

**2015 No. 785**

**RAILWAYS**

**The Channel Tunnel (International Arrangements) (Charging Framework and Transfer of Economic Regulation Functions) Order 2015**

*Made* - - - - *24th March 2015*

*Laid before Parliament* *26th March 2015*

*Coming into force in accordance with article 1(2)*

The Secretary of State for Transport makes this Order in exercise of the powers conferred on the appropriate Minister by section 11 of the Channel Tunnel Act 1987(a).

**Citation and commencement**

1.—(1) This Order may be cited as the Channel Tunnel (International Arrangements) (Charging Framework and Transfer of Economic Regulation Functions) Order 2015.

(2) This Order comes into force on the date when the IGC regulation comes into force, as provided for in Article 8 of that regulation.

(3) The Secretary of State for Transport must give notice in the London, Edinburgh and Belfast Gazettes of the date provided for in paragraph (2).

**Interpretation**

2. In this Order—

”the 2005 Order” means the Channel Tunnel (International Arrangements) Order 2005(b);

”the 2005 Regulations” means the Railways Infrastructure (Access and Management) Regulations 2005(c);

”the 2015 Regulations” means the Railways Infrastructure (Access and Management) (Amendment) Regulations 2015(d);

”the IGC regulation” means the regulation of the Intergovernmental Commission of 23rd March 2015 transferring economic rail regulation competence from the Intergovernmental Commission to the national regulatory bodies, setting out principles for cooperation between them and establishing a charging framework for the Channel Fixed Link; and

”Intergovernmental Commission” means the Commission established pursuant to Article 10 of the Treaty(e).

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(a) 1987 c.53. “Appropriate Minister” is defined in section 13(1) of that Act.

(b) S.I. 2005/3207, amended by S.I. 2008/2366 and 2009/2081. All those instruments are revoked by this Order.

(c) S.I. 2005/3049, amended by S.I. 2009/1122 and 2011/1043 and by the 2015 Regulations.

(d) S.I. No 2015/786.

(e) “Treaty” is defined in section 1(4) of the Channel Tunnel Act 1987.

### **Application of the IGC regulation**

3. The IGC regulation, the text of which is set out in the Schedule, has effect.

### **Revocation**

4. The 2005 Order, the Channel Tunnel (International Arrangements) (Amendment) Order 2008(a) and the Channel Tunnel (International Arrangements) (Amendment) Order 2009(b) are revoked.

### **Supplemental provisions and savings**

5.—(1) This article is subject to Article 5 of the IGC regulation.

(2) In any case where the 2005 Regulations, as amended by the 2015 Regulations, make provision equivalent to that made under or by virtue of the 2005 Order before its revocation by this Order, then—

- (a) in so far as anything done by any person under or by virtue of the 2005 Order could have been done by that person under such provisions of the 2005 Regulations as so amended, it is to have effect as if so done; and
- (b) in so far as anything that is in the process of being done by any person under or by virtue of the 2005 Order, immediately before its revocation, could continue to be done by that person under such provisions of the 2005 Regulations as so amended, it may continue to be so done.

(3) Anything done or in the process of being done by the Intergovernmental Commission under or by virtue of the 2005 Order is to be treated as done or in the process of being done by the Office of Rail Regulation(c).

Signed by authority of the Secretary of State for Transport

24th March 2015

*Kramer*  
Minister of State  
Department for Transport

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(a) S.I. 2008/2366.

(b) S.I. 2009/2081.

(c) The Office of Rail Regulation was established by section 15 of the Railways and Transport Safety Act 2003 (c.20).

## SCHEDULE

Article 3

### Regulation transferring economic rail regulation competence from the Intergovernmental Commission to the national regulatory bodies, setting out principles for cooperation between them and establishing a charging framework for the Channel Fixed Link

The Intergovernmental Commission established to supervise, in the name and on behalf of the United Kingdom and French governments, all matters concerning the construction and operation of the Fixed Link (“the IGC”):

Having regard to the Treaty between the United Kingdom of Great Britain and Northern Ireland (“the United Kingdom”) and the French Republic (“France”) concerning the construction and operation by private concessionaires of a Channel Fixed Link, signed at Canterbury on 12 February 1986 (“the Treaty of Canterbury”), and in particular Articles 1 and 10 thereof;

Having regard to Directive 2012/34/EU of the European Parliament and of the Council of 21 November 2012 establishing a single European railway area (“the Directive”), and, in particular, Articles 26, 29, 32, 55, 56 and 57 thereof;

Considering that, under Article 26 of the Directive, Member States shall ensure that charging schemes for railway undertakings allow the infrastructure manager to market and make optimum effective use of the available infrastructure capacity;

Considering that, under Article 29 of the Directive, Member States must establish a charging framework;

Considering that Article 32(3) of the Directive applies to the Channel Fixed Link;

Considering that Article 55 of the Directive requires each Member State to establish a single national regulatory body for the railway sector, which must be a stand-alone authority which is, in organisational, functional, hierarchical and decision-making terms, legally distinct and independent from any other public or private entity, except that it may be joined in organisational terms with a number of authorities specified in the Directive;

Considering that provisions will have been made by the time this regulation enters into force, by the United Kingdom and France for the transposition of the Article 55 of the Directive;

Considering, therefore, that the regulation of the Intergovernmental Commission of 23 July 2009, on the use of the Channel Tunnel (“the bi-national regulation of 23 July 2009”), should be repealed, and that the functions of the IGC by virtue of European law as regulatory body in respect of the Fixed Link should be transferred to the regulatory bodies of the United Kingdom and France;

Considering that the main task of a regulatory body is to ensure fair and non-discriminatory access to railway networks and services and that, under article 56 of the Directive, a regulatory body is competent, in particular, for dealing with appeals concerning the network statement, the allocation process, the charging scheme, the level or structure of infrastructure charges, arrangements for access and access to and charging for services,

Considering that Article 57 of the Directive requires Member States to ensure that cooperation arrangements are established between the national regulatory bodies for the railway sector; considering that the cross-border nature of the Fixed Link infrastructure and the existence of only one infrastructure manager require effective mechanisms to be set up in order to ensure, insofar as possible, that the decisions made by the regulatory bodies are clearly aligned for the whole Fixed link,

Has adopted the following regulation:

### **Article 1**

1. The function of the IGC as a regulatory body is transferred to the regulatory bodies established by the United Kingdom and France by virtue of European law (“the regulatory bodies”).
2. These regulatory bodies shall respectively have jurisdiction over the part of the Fixed Link situated on the territory of their State, as determined in accordance with article 3 of the Treaty of Canterbury.

### **Article 2**

1. The IGC shall ensure that any information or document that it holds for the purposes of its functions under the bi-national regulation of 23 July 2009 are communicated to the regulatory bodies as quickly as practicable after the repeal of that regulation pursuant to Article 7.
2. The IGC and the regulatory bodies shall exchange information as necessary to perform their respective functions.

### **Article 3**

1. Where an appeal concerning the Channel Fixed Link is made to one of the regulatory bodies, a corresponding appeal shall also be made to the other regulatory body. The first such appeal shall only be considered to be valid once the second one has been duly lodged.
2. The regulatory bodies shall, in the performance of their functions relating to the Channel Fixed Link, have regard to the need to coordinate and to adopt decisions or opinions that have an aligned legal and practical effect across the entirety of the Channel Fixed Link.

3. To that end, the regulatory bodies shall, in the performance of their functions relating to the Channel Fixed Link, cooperate closely and coordinate their decision making, including by putting in place effective common working arrangements. For the purpose of ensuring legal certainty, those working arrangements shall permit the adoption of aligned decisions or opinions by the regulatory bodies.

4. The regulatory bodies shall keep the IGC informed of their common working arrangements, and shall publish them.

5. Where, in spite of the common working arrangements referred to above, it appears likely that the regulatory bodies will adopt decisions or opinions that do not have an aligned legal and practical effect across the entirety of the Channel Fixed Link, they shall, before adopting these, consult all interested parties, including the IGC.

6. In the performance of their functions relating to the Channel Fixed Link, the regulatory bodies shall consult one another. When so consulted, they shall provide each other all the information that they themselves have the right to request under their national law. This information may only be used for the purposes of the matter in relation to which the information has been provided under this paragraph.

#### **Article 4**

1. This regulation is without prejudice to the provisions of Article 10(1) of the Treaty of Canterbury conferring on the IGC the function of supervising, in the name and on behalf of the Governments of the United Kingdom and of France, all matters concerning the operation of the Fixed Link. In carrying out this function, the IGC shall respect the independence of the relevant regulatory bodies and shall not interfere with their decision making process.

2. Within that framework, the regulatory bodies may consult the IGC, and the IGC may make any representation to them, on any issue and at any point in this process.

#### **Article 5**

Where, before the coming into force of this regulation, a decision taken by the IGC in the exercise of its functions under the bi-national regulation of 23 July 2009 is or maybe the subject of an application for judicial review, the adjudicating authorities concerned shall continue to have jurisdiction in relation to the application, pursuant to Article 76 of the IGC regulation of 24 January 2007 on the safety of the Channel Fixed Link.

#### **Article 6**

The charging framework established by virtue of Article 29 of the Directive in respect of the Channel Fixed Link shall be the one set out in the Annex to this regulation.

#### **Article 7**

The bi-national regulation of 23 July 2009 is repealed.

## **Article 8**

Each Government shall notify the other of the completion of its necessary internal procedures to enable this regulation to come into force. This regulation shall enter into force on the date of reception of the later notification.

Done by the Intergovernmental Commission on 23rd March 2015 in English and French, both texts being equally authoritative.

The Head of the UK delegation to the IGC

Christopher Irwin

The Head of the French delegation to the IGC

Pascale Andréani

## **ANNEX**

### **Charging Framework for the Channel Fixed Link**

#### **Article 1**

##### **Introduction**

1. The purpose of this charging framework is to set out the regime by which the infrastructure manager of the Channel Fixed Link shall determine the charges for the use of the infrastructure, in accordance with Article 29(1) of Directive 2012/34/EU (the Directive). Any charges levied by the infrastructure manager on railway undertakings shall be determined and collected pursuant to this charging framework.
2. In accordance with Article 2(9) of the Directive, transport operations in the form of shuttle services for road vehicles through the Channel Fixed Link shall not be subject to this charging framework and, for the purposes of this framework, shall not be covered by the phrases “railway activities” and “train service”.
3. Except where the context otherwise requires, expressions used in this charging framework shall have the same meaning as in the Directive.

## **Article 2**

### **Charging rules**

1. The infrastructure manager shall be responsible for establishing and applying the charging rules for the railway infrastructure of the Channel Fixed Link.
2. In accordance with the Treaty of Canterbury, the Channel Fixed Link shall be financed without recourse to government funds or to government guarantees of a financial or commercial nature.

## **Article 3**

### **General principles**

When performing its functions, the infrastructure manager shall, at all times, ensure that the charges are transparent, non-discriminatory and fair.

## **Article 4**

### **Access charges**

1. Charges must be at least equivalent to the cost that is directly incurred as a result of operating the train service.
2. The infrastructure manager may set or continue to set higher charges than the cost that is directly incurred by the operation of each train service on the basis of the long-term costs of the Channel Fixed Link project, attributable to the railway activities.
3. These long term costs shall be recovered over the life of the Concession Agreement. These costs shall include the costs of financing any investment fulfilling the criteria set out in article 32(3) of the Directive, made by the infrastructure manager in relation to the railway activities, including the cost of debt and its repayment and a reasonable return on capital invested, as well as the costs of operation, maintenance and renewal of such investments.
4. The infrastructure manager is also authorised to levy mark-ups, as long as the conditions laid down in relation to this in Article 32(1) of the Directive are fulfilled.
5. Charges levied to recover the cost that is directly incurred as a result of operating the train service may include a charge which reflects the scarcity of capacity during periods of congestion.
6. The infrastructure manager may also introduce schemes available to all railway undertakings using the Channel Fixed Link, for specified traffic flows, granting time-limited discounts to encourage the development of new rail services. The infrastructure manager may also grant discounts encouraging the use of considerably underutilised paths. Similar discount schemes shall apply for similar services. Discount schemes shall be applied in a non-discriminatory manner to any railway undertaking.

7. The above-mentioned discounts may, in particular, include variations of the charges levied on railway undertakings according to the time when the path is used in order to encourage optimal use of the railway infrastructure in terms of railway path, speed and schedule.

8. If the infrastructure manager decides to grant discounts or to vary the charges, it must ensure that it sets out the detail of such discounts and variations in the network statement.

## **Article 5**

### **Calculation of access charges**

1. The infrastructure manager shall determine the charges for use of the Channel Fixed Link by train services.

2. In doing so the infrastructure manager shall respect the principles of non-discrimination, transparency and fairness and take into account how the costs to be recovered relate to the activities of the railway undertakings concerned.

3. No portion of any costs shall be recovered more than once.

4. The infrastructure manager shall determine the terms of payment, refund or waiver if a reservation for infrastructure capacity is cancelled and can be reallocated to another railway undertaking.

## **Article 6**

### **Method for apportioning costs**

The infrastructure manager shall establish and publish a method for apportioning costs which is fair, transparent, non-discriminatory and in conformity with the principles established in this charging framework. It shall update this method when necessary.



## EXPLANATORY NOTE

*(This note is not part of the Order)*

This Order gives effect to a bi-national regulation (“the new bi-national regulation”) of the Intergovernmental Commission on the Channel Tunnel (IGC), and revokes the Channel Tunnel (International Arrangements) Order 2005 (“the 2005 Order”). The new bi-national regulation transfers the economic regulation of the Tunnel from the IGC to the national regulator of the United Kingdom and France, namely the Office of Rail Regulation (ORR) in the case of the United Kingdom and the Autorité de régulation des activités ferroviaires (ARAF) in the case of France. It makes provisions consequential to that transfer, concerning, in particular:

- the transfer to the domestic regulators of the information currently held by the IGC pursuant to its economic regulation functions;
- cooperation and coordination between the domestic regulators, in accordance with Article 57 of Directive 2012/34/EU (OJ L 343, 14.12.2012, p. 32);
- the preservation of the general supervisory role of the IGC;
- its relationship with the domestic regulators;
- savings concerning the jurisdiction of the adjudicating authorities which, before the transfer, had competence to deal with the judicial review of IGC decision with respect to economic regulation;
- revocation of the IGC bi-national regulation of 2009, which implemented Directives 91/440/EEC (OJ No. L 237, 24.8.1991, p. 25) and 2001/14/EC (OJ No. L 75, 15.3.2001, p. 29); implementation of the relevant EU legislation will no longer be found in an IGC bi-national regulation, except in the respect set out in the second indent above, and in the paragraph below.

The new bi-national regulation also makes provision to implement Article 4(1) of Directive 2001/14/EC. That Article requires Member States to establish a charging framework. That framework is now set out in the Annex to the new bi-national regulation.

*Article 1(2)* provides for this Order to enter into force on the date on which the new bi-national regulation comes into force. Under Article 8 of the new bi-national regulation, this will be when both the UK and French governments have completed the internal processes necessary to give the new bi-national regulation the force of law in their respective legal systems, and notified each other that they have done so.

*Article 1(3)* of this Order provides that the Secretary of State must give notice, in the London, Edinburgh and Belfast Gazettes, of the date when the new bi-national regulation, and therefore this Order, enters into force.

*Article 3* gives effect in the United Kingdom to the new bi-national regulation. *Article 4* revokes the 2005 Order and the instruments that subsequently amended it.

Many provisions of the revoked 2005 Order will be replicated in the Railways Infrastructure (Access and Management) Regulations 2005, by virtue of the Railways Infrastructure (Access and Management) (Amendment) Regulations 2015 (which enter into force at the same time as this Order). Where this happens, *article 5* provides that what had been done under or by virtue of the 2005 Order is to have effect as if done under the 2005 Regulations, as amended, if it could have been done under those Regulations. It also provides that what was in the process of being done under or by virtue of the Order may continue to be done under the 2005 Regulations, as amended, if it could continue to be done under those Regulations. However, what had been done, or in the process of being done, by the IGC, will be deemed to have been done, or in the process of being done, by the ORR. Furthermore, as provided by Article 5 of the new bi-national regulation, the adjudicating authorities that, before the revocation of the 2005 Order, had competence to deal with the judicial review of IGC decisions taken before that date under that Order will continue to have jurisdiction.

An impact assessment has not been produced in respect of this Order, since it has no impact of the costs of business or the voluntary sector. An Explanatory Memorandum, with a transposition note annexed to it, is published alongside this Order at [www.legislation.gov.uk](http://www.legislation.gov.uk).

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