

Rail Delivery Group



The European Union (Withdrawal) Bill



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The Speed Read

- The European Union (Withdrawal) Bill will bring EU law onto the UK statute books to give certainty as the UK leave the EU.
- The Bill makes provision for Ministers to quickly correct references in this law that no longer make sense once the UK has left the EU, e.g. references to the European Court of Justice (ECJ).
- Whilst RDG welcomes the certainty and the apparent commitment to current EU rail legislation there are four key risks:
 1. Powers given to Ministers are very wide ranging and could be used to make policy by stealth.
 2. There will be a lot of 'inoperabilities' or things that need to be corrected at law transfers over.
 3. There will be new opportunities for legal challenge as the Supreme Court has the option to overturn ECJ judgements. This could create uncertainty.
 4. There will be inconsistencies where current EU legislation has an 'in force' and 'application' dates that straddle Brexit Day
- RDG are working on a database of legal inoperabilities and will monitor the policy change situation.

1 About Rail Delivery Group

The purpose of the Rail Delivery Group (RDG) is to enable Network Rail and passenger and freight operating companies to succeed by delivering better services for their customers. This ultimately benefits taxpayers and the economy. As a representative body for the whole industry RDG provides a voice for both passenger train and freight train operators. RDG also provides important ticketing, information and reservation services for passengers on behalf of our members' companies. RDG works in close partnership with the supply chain.

The railway is integral to the British economy. The rail network transports millions of commuters to their workplaces and freight goods vital for business. It is the only form of mechanised transport which has seen usage increase consecutively every year, since the turn of the century.

Independent analysis shows that the rail industry and supply chain contribute up to £10.1bn in gross value added (GVA) to the economy every year and enhance the productivity of the UK by an estimated £11.3bn by reducing road congestion and enabling companies to locate closer to each other. In addition to this, some 2140,000 people are employed by the rail industry and its supply chain.

2 Background

2.1 The referendum

On 23 June 2016, a referendum on the United Kingdom's (UK) membership of the European Union (EU) was held with a majority of voters in favour of the UK leaving the EU. In March 2017, the Government triggered Article 50 of the Treaty of the European Union and negotiations have since begun.

2.2 Types of EU law

There are many EU regulations and directives that apply to the rail industry. Some of these legal acts are directly addressed to the transport sector and are known as vertical legislation. Other regulations and directives are addressed to multiple sectors, for example EU procurement law and are known as horizontal (sometimes called transverse) legislation. The legislation is created by the EU as a Regulation, Directive, Implementing Act or Delegated Act.

A regulation is a binding legislative act. This means it has to be applied directly from the date set out in the legislation and in its entirety in all Member States. A regulation does not need to be transposed into UK law whilst the UK is a member of the EU.

A directive sets out a goal that the Member States must achieve by creating domestic legislation through a process called transposition. Once the UK has ended its membership of the EU, the government could repeal or amend the domestic Acts of Parliament which transpose the directives. This would have to be done on an individual basis in line with domestic policy change.

Provisions are made within regulations for the European Commission to instigate additional legislation to flesh-out measures as and when there is more experience as to how the regulation is working. These are known as delegated and implementing acts. They allow the Commission to give greater clarity without going through the process of creating a whole new regulation. Implementing and delegated acts have 'direct effect' which means they apply like regulations.

It is estimated that there are around 12,000 regulations or directly applicable acts in force now and around 7,900 statutory instruments have been used by Government to implement directives.

2.3 What the Bill does

The European Union (Withdrawal) Bill will convert the body of EU legislation into UK law at the point that the UK leaves the EU. The Bill repeals the European Communities Act 1972 and puts in enabling legislation to amend, modify and repeal- where necessary- other legislation to end the supremacy of EU law.

“ The Repeal Bill is designed to ensure that the UK exits the EU with maximum certainty, continuity and control ”

- DEXEU 13 July 2017



The Government has issued the Bill with the following aims:

- Avoid copying out each piece of directly applicable legislation into UK law.
- Provide maximum certainty as the UK leaves the EU.
- Give the UK more time to decide which elements of EU law to keep, modify or repeal in the long-term.
- Provide a transitional arrangement if no deal is made with the EU by the end of the two-year negotiating period.
- Bring EU law into UK law without making major changes to policy or establishing new legal frameworks.
- Ensure there is proper legislative scrutiny of any policy change or new provisions which are required.

3 Review of the Bill

The Bill is highly technical but does not provide any light as to the direction of Brexit or exactly how the powers it confers will be used; indeed, this is not the Bill’s intention. It is also highly likely that the Bill will be significantly modified as it goes through both Houses of Parliament.

A significant portion of the Bill deals with the complexity of the relationship with the UK’s devolved administrations, Wales, Scotland and Northern Ireland. This is anticipated to have a relatively low impact on the rail sector as any changes to vertical EU rail legislation will not be undertaken by devolved administrations.

The SWOT below summarises some of the key strengths and weaknesses of the Bill. It also takes a snapshot of how these impact rail. Some of the more substantive issues for rail are expanded upon in the following section.

3.1 SWOT

Strengths of the Bill	Weaknesses of the Bill
<ul style="list-style-type: none"> • Clearly no retroactive effect. • Better than having no application of EU law and potential policy lacunas. • Section 7(7) limits the powers to two years after ‘Brexit Day’. 	<ul style="list-style-type: none"> • Wide ranging powers, for example Section 7(1). • It is unclear how this Bill will be modified if the negotiations significantly shift the UK or EU’s position.
Opportunities for the industry	Threats for the industry
<ul style="list-style-type: none"> • Could remove some of the most onerous requirements that do not support the objectives of our whole industry. 	<ul style="list-style-type: none"> • Policy by stealth due to wide ranging powers. Schedule 1 3(1) limits the ability to challenge • Francovich specifically excluded. Whilst this is logical in itself, as it is part of EU case law, it does clearly indicate that the Government does not want to open the compensation question. • The industry requests things in the Bill (due to timescales) that need more consideration e.g. standards frameworks

4 What does this mean for rail?

It is difficult to isolate any one sector when analysing the Bill; the nature of horizontal legislation means that many effects will be cross-industry. There is nothing that will cause a unique issue for RDG members. However, RDG has identified four areas with potentially interesting sector-specific case studies or areas for the industry to work on.

4.1 Secondary legislation

One of RDG's key principles of all of its Brexit work is that no policy changes should be made 'by stealth'. Any departure from current jurisprudence should be as a result of a clear change in government policy in consultation with stakeholders. It is crucial to retain legal certainty.

The Bill confers wide-ranging powers on 'Ministers of the Crown' to deal with deficiencies following withdrawal. These so-called "Henry VIII powers" allow Ministers to enact secondary legislation which would otherwise be made by an Act of Parliament. Whilst this is sensible for matters of inoperability (below), this is problematic if it leads to policy change without full consultation in the normal way.

CASE STUDY: THE RAILWAYS ACT 1993

There is a perception that the European Union (EU) was the catalyst for liberalisation in the UK. However, the Railways Act 1993 preceded any EU law and UK policy has always gone beyond any of the Railway Packages. As such, RDG would be concerned if the fundamental principles of the Railways Act were opened using the Repeal Bill, under the guise of modifying the Fourth Railway Package. Any structural or organisational changes requiring legislation should be consulted and go through Parliament accordingly.

4.2 Legal inoperabilities

In advance of the Bill being enacted Government departments will identify where there are 'legal intolerabilities' in the EU being transposed. For example, the Government must identify references to agencies that the UK are no longer a part of, or the European Court of Justice (ECJ). This is a significant undertaking as it will not be as simple as a word replace exercise.

CASE STUDY: EUROPEAN RAIL FREIGHT CORRIDORS

The European Rail Freight Corridor Regulation (913/2010) is a good example of complexities that may arise from legal inoperabilities. It is highly likely that the industry will want to retain many aspects of this Regulation but it is unclear how future membership of a European Economic Interest Group (EEIG) will work to allow membership of the governance board. It is also unclear who will have the final say over the maps and corridors. The inoperabilities in this Regulation cannot be fixed with a simple word replace exercise.

4.3 In force v application

A source of uncertainty from the Bill arises from the provisions of section 3(3)(a), which provides that, “in the case of anything which comes into force at a particular time and is stated to apply from a later time”, the law is continued into UK law as “it is in force and applies immediately before exit day”. This means that, where EU legislation has been adopted prior to exit day, any part of it that has not taken effect before that day will not become effective in UK law. This could create considerable uncertainty.

CASE STUDY: THE FOURTH RAILWAY PACKAGE

The Public Service Obligation (PSO) Regulation 2016/2338, which was part of the Fourth Railway Package is an example with in force and application dates that straddle Brexit Day. The Regulation will have direct applicability from 24 December 2017 but Member States do not have to apply it until December 2019; post the predicted Brexit Day of 1 April 2019.

4.4 Jurisdiction of the ECJ

Under the Bill it is open to the UK Supreme Court to overturn any EU case law and therefore it can be envisaged that there may be a number of challenges to existing interpretations of EU law in the UK courts after exit day. Moreover, post-exit day, English courts will no longer be able to refer any matter to the ECJ (s6(1)(b)) and will not be bound by any principles laid down or any decisions by the ECJ after exit day (s6(1) (a)).

CASE STUDY:

According to the Fourth Railway Package, PSOs may be made up of a mixture of cost-covering and not cost-covering services, it is not clear to what extent existing case law on PSOs would be used to make an interpretation if there were a challenge to an interpretation made by a franchising body.

In the Corsica Ferries case, the European Court of Justice (ECJ) ruled that whilst it was acceptable for the ferry company SNCM to be subsidised for running its winter service between Corsica and Marseille. However, including the profitable summer services within the PSO was incompatible with the rules on state aid. The ECJ ruled that “[private] operators on the market were capable of meeting demand during the peak period” and therefore including the summer service in the PSO was unnecessary.

Would this case be read across? Would a challenge be created because the concept of PSOs has been anglicised into a franchising model? Would anyone have the appetite to challenge anything knowing it would be subject to a lengthy process of reinterpretation?

5 Annex: List of key EU rail legislation

Type	Number	Title	Summary
R	(EC) 352/2009	on the adoption of a common safety method on risk evaluation	the purpose of the CSM is to enable mutual recognition of results from risk assessment by harmonising the risk management processes used to assess safety levels and by harmonising the exchange of safety relevant information between actors within the rail industry
IA	Commission Implementing Regulation (EU)2015/171	on certain aspects of the procedure of licensing railway undertakings	The regulation introduces a standard format for the licence document, changes in the scope of requirements concerning financial fitness, third-party insurance and the method of notification of the licence document.
R	(EC) 653/2007	on the use of a common European format for safety certificates	advises the use of a common European format for safety certificates and application documents
R	(EC) 1158/2010	on a common safety method for assessing conformity	establishes a common safety method for assessing conformity with requirements for obtaining safety certificates.
R	(EU) 1077/2012	on a common safety method for supervision by national safety authorities	National Safety Authorities apply this Regulation to oversee the compliance with the legal obligation on a railway undertaking or infrastructure manager to use a safety management system to ensure the control of all risks associated with their activities.
R	(EU) 1078/2012	on a common safety method for monitoring to be applied by railway undertakings, infrastructure managers after receiving a safety certificate	Sets out a harmonised framework for monitoring. It is applied by railway undertakings, infrastructure managers and entities in charge of maintenance to enable the effective management of safety of the railway system during its operation and maintenance activities.
R	(EC) 1315/2013	on Union guidelines for the development of the trans-European transport network	The TEN-T Union Guidelines set out objectives, priorities and outlines of measures for establishing and developing networks, to create the framework for identifying projects of common interest
R	(EU) 1316/2013	establishing the Connecting Europe Facility	the CEF governs EU funding in the transport, energy and telecommunications sectors during the period 2014 - 2020

Type	Number	Title	Summary
R	(EC) 913/2010	concerning a European rail network for competitive freight	<p>The Regulation requests Member State to establish international market-oriented Rail Freight Corridors to meet three challenges :</p> <ol style="list-style-type: none"> 1. strengthening co-operation between Infrastructure Managers on key aspects such as allocation of path, deployment of interoperable systems and infrastructure development; 2. striking the right balance between freight and passenger traffic along the Rail Freight Corridors, giving adequate capacity and priority for freight in line with market needs and ensuring that common punctuality targets for freight trains are met; 3. promoting intermodality between rail and other transport modes by integrating terminals into the corridor management and development.
R	(EU) 201/2011	on the model of declaration of conformity to an authorised type of railway vehicle	This Regulation sets out the form that a declaration of conformity for an authorised type of railway vehicle should take.
R	(EU) 445/2011	on a system of certification of entities in charge of maintenance for freight wagons	This applies to any ECM for freight wagons to be used on the EU railway network. The purpose of the system of certification is to provide evidence that an ECM has established its maintenance system and can meet the requirements set out in the ECM Regulation.
R	(EU) 2016/796	on the European Union Agency for Railways and repealing Regulation (EC) No 991/2004	<p>The European Union Agency for Railways was set up through the regulation (EC) No 881/2004 to help create this integrated railway area by reinforcing safety and interoperability.</p> <p>With regulation (EU) 2016/796 of the European Parliament and of the Council of 11 May 2016 on the European Union Agency for Railways the previous regulation (EC) No 881/2004 has been repealed.</p>

Type	Number	Title	Summary
R	(EC) 1371/2007	2007 on rail passengers' rights and obligations (part of the Third Railway Package)	Ensures basic rights for passengers, for example, with regard to insurance, ticketing, and for passengers with reduced mobility.
R	(EC) 1370/2007	on public passenger transport services by rail and by road	sets the frame for the award of compensation and/or exclusive rights for the discharge of public service obligations in the field of public passenger transport services by rail and by road.
IA	Commission Implementing Regulation (EU) 869/2014	Commission Implementing Regulation on new international rail passenger services	sets out the details of the procedure and criteria when determining whether the principal purpose of a rail service is to carry passengers between stations located in different Member States and whether the economic equilibrium of a public service contract for rail transport is compromised by an international rail passenger service.
IA	Implementing Regulation (EU) 2016/545	on procedures and criteria concerning framework agreements for the allocation of rail infrastructure capacity	sets out procedures and criteria concerning framework agreements for the allocation of rail infrastructure capacity.
IA	Implementing Regulation (EU) 2015/909	on the modalities for the calculation of the cost that is directly incurred as a result of operating the train service	modalities to calculate direct costs provides details on how infrastructure managers should calculate their direct costs.
IA	Commission Implementing Regulation (EU) 2015/10	Commission Implementing Regulation on criteria for applicants for rail infrastructure capacity	sets out the requirements for financial guarantees that an infrastructure manager may request to ensure that its legitimate expectations about future revenues are met without exceeding a level proportional to the level of activities contemplated by the applicant.
IA	Commission Implementing Regulation (EU) 2015/429	setting out the modalities to be followed for the application of the charging for the cost of noise effects	sets out the modalities to be followed for the application of the charging for the cost of noise effects. It harmonises the charging principles and thus encourages more Member States to introduce noise charging.
R	Proposal for a Regulation amending Regulation	concerning the opening of the market for domestic passenger transport services by rail (PSO)	to open domestic rail passenger markets from 2020, so that railway operators can provide services across the EU. More competitive pressure is expected to lead to

Type	Number	Title	Summary
	(EC) No 1370/2007		more frequent trains, and higher quality services better in tune with customer needs;
R	Regulation 2016/2337 repealing Regulation (EEC) No 1192/69	of the Council on common rules for the normalisation of the accounts of railway undertakings	Regulation (EEC) No 1192/69 is repealed as it has become obsolete.
D	2006 No.599	The Railways and Other Guided Transport Systems (Safety Regulations) 2006 (ROGS) (Second Railway Package);	Introduced to put the requirements of the 2004 European Railway Safety Directive into practice in Great Britain. The directive aims to continue to remove barriers to providing international transport services by creating a common framework for railway safety across the European Union. This sits alongside the European Interoperability Directive, which aims to remove the technical problems involved in running trains between member states.
D	2005 No.3050	The Railways (Licensing of Railway Undertakings) Regulation 2005 (First Railway Package)	Implements Directive 2012/34/EU establishing a Single European Railway Area
D	2006 No.397	The Railways (Interoperability) Regulations 2006	Implements the Second Railway package in the UK
D	2006 No.598	The Railways (Access to Training Services) Regulations 2006	Implements the Second Railway Package in the UK
D	2010 No.724	The Train Driving Licences and Certificates Regulations 2010	Sets out the requirement to hold a licence and certificate to drive a train operating on the mainline railway.
R		Regulations relating to Technical Specifications for interoperability (TSIs)	Various detailed TSIs sit under this.
D	SI 2009/2970	The Rail Passengers' Rights and Obligations Exemptions Regulation 2010	Implements the third Railway Package in the UK which ensures basic rights for passengers, for example, with regard to insurance, ticketing, and for passengers with reduced mobility.

Type	Number	Title	Summary
D	2005 No.3049	The Railways Infrastructure (Access and Management) Regulations 2005	implements the First Railway Package which was designed to open the international rail freight market, establish a general framework for the development of European railways, set out the conditions that freight operators must meet in order to operate services on the European rail network, and introduce a defined policy for capacity allocation and infrastructure charging.
D	2009 No.1122	The Railways Infrastructure (Access and Management) Amendment Regulation 2009	implements Directive 2007/58/EC on the allocation of railway infrastructure capacity and the levying of charges for the use of railway infrastructure
D	2016 No.645	Railways (Access, Management and Licensing of Railway Undertakings) Regulations 2016	<p>Implement Directive 2012/34/EU establishing a single European railway area. The changes in the Directed are designed to address issues in the EU railway market such as low levels of competition within rail, low levels of public and private investment in railways and inadequate market supervision and regulatory oversight within some EU Member States.</p> <p>The 2016 Regulations revoke and replace the infrastructure (Access and Management) Regulations 2005 (the 2005 Regulations) and amend The Railway (Licensing of Railway Undertakings) Regulations 2005</p>
D		Directive amending 2012/34/EU establishing a single European railway area, as regards the opening of the market for domestic passenger transport services by rail and the governance of the railway infrastructure (Governance)	aim is to further develop the single European Railway Area by opening up domestic rail passenger markets to competition and to create a level playing field for all railway undertakings.
D	(EU) 2016/798	Directive on 2016/798 Railway Safety	Directive (EU) 2016/798 was adopted by the European Commission on 11 May 2016 as part of the Fourth Railway Package. This is a recast of to revise the Railway Safety Directive and Member States have until 16



Type	Number	Title	Summary
			June 2019 to transpose the requirements into domestic legislation.
D	(EU) 2016/797	Directive 2016/797 on the Interoperability of the rail system within the European Union	Part of the technical pillar of the 4th Railway Package.

This paper is written on behalf of RDG members. Where this paper refers to the 'industry' this is shorthand for RDG members unless clearly state otherwise.