 5 and Schedule 2) regulates the constitution of traffic commissioners – as independent office-holders appointed by the Secretary of State for Transport. To administer the system, section 4 currently divides Great Britain into eight geographical 'traffic areas'. At present each traffic area has a traffic commissioner appointed specifically to undertake the regulatory matters relating to that traffic area. However, this system is in course of amendment under sections 1 to 6 of the Local Transport Act 2008. The connection between a traffic commissioner and a particular traffic area will cease in favour of the use of a pool of traffic commissioners, who would be deployed by the senior traffic commissioner to carry out particular functions. Existing limits on the jurisdiction of traffic commissioners would serve to ensure that traffic commissioners for England and Wales would not be deployed to carry out inappropriate functions in Scotland, or vice versa. Consequential amendments to the provisions in the present regulations which refer to traffic commissioners are likely to be made by a statutory instrument planned to come into force by Spring 2012.

4.10 The 1981 and 1995 Acts established a dual system of licensing; 'standard licences' being needed where an undertaking operates goods or passenger vehicles for hire or reward, and 'restricted licences' being needed when the goods vehicles are used only in connection with any trade or business carried on by the licensee. Regulation 1071/2009 requires road transport operators to hold "authorisations". As the Regulation in general only applies to carriage for hire or reward these equate to 'standard' licences under the Acts. The 1981 and 1995 Acts, together with the regulations made under them, comprehensively regulate the licensing of goods and passenger vehicle operators in Great Britain, including the obligation to hold a licence, how applications are to be made and determined and their variation and revocation. Operators must be of good repute, meet a financial standing test, have a transport manager that is properly qualified, have an operating centre and proper arrangements in place to maintain their vehicles. The enforcement powers of traffic commissioners allow them to examine evidence at a public inquiry and impose

regulatory measures – including suspension or withdrawal of individual operator licences.

4.11 Regulation 1071/2009 (article 3.1) requires operators to have, in addition to good repute, financial standing and professional competence, an effective and stable establishment in a member state. It is these requirements which must be met before an authorisation can be granted.

5. Territorial Extent and Application

5.1 The regulations apply only to Great Britain except for regulation 4(2) which also applies to Northern Ireland. This designates the Secretary of State as the public authority to supervise the operation of the national electronic register which covers the whole of the United Kingdom.

5.2 Implementation of the Regulation in Northern Ireland is being taken forward by the Department of the Environment in Northern Ireland, by its Driver and Vehicle Agency through the Goods Vehicle (licensing of Operators) Act (Northern Ireland) 2010 which transposes the Regulation into domestic law .

6. European Convention on Human Rights

6.1 Mike Penning has made the following statement regarding Human Rights:

In my view, the provisions of the Road Transport Operator Regulations 2011 are compatible with the Convention rights.

7. Policy Background

- **What is being done and why**

7.1 Regulation 1071/2009 has direct effect, so the relevant national law must be amended to take proper account of it. However, as the Regulation leaves a considerable degree of discretion on detailed implementation to individual member states, the Secretary of State believes it falls into the category of a regulation requiring implementation measures to be taken by Member States. These regulations therefore make provisions in national law to deal with the discretion inherent in the Regulation, so that road transport operators in Great Britain know exactly how the Regulation applies to them.

7.2 There are three aspects of the Regulation where Member States are required to make provision in national law:

7.3 The first is the requirement for road transport operators to be of good repute. Article 3.1 provides that ‘undertakings engaged in the occupation of road transport operator shall ... (b) be of good repute’. Article 6.1 provides that ‘member states shall determine the conditions to be met by undertakings ... in order to satisfy the requirement of good repute.’ The Regulation therefore clearly envisages national implementation in this area. The 1981 and 1995 Acts already deal with the

requirement of good repute required by Directive 96/26/EC, so only a few minor amendments are required

7.4 The second area where national implementation is essential relates to the procedures to be used in the application, variation and revocation of authorisations. For example, Article 10.1 provides that ‘each Member State shall designate one or more competent authorities to ensure the correct implementation of this Regulation’, and Article 10.2 provides that those competent authorities must publish ‘the procedures to be followed by interested applicants’. Although the Regulation specifies the maximum time period for considering an application (see Article 11.3), it otherwise leaves these procedures to be determined by Member States. So, without national provision, road transport operators will not know what procedures to use to apply for an authorisation. Those procedures could be prescribed by self-standing regulations made under s.2(2) of the European Communities Act 1972, or by use of the powers of the Senior Traffic Commissioner under section 4C of the 1981 Act (as amended by Part 1 of the Local Transport Act 2008). However, it is more logical and helpful to the industry to amend the 1981 and 1995 Acts because they already contain detailed provisions about how applications for licences are to be made to Traffic Commissioners which are well understood and accepted by the goods industry.

7.5 Article 6.2 takes a similar approach to the question of whether an undertaking has lost its good repute: it provides that ‘the competent authority ... shall carry out in an appropriate and timely manner a duly completed administrative procedure ...’ but gives no further details of exactly what such a procedure must consist of. Member States must fill in the detail.

7.6 Similarly, as regards the suspension and withdrawal of licences, Article 13 provides that the competent authority ‘may’ set time limits for rectification, and these time limits are framed as maxima, so the Regulation envisages that the competent authority may decide to impose lower limits, if indeed they decide to allow operators to attempt to rectify the problem rather than simply withdrawing the authorisation, which is also an option for Member States under Art 13. The changes to domestic legislation therefore set out what the procedures are in the case of suspension or withdrawal of licences. As the 1995 and 1981 Acts currently prescribe the detail of these procedures, for the reasons given above, the implementing regulations amend and apply the Acts.

7.7 Article 15.2 provides that ‘Member States shall take steps to ensure’ that undertakings affected by negative decisions have a right of appeal. Such a provision needs to be set out in national law, and amending the domestic Acts is the most appropriate way.

7.8 The third area where national legislation is required relates to penalties for breach. Article 22 provides that ‘Member States shall lay down the rules on penalties applicable to infringements of the provisions of this Regulation...’. As the 1981 and 1995 Acts already contain penalties for infringements relating to licences (which are again well understood and accepted by the industry), the implementing regulations simply change those existing provisions to reflect the Regulation.

7.9 There are also a number of other provisions in the Regulation where Member States are given discretion over certain matters, and although the Regulation would be workable without the discretions being exercised, most provide more flexibility to operators in how they comply and therefore reduce the burden of the Regulation on industry. In line with current Government policy, the regulations therefore make provisions exercising them. The provisions of the Regulation conferring discretions include:

- Article 1.5 – allows Member States to exempt undertakings from the application of the Regulation if they have only a minor impact on the transport market.
- Article 4 – allows a transport manager who is an employee of an operator to also act as a consultant transport manager to other operators.
- Article 7.2 – allows derogation from the requirements relating to financial standing.
- Article 8.7 - contains a discretion concerning the requirement of professional competence to allow exemptions for holders of certain qualifications.
- Article 9 – allows Member States to exempt from the professional competence examination persons who have continuously managed a road transport undertaking for 10 years.

7.10 Again, the most appropriate way of exercising these discretions is to amend the 1981 and 1985 Acts, which already deal with most of the matters in question. In addition to clarifying provisions in the Regulation, the Acts are amended where appropriate to refer to the relevant article of the Regulation in order to help achieve a coherent set of provisions for users of the legislation. .

7.11 In conclusion, the amending legislation ensures that domestic legislation maintains a coherent regime that remains comprehensible to the industry to whom it applies and will result in the minimum change to existing practices and thereby minimise the burden of the Regulation on operators. The amending regulations apply this only to those areas where the Regulation gives Member States some discretion, or to make the regime coherent to operators. The regulations cross-refer to the Regulation where possible and do not include provisions that conflict with the Regulation. Furthermore, the regulations do not reproduce any parts of the Regulation that impose obligations only on Member States or their competent authorities (e.g. Chapters 4 and 5), where national legislation is generally not required.

8. Consultation Outcome

8.1 There is no requirement to consult on this instrument. However, a formal consultation took place on implementation of the derogations and content of the draft impact assessment. The results can be found at:

<http://www.dft.gov.uk/consultations/dft-2011-11>

The consultation exercise showed broad support for the content of the draft impact assessment and the adoption of all the derogations, as they would increase flexibility and reduce the burden of the regulation on industry.

The Regulation also allows the competent authority to determine detailed, non-legislative policies in a number of areas. Discussions with the Senior Traffic Commissioner post-consultation have also highlighted further areas where flexibility in the adoption of those policies could be increased to reduce burdens – particularly by maximising the means by which appropriate financial standing could be demonstrated and reducing the burden of proof on operators.

9. Guidance

9.1 The detailed requirements of the regulations will be communicated to the industry in the following three ways:

(a) The Department producing detailed written guidance to prospective operators on the requirements of operator licensing as part of the ‘welcome pack’ it issues (which can be downloaded) when individuals request an application form. This guidance will be updated to reflect the requirements of the Regulation.

(b) The Department continuing to maintain further detailed Web guidance on the rules of operator licensing that will be amended to reflect the Regulation.

(c) The Senior Traffic Commissioner issuing statutory directions and guidance to his fellow Traffic Commissioners under section 4C of the Public Passenger Vehicles Act 1981 (as amended by Part 1 of the Local Transport Act 1981). This guidance will be updated to reflect the new requirements of the Regulation.

10. Impact

10.1 An impact assessment has been prepared for this instrument and can be viewed here <http://www.dft.gov.uk/consultations/dft-2011-11>

11. Regulating small business

11.1 The Regulation will affect small businesses and the Impact Assessment covers the impact on them. It explains that both the road and passenger transport sectors contain a significant percentage of small businesses and that, as part of the requirement to undertake a small firms impact test, telephone consultation was undertaken with a sample of road haulage businesses. The findings showed that the majority of changes would not cause those operators undue difficulty and that the concerns expressed could be dealt with by adopting available derogations in the Regulation.

12. Monitoring and Review

12.1 The regulations contain a statutory requirement for Ministerial review every five years.

13. Contact

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THE ROAD TRANSPORT OPERATOR REGULATIONS 2011

TRANSPOSITION NOTE

Purpose

1. The Road Transport Operator Regulations 2011 (“the Regulations”) transpose, Regulation (EC) No. 1071/2009 of the European Parliament and of the Council of 21st October 2009 establishing common rules concerning the conditions to be complied with to pursue the occupation of road transport operator and repealing Council Directive 96/26/EC (“Regulation 1071/2009”). Apart from regulation 4(2) (supervisory authority for the national electronic register), the regulations apply only to Great Britain, separate provision being made for Northern Ireland.

Transposition

2. The Regulations implement Regulation 1071/2009 mainly by making consequential changes to domestic legislation which currently regulates road transport operations (and which apply to a wider range of operations than the Regulation). The modifications to the domestic legislation are intended both to exercise discretions conferred on member states by Regulation 1071/2009 and to ensure the legislation’s continued coherence and workability. This is very important as the competent authority – the traffic commissioners – exercise judicial functions (being specified as a tribunal for the purposes of the Tribunals and Inquiries Act 1992). Relying wholly on the Regulation would not provide sufficient legal certainty and could require operators to seek clarification through the courts, raising the possibility of the scope of existing regulatory provisions being gradually extended through judicial decision. This would impose a very significant additional burden on industry and result in a fragmented regulatory regime that was be very difficult for individual operators to interpret without legal advice. The current legislative regime is well understood by the industry which fully supports its retention.

3. The following tables identify how Regulation 1071/2009 has been implemented by the Regulations. In the tables:

“the 1981 Act” means the Public Passenger Vehicles Act 1981 (c.14);

“the 1995 Act” means the Goods Vehicles (Licensing of Operators) Act 1995 (c.23).

and references to a numbered regulation are to the relevant provision in the Regulations, and to a section or schedule to the section or schedule of the relevant Act *as amended by the Regulations (schedules 1 and 2)*.

TABLE 1
Articles implemented directly by the Regulations

Article	Objective	Implementation	Responsibility
10	MS to designate Competent Authorities	Regulation 4(1), (3) and (4)	Secretary of State
11.5	Undertakings to notify changes in data	Regulation 6	Traffic commissioners
16.1	Designation of public	Regulation 4(2)	Secretary of State

	<p>(b) road passenger transport undertakings engaged exclusively in non-commercial services or with a main occupation which is not road passenger transport operator;</p> <p>(c) road transport in operations solely by means of vehicles with a maximum authorised speed not exceeding 40 km/h.</p>	<p>Sections 1(1) and 12(1)</p> <p>Derogation overridden by unamended application of the Act.</p>	<p>Derogation overridden by unamended application of the Act.</p>	
1.5	<p>Member states may exempt from all or some of the provisions only those operators exclusively engaged in national transport operations having only a minor impact for specified reasons.</p>		<p>Section 2(2)(d) of the 1995 Act provides for exemption of vehicles used for prescribed uses.</p>	
3.1	<p>Undertakings to have:</p> <p>(a) effective and stable establishment in the member state;</p> <p>(b) be of good repute;</p> <p>(c) have appropriate financial standing; and</p> <p>(d) have requisite</p>	<p>Section 14ZA(2)</p>	<p>Section 13A(2)</p>	<p>Traffic commissioners</p>

	professional competence.			
3.2	Member states may impose additional requirements.	Section 14ZC	Section 13C	Traffic commissioners and Secretary of State
4.1	Road transport operators to designate at least one transport manager satisfying article 3(1)(b) and (d).	Section 14ZA(3)	Section 13A(3)	Traffic commissioners
4.2	Competent authority may permit undertaking not to designate a transport manager under article 4.1 in specified circumstances.	Section 14ZA(3)	Section 13A(3)	Traffic commissioners
4.3	Discretion for member states to prohibit or restrict designation under article 4.2	Section 14ZA(3)	Section 13A(3)	Traffic commissioners
4.4	Undertaking to notify the competent authority of transport managers designated.	Enforceable by licence conditions – see section 16A.	Enforceable by licence conditions – see section 22.	Traffic commissioners
5	Conditions relating to the requirement for establishment.	Section 14ZA(2)(a)	Section 13A(2)(a)	Traffic commissioners
6.1	Member states to determine the conditions to satisfy the requirement of good repute	Conditions specified in section 14ZA(2)(b) & (3)(a) & Schedule 3, paragraph 1.	Conditions specified in section 13A(2)(b) & (3)(a) & Schedule 3, paragraphs 1-5.	Traffic Commissioners
6.2	Requirements as	Procedure	Procedure	Traffic

	to Competent Authority's procedure to determine whether loss of good repute would be a disproportionate response.	specified in Schedule 3, new paragraphs 7B & 7C.	specified in Schedule 3, new paragraphs 16 & 17.	Commissioners
6.3	The requirement of good repute not to be satisfied until a rehabilitation measure as been taken pursuant to the relevant provisions of national law.	Schedule 3, paragraph 7C regulates the application of rehabilitation measures.	Schedule 3, paragraph 17 regulates the application of rehabilitation measures.	Traffic Commissioners
7	Conditions relating to the requirement of financial standing	Section 14ZA(2)(c).	Section 13A(2)(c).	Traffic Commissioners
8.1	Knowledge required to show requisite professional competence. MS' discretions to: a) require oral exam; and b) impose prior training.	Section 14ZA(2)(d) & 14ZA(3)(b). Discretions not being exercised.	Section 13A(2)(d) & (3)(b). Discretions not being exercised.	The Secretary of State
8.2	MS in which exam to be sat	No provision	No provision	
8.3	Exams to be organised & certified by bodies authorised by MS.	Schedule 3, paragraphs 6 & 7.	Schedule 3, paragraph 13.	
8.4	MS may authorise bodies to provide training	Discretion not being exercised	Discretion not being exercised	
8.5	MS may promote periodic training	Discretion not being exercised	Discretion not being exercised	
8.6	MS may require retaining	Discretion not being exercised	Discretion not being exercised	

8.7	MS may exempt certain persons from parts of the exam	Schedule 3, paragraph 6(1A).	Schedule 3, paragraph 13(1A).	
9	MS may exempt from art 8 exams persons with 10 years experience as a transport manager	2011 Regulations: Schedule 3, part 1, paragraph 6. (Power exercisable until 4 December 2013)	2011 Regulations: Schedule 3, part 2, paragraph 14. (Power exercisable until 4 December 2013)	Secretary of State
10	See Table 1			
11.1	Competent Authority to authorise road transport operators.	Section 12(2)	Section 8(1)	Traffic Commissioners
12.1	Duty of competent authorities to monitor compliance and carry out checks.	No provision	No provision	Traffic Commissioners
13	Procedure for suspension and withdrawal of authorisation	Section 17	Section 27	Traffic Commissioners
14	Declaration of unfitness of transport manager	Schedule 3, paragraph 7B(2)	Schedule 3, paragraph 16(2)	Traffic Commissioners
15.1	Negative decisions of competent authorities to state reasons.	No provision	No provision	Traffic Commissioners
15.2	Member states to provide for appeals	Section 50	Section 37	Upper Tribunal
22	Penalties	Section 17	Section 27	Traffic commissioners