

# Consultation on proposed amendments to the regulatory and appeal mechanism for the Channel Tunnel.

## Purpose and Scope

1. The purpose of this consultation is to ask stakeholders for any comments they may have on proposed amendments to the way that the UK delegation to the IGC ("the UK Delegation") operates. The aim of the amendments is to provide the Intergovernmental Commission (IGC) with statutory access to the resources and expertise to facilitate its role in carrying out the regulatory functions set out in The Channel Tunnel (International Arrangements) Order 2005 (SI 3207/2005) ("the Order").
2. The scope of this consultation is restricted to the arrangements to be implemented within the UK concerning the regulation of the Channel Tunnel. It does not affect the arrangements in place for the domestic rail industry in Great Britain.

## Introduction

3. The Order implements, in relation to the Channel Tunnel, EC legislation and in particular Directive 2001/14/EC, which sets out a framework to increase the transparency of capacity allocation and charging processes. Under the Order, the IGC is appointed as the regulatory body for the Channel Tunnel and its duties include acting as an appeal body where an applicant is aggrieved, for instance, as a result of decisions taken by Eurotunnel in relation to access to or the access charges for the Channel Tunnel.
4. The Government has become aware of the desirability of providing for further expertise to support the UK Delegation's contribution to the regulatory and appellate functions of the IGC under Directive 2001/14/EC. Following a review of the current arrangements in Great Britain, the Government is therefore proposing amendments to the Order that are intended to enhance the ability of the IGC to carry out the regulatory functions effectively by:
  - enabling the Office of Rail Regulation (ORR<sup>1</sup>) to provide independent, expert advice and assistance via the UK Delegation to the IGC in relation to the regulatory functions under the Order. This would facilitate a consistency in approach to rail regulatory issues in Great Britain, where ORR already fulfils these functions under Directive 2001/14/EC for the main line network and where it is the appeal body for CTRL, subject to some specific requirements on charging issues; and
  - providing for the appointment by the Secretary of State of two members to the UK delegation following consultation with the ORR.

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<sup>1</sup> ORR is the independent safety and economic statutory rail regulatory body for Britain's railways. It was established on 5 July 2004 under the Railways and Transport Safety Act 2003, and succeeded the Rail Regulator.

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5. The proposed arrangements have been discussed with ORR and the members of the UK delegation. They have all indicated that they are content with the proposals. Although these new arrangements do not require formal agreement from the French Government, the UK delegation has also kept its French colleagues informed of its proposals and the reasoning behind them.

## Background

6. The IGC was established in 1986 by Article 10 of the Treaty of Canterbury. It provides a single body through which the British and French Governments jointly exercise their rights and obligations under the Channel Tunnel Concession Agreement. At the time of its creation, and until the transposition of the European "First Rail Package"<sup>2</sup> of Directives establishing the single market in the rail freight sector, the role of the IGC was essentially that of monitoring the construction and operation of the Channel Tunnel, taking decisions in the name of the two Governments for the implementation of the Concession, and ensuring the coherent application of the safety and security regimes applying to the Tunnel.
7. The IGC was not established as a body incorporating permanently within itself the expertise necessary to carry out all its functions allocated pursuant to the Treaty; this was not considered necessary. Instead, the Treaty provides that for the purposes of carrying out its functions the IGC is entitled to call on the assistance of the authorities of each Government or any body or expert of its choice.
8. The IGC comprises a UK and French delegation each of seven members, appointed by their respective Government. Decisions of the IGC are taken by agreement between the two Heads of Delegation. The Chair of the IGC alternates on an annual basis between the two Heads; since 1 April 2007 it has been held by France. On 1 April 2008 it will revert to the UK.
9. Developments in European legislation led the British and French Governments to expand the role of the IGC to include that of regulatory body for the Channel Tunnel in accordance with the requirements of Article 30 of Directive 2001/14/EC. However, as noted above, the IGC as currently constituted lacks statutory access to all the expertise and resources which may assist it with carrying out all the regulatory functions allocated to it.
10. In the UK, the domestic rail regulator, the ORR, is an obvious source of advice and assistance that the IGC may wish to call upon when carrying out its regulatory functions. The proposed amendments provide the ORR with the power and the duty to provide such advice and assistance to the IGC.

## Issues for Consideration

11. In order to enhance the ability of the IGC to carry out its regulatory functions, the Government is proposing to implement two measures contemplated by the proposed amendments to Statutory Instrument (SI) 2005/3207 (as set out in the draft amending SI attached at Annex 4) and further developed in a Memorandum of Understanding (MoU) between the ORR and the Department for Transport (DfT), attached at Annex 2.

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<sup>2</sup> Directive 91/449/EEC on the development of the Community's railways, as amended by Directive 2001/12/EC; Directive 95/18/EC on the licensing of railway undertakings, as amended by Directive 2001/13/EC; and Directive 2001/14/EC on the allocation of railway infrastructure capacity and the levying of charges for the use of railway infrastructure.

## **Appointment of ORR members to UK Delegation of IGC**

12. The first of these is to strengthen the internal resources of the IGC by providing that two of the members of the UK Delegation, including the Head of the UK Delegation, are appointed by the Secretary of State following consultation with the ORR. In the interests of transparency, it is proposed to amend the Order to make this a statutory requirement (see Annex 4).
13. These members (referred to below as "ORR members") will possess requisite expert knowledge relevant to the discharge of the regulatory functions of the IGC and will act independently of the UK Government. They will be able to seek advice and assistance from the ORR in relation to the performance of those functions. The MoU records that the Government will not seek to direct any decision of the ORR members connected with regulatory issues. It also sets out the terms of appointment of the ORR members, their roles and how they will carry them out.
14. In line with these changes, and to ensure continuity, it is also proposed that the UK Secretariat will move to the offices of the ORR from the DfT. Responsibility for the appointment of the UK Secretary and staffing of the Secretariat will also transfer to the ORR. These arrangements are explained further in section 8 of the MoU.

## **Involvement of ORR in regulatory matters**

15. The second measure is to facilitate the IGC's access to external resources by creating a statutory duty for the ORR to advise and assist the IGC on matters relating to its regulatory functions as the IGC may require. The ORR is the economic regulator for the domestic rail network and carries out the regulatory functions set out in Directive 2001/14/EC. As such, it has the necessary expertise and resources to advise and assist the IGC in the performance of its regulatory functions.
16. The scope of the advice and assistance that the ORR may be asked to provide by the IGC for the purpose of carrying out its regulatory functions is set out in the list at Annex 3.

## **Functions of UK Delegation members**

17. Under the new proposals, the Head of UK Delegation will be appointed in consultation with the ORR, as will one other of the remaining six members of the UK delegation. The other five members will be drawn from the Channel Tunnel Safety Authority (whose membership of the IGC is a stipulation of the Treaty of Canterbury), the Transport Security section of the DfT, the Foreign and Commonwealth Office, Her Majesty's Revenue and Customs, and the Home Office.
18. The Head of Delegation will refer other, non-regulatory matters and decisions, such as safety and security issues in relation to the Channel Tunnel, for consideration and advice to the other members of the IGC where appropriate and without reference to the ORR.

## **Decisions of the Intergovernmental Commission**

19. The Order provides that a decision by the IGC in accordance with its regulatory functions is binding on all parties covered by that decision. Where the decision contains a direction as to the remedial action to be taken, any party to whom the direction is

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addressed is under an obligation to comply with it. Further consideration is being given to whether amendments are required in respect of the enforcement of the IGC's decisions.

## **Interface with French authorities**

20. The new arrangements will require collaboration and contacts with the French *Mission de Contrôle des Affaires Ferroviaires* (MCAF) established pursuant to Directive 2001/14/EC. Preliminary discussions with the French Government suggest that the French delegation to the IGC will call on MCAF for advice on similar regulatory matters. In such circumstances, the ORR will want to discuss with MCAF any regulatory matters on which the IGC has been asked to decide and on which ORR has been asked to advise. (Article 31 of Directive 2001/14/EC places a requirement upon regulatory bodies to exchange information about their work and decision-making principles and practice for the purpose of co-ordinating their decision-making principles across the Community.)

## **Financial Arrangements**

21. The proposed arrangements are not expected to have any financial impact; it is anticipated that, to the extent that these proposals could give rise to additional costs, these will be covered by the existing provision of the Concession Agreement under which the Concessionaires (Eurotunnel) meet the expenses of the IGC. In effect, it is proposed that the existing funding arrangements will simply transfer to ORR. The MoU outlines the procedure in the event that the Concessionaires fail to make the necessary payments.

## **Responses to this consultation**

22. Consultees' views are sought on the arrangements proposed above, on the draft SI and on the MoU, in particular focussing on the considerations below:

- 1) Do you consider that the proposed arrangements enhance the ability of the IGC to carry out its regulatory functions in relation to the Channel Tunnel effectively?
- 2) Are there any other measures that might be taken which you consider would make a positive contribution to the IGC's ability to carry out its regulatory functions?
- 3) Do you have any concerns about the proposed transfer of the UK Secretariat to the ORR and if so, of what nature?

Responses to this consultation should be addressed to:

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Department for Transport  
Rail Strategy and International  
Fifth Floor  
Great Minster House  
76 Marsham Street

Consultation on proposed amendments to the regulatory and appeal mechanism for the Channel Tunnel.

London

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e-mail: [deborah.phelan@dft.gsi.gov.uk](mailto:deborah.phelan@dft.gsi.gov.uk)

23. The deadline for return of responses is **7 December 2007**. We cannot guarantee that responses received after this deadline will be taken into account.
24. A list of organisations/stakeholders that we have sent this consultation to is included in Annex 1. If you have any suggestions of others who may wish to be involved in the consultation process please let us know.
25. This consultation has been produced in accordance with the principles of the Government's "Code of Practice on Consultation" which are included at Annex 5.
26. An Impact Assessment has not been produced because there are no impacts or administrative burdens on business, charities, the voluntary sector or the public sector.
27. A summary of responses to this consultation will be published on our website after the consultation period has closed.
28. According to the requirements of the Freedom of Information Act (2000), all information contained in your response to this consultation may be subject to publication or disclosure. This may include personal information such as your name and address. If you want your response or your name and address to remain confidential, you should explain why confidentiality is necessary. Your request will be granted only if it is consistent with Freedom of Information obligations. An automatic confidentiality disclaimer generated by your e-mail system will not be regarded as binding on the Department.

## **Annex 1**

### **List of Named Consultees**

British Railways Board

Channel Tunnel Intergovernmental Commission

English, Welsh and Scottish Railways Ltd (EWS)

Euro Cargo Rail

Europorte 2

Eurostar (UK) Ltd

Eurotunnel

Freight Europe UK

Freightliner

GB Railfreight

Norfolk Line

Office of Rail Regulation

Rail Freight Group

SNCF

SNCF Freight UK

## **Annex 2**

### **Memorandum of Understanding between the Department for Transport (DfT) and the Office of Rail Regulation (ORR) concerning the appointment of members nominated by the ORR to the UK delegation to the Intergovernmental Commission (IGC) and other related matters**

The DfT and the ORR have agreed the following:

#### **1. Appointment of the ORR members to the UK delegation to the IGC**

1.1 Having consulted the ORR and taken into account its recommendation, the Secretary of State for Transport ("SoS") will appoint two members of the IGC (the "ORR members") to carry out on behalf of the UK delegation to the IGC (the "UK delegation") the functions of the IGC under Directive 2001/14 and SI 2005/3207 (the "regulatory functions"). One of the ORR members shall be the Head of the UK delegation ("HoD").

#### **2. Functions of the ORR members**

2.1 The ORR members shall carry out the regulatory functions on behalf of the UK delegation.

2.2 Unless the ORR members consider it necessary or expedient for the performance of the regulatory functions, they shall not directly or indirectly consult with the SoS, other members of Her Majesty's Government or the Policy members (as defined in paragraph 4.1 below). The provisions of Article 10(1) of the Treaty of Canterbury do not provide grounds for such consultation by the ORR members. Neither the SoS, other members of Her Majesty's Government nor the Policy members shall seek to direct any decision of the ORR members connected with the performance of the regulatory functions, nor any advice they may be asked to give in connection with a consultation procedure under Article 18 of the Treaty in relation to such decisions.

2.3 The ORR members shall seek advice and assistance from the ORR in order to facilitate the performance of the regulatory functions and[, subject to the amendment of SI 2005/3207 to appoint the ORR to advise and assist the IGC,] the ORR shall provide such advice and assistance as the ORR members may require [in accordance with that amendment].

#### **3. Appointment of the CTSA Member**

3.1 Having consulted the ORR and taken into account its recommendation, the SoS shall appoint to the UK delegation a member of the Channel Tunnel Safety Authority (the "CTSA Member").

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#### **4. Appointment of the Policy members to the UK delegation**

4.1 The appointment of the remaining members of the UK delegation ("Policy members") shall be a matter for Her Majesty's Government and shall be made without consulting the ORR.

#### **5. Functions of the Policy members**

5.1 Policy members shall only be concerned with the performance of the functions of the IGC under the Treaty of Canterbury where they are carried out independently of the regulatory functions. Each Policy member shall provide information or advice to the HoD in relation to matters before the IGC falling within his/her expertise.

#### **6. Additional functions of the HoD**

6.1 All decisions of the IGC shall be taken by agreement between the Heads of the UK and French delegations in accordance with Article 10(5) of the Treaty of Canterbury.

6.2 The HoD shall take decisions required in performance of the regulatory functions on behalf of the UK delegation without seeking the approval directly or indirectly of the SoS or other members of Her Majesty's Government.

6.3 The HoD shall refer all other matters and decisions (the "non-regulatory decisions") to be taken by the IGC to the CTSA Member or the relevant Policy member(s) for consideration and advice.

6.4 S/he shall take into account the advice from the CTSA Member or the relevant Policy member(s) of the UK delegation and, if s/he proposes to take a non-regulatory decision which is contrary to this advice, s/he shall consult further with the CTSA Member or the relevant Policy Member(s) and take into account any additional views such Member(s) may express before taking the non-regulatory decision in question.

6.5 Where there is disagreement between the Heads of the UK and French delegations, the procedure for consultation between the Governments provided for in Article 18 of the Treaty of Canterbury shall apply.

#### **7. Terms of appointment of the ORR members**

7.1 It is agreed that different terms of appointment may be required where an ORR member is not an employee or member of ORR. The ORR members:

- (a) shall be appointed for a fixed term of no more than 5 years (but may be reappointed);
- (b) may resign by notice to the Secretary of State; and
- (c) shall hold and vacate office in accordance with the terms of their appointment.

7.2 The Secretary of State may, having consulted the ORR, terminate the appointment of an ORR member by notice in writing on the grounds that the ORR member -

- (a) has been absent from meetings of the IGC or the UK delegation without good cause during a period of more than six months, or in the case of the HoD has been absent from two consecutive meetings without good cause;

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- (b) has a financial or other personal interest which is likely to influence the performance of his/her functions as an ORR member;
- (c) is the subject of a bankruptcy restrictions order (or interim order);
- (d) has had his/her estate sequestrated in Scotland or, under Scots law, has made a composition or arrangement with, or granted a trust deed for, his/her creditors,
- (e) has misbehaved;
- (f) is unable, unfit or unwilling to perform his/her functions as a member; or
- (g) in the case of an ORR member that is an employee or member of ORR, upon that person ceasing to undertake work as an employee or member of ORR.

7.3 The ORR shall with the approval of the Secretary of State make payments to the ORR members by way of:

- (a) remuneration in the case of ORR members that are not employees of ORR;
- (b) allowances;
- (c) expenses.

7.4 Such sums shall be met out of the payments made by the Concessionaires under clause 27.8 of the Concession Agreement of 14 March 1986, as amended ("the Concession Agreement"). In the event that the Concessionaires fail to meet their obligations under this provision, the SoS shall indemnify the ORR in respect of payments due to the ORR members under paragraph 7.3 above.

## **8. Secretariat to the UK delegation**

8.1 The ORR shall provide a Secretary and a secretariat to the UK delegation, staffed by employees of or secondees to the ORR.

8.2 The secretariat shall provide general administrative and technical support to the UK delegation, including and in co-operation with the secretariat to the French delegation where appropriate:

- (a) managing the funding of the UK delegation's activities, as provided in paragraphs 10.1-10.3 below;
- (b) preparing agendas, documentation and papers for meetings of the IGC;
- (c) recording the proceedings of the IGC;
- (d) notifying decisions of the IGC;
- (e) receiving and dealing with correspondence addressed to the IGC; and
- (f) arranging expert assistance and consultancy support.

## **9. Organisational liability issues**

9.1 Where liability attaches to the IGC or the ORR as a result of the performance of the regulatory functions or non-regulatory functions under the Treaty of Canterbury, responsibility for ensuring payment of any compensation due from Her Majesty's Government shall fall, in the first instance, to the DfT.

## **10. Funding**

10.1 The secretariat will be responsible for managing the funding of the UK delegation's activities. Any balance remaining once the costs of the UK delegation have been deducted from the payments it has received, shall be payable to the Consolidated Fund; for these purposes, the 'costs of the UK delegation' can be taken to include, inter alia, the costs of the ORR (incurred in connection with its obligations under the Memorandum) and the costs of the CTSA and the Kent Fire & Rescue Service (incurred in connection with their Channel Tunnel activities).

10.2 In the event that the Concessionaires do not make payment(s) in full as they fall due, the ORR will inform DfT and - acting in the best financial interests of the IGC - make all reasonable endeavours to obtain payment from the Concessionaires without further delay. In the event that any debt is outstanding for more than 3 months, the ORR shall refer the matter to the SoS for further action.

10.3 If for any reason the Concessionaires do not pay any amount payable by them under clause 27.8 of the Concession Agreement within 3 months of the date on which that sum was due, the SoS shall pay promptly (and in any event within 28 days) to the ORR any moneys owing to it as a result in respect of the costs incurred in performance of its functions and obligations under this Memorandum. Any such sum paid by the SoS to the ORR pursuant to this obligation shall be recouped from moneys recovered from the Concessionaires following enforcement of their obligations under clause 27.8 of the Concession.

10.4 The SoS shall indemnify the ORR for any expenses incurred in connection with the regulatory functions and the other functions of the IGC (including payments to the ORR members under paragraph 7.3 above), where such expenses are not recoverable by the SoS from the Concessionaires under clause 27.8 of the Concession Agreement.

## **11. Revisions to the Memorandum**

11.1 The provisions of this memorandum shall be reviewed in the event of a change of circumstances or at such other time as the parties consider appropriate and if, as result of the review, any of the provisions are no longer considered appropriate, they may be varied, superseded or revoked by agreement between the parties.

August 2007

## **Annex 3**

### **Summary list of ORR's regulatory role / functions**

1. Providing advice and assistance as required on procedural and substantive issues arising out of any appeals to the IGC brought under Article 12 of the Bi-national regulation of 25 October 2005 by any international grouping or railway undertaking which believes that it has been unfairly treated, discriminated against or is in any other way aggrieved, and in particular by a decision of the infrastructure manager (ie Eurotunnel) or, where appropriate, the railways undertaking in relation to the Channel Tunnel. Decisions which may give rise to such an appeal may relate to any of the following (but will not necessarily do so):
  - The network statement
  - The criteria contained within it
  - The allocation process and its result
  - The charging scheme
  - The level or structure of infrastructure fees which the aggrieved party is, or may be, required to pay
  - The enforcement and monitoring of safety rules
2. Identifying and assessing information that might be needed by the IGC in order to fulfil its appellate, supervisory and other regulatory functions under Article 12 of the Bi-national regulation.
3. Providing advice and assistance as required as to the appropriate remedy in relation to an appeal or other complaint under the Bi-national regulation.
4. Providing advice or assistance in relation to any judicial review proceedings resulting from a decision of the IGC in relation to an appeal or other regulatory function of the IGC under Article 12 of the Bi-national regulation.
5. Assisting with any other reasonable request for information or advice from the IGC on issues related to the above.

Draft Statutory Instrument

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STATUTORY INSTRUMENTS

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2007 No.

CHANNEL TUNNEL

RAILWAYS

The Channel Tunnel (International Arrangements) (Amendment)  
Order 2007

<i>Made</i> - - - -	[ ] 2007
<i>Laid before Parliament</i>	[ ] 2007
<i>Coming into force</i> - -	[ ] 2007

The Secretary of State makes the following Order in exercise of the powers conferred by section 11 of the Channel Tunnel Act 1987<sup>(1)</sup>:

**Citation and commencement**

1. This Order may be cited as the Channel Tunnel (International Arrangements) (Amendment) Order and shall come into force on [ 2007].

**Amendment of the Channel Tunnel (International Arrangements) Order 2005**

2.--(1) The Channel Tunnel (International Arrangements) Order 2005<sup>(b)</sup> is amended as follows.

(2) In article 2 (Interpretation) after the definition of "international articles" insert--

""Office of Rail Regulation" means the body established under section 15 of the Railways and Transport Safety Act 2003<sup>(c)</sup>"

(3) After article 4 (Regulatory body) insert--

**""Role of the Office of Rail Regulation**

4A.-(1) With a view to facilitating the performance of the obligations under article 4(1) by the Intergovernmental Commission the Secretary of State must exercise the power of appointment under article 10.4 of the Treaty so as to ensure that at least two members of the

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(1) 1987 c.53.

(b) S.I. 2005/3207

(c) 2003 c.20.

Intergovernmental Commission are appointed following consultation by the Secretary of State with the Office of Rail Regulation.

(2) If called upon by the Intergovernmental Commission the Office of Rail Regulation shall provide to that body such assistance as it may require for the purpose of carrying out the functions under article 12 of the international articles."

Signed by authority of the Secretary of State for Transport

[ ] 2007

[Parliamentary Under Secretary of State]  
Department for Transport

### **EXPLANATORY NOTE**

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

This Order amends The Channel Tunnel (International Arrangements) Order 2005.

Article 2(3) of this Order gives the Office of Rail Regulation the function of meeting requests for assistance from the Intergovernmental Commission for the purpose of carrying out its functions as the regulatory body for the Channel Tunnel under article 12 of the Schedule to the 2005 Order. For the purpose of facilitating the performance of those functions by the Intergovernmental Commission, article 2(3) also requires that at least two members are appointed by the Secretary of State to the Intergovernmental Commission after consulting the Office of Rail Regulation.

## Annex 5

### Code of Practice on Consultation

The Government has adopted a code of practice on consultations. The code of practice applies to all UK public consultations by government departments and agencies, including consultations on EU directives.

Though the code does not have legal force, and cannot prevail over statutory or other mandatory external requirements (e.g. under European Community Law), it should otherwise generally be regarded as binding unless Ministers conclude that exceptional circumstances require a departure.

The code contains six criteria. They should be reproduced in all consultation documents. There should be an explanation of any departure from the criteria and confirmation that they have otherwise been followed.

#### Consultation criteria

1. Consult widely throughout the process, allowing a minimum of 12 weeks for written consultation at least once during the development of the policy.
2. Be clear about what your proposals are, who may be affected, what questions are being asked and the time-scale for responses.
3. Ensure that your consultation is clear, concise and widely accessible.
4. Give feedback regarding the responses received and how the consultation process influenced the policy.
5. Monitor your department's effectiveness at consultation, including through the use of a designated consultation co-ordinator.
6. Ensure your consultation follows better regulation best practice, including carrying out an Impact Assessment if appropriate.

A full version of the code of practice is available on the Cabinet Office web-site at:

<http://www.cabinetoffice.gov.uk/regulation/documents/consultation/pdf/code.pdf>

If you consider that this consultation does not comply with the criteria or have comments about the **consultation process** please contact:

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Consultation Co-ordinator

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