

Consultation on the Railways and Other Guided Transport Systems (Miscellaneous Amendments) 2013 – Summary of key outcomes

ORR as a certification body

We asked for comments on ORR's roles as a certification body. There was strong support (two-thirds of those that responded) for ORR continuing the role as certification body. Most were concerned that extra costs would be imposed on the ECM if ORR did not continue the role beyond the initial two-year period.

We will consider the consultation responses as part of the review of ORR's role as a certification body in 2014.

Amending EARR

None of the respondents objected to the proposal to amend EARR to give ORR inspectors jurisdiction to enter and have enforcement powers in certain premises, although some requested clarification of the extent of ORR's enforcement powers. ORR will include the latter in its guidance.

Maintenance of freight wagons

We consulted on an amended regulation 18A of ROGS, which requires an ECM for freight wagons to hold an ECM certificate.

Two respondents pointed out that the draft did not take account of the transitional provisions in the ECM Regulation. The drafting of the definition of an ECM Certificate (being inserted into regulation 2(1) of ROGS) has therefore been amended to make it clear that the term also includes reference to certificates or self-declarations deemed equivalent to such a certificate under the transitional provisions at articles 12(3) to (7) of the ECM Regulation. The effect is that an ECM in possession of one of those certificates or having made a relevant self-declaration will be taken to have met the requirement to hold an ECM certificate for the relevant transitional period. The effect of this is minimal in that it simply delays the requirement to hold a full ECM Certificate issued in accordance with the ECM Regulation for some parties where other provisions of recognised equivalence are already in place.

Definition of “mainline railway”

Twelve respondents (71 per cent) agreed with the proposed approach to carve out specific railway systems from the mainline railway requirements in ROGS through the use of a list published by ORR. One respondent disagreed but gave no reasons.

There were some reservations about the use of a list of rail systems that ORR has determined is not the mainline railway. Some respondents thought that:

- it might be unnecessarily administratively complex to maintain a list;
- as most of the excluded systems are free-standing, it might be better to exclude them by a suitably-worded class exemption and reserve the list to those that are not caught by it; and
- ORR could use the approach in the Rail Vehicle Accessibility (Networks) Exemption Order 2010 (S.I. 2010/904) (“RVANEO”), which lists exempted heritage and tourist lines in a Schedule.

ORR considers that once the list has been established, it would not be administratively complex to maintain. However, it might be more complex to find suitable wording for a class exemption (the previous definition of “mainline railway” tried to do this). The disadvantage of using the approach in the RVANEO is that it would be less flexible when making any amendments to the list which are likely to be required in due course as separate amendment orders would be needed on each such occasion.

The approach to a list of exclusions from the mainline railway follows the approach to non-interoperable rail systems in the Railways (Interoperability) Regulations 2011 (S.I. 2011/3066) and it is important to align the two regimes as far as possible.

ORR proposes to adopt this approach in relation to the exclusions from the Railway Safety Directive. This ensures consistency of approach across regulatory boundaries. There were extensive comments on new regulation 2A. Many of them concerned the wording that was copied out of the Railway Safety Directive. For example, the phrase “metros and other light rail systems” should be replaced by “metros or light rail systems” because London Underground is not a light rail system.

The Regulations have retained the wording used in the Railway Safety Directive because the Government’s approach to the transposition of EU Directives is, as far as possible, to “copy out”. Listing rail systems under each description avoids any confusion of how a particular system is exempt if the wording from the Directive is not clear. The Department for Transport does not consider that the Railway Safety Directive requires a railway system to be both a metro system and a light rail system to be eligible for exemption under its derogation provisions (the railway system could fall into either or both of these

categories and be exempt) and the Department considers this provision is to be interpreted consistently with the Directive.

Based on comments received, the Regulations:

- take on board some suggestions on the language in regulation 2A where this does not conflict with “copy out”;
- include a clause in regulation 2A which gives ORR discretion to decide that a determination no longer applies; and
- provide a mechanism in regulation 27 for an appeal to the Secretary of State in relation to a determination under regulation 2A.

Systems on the Approved List

We consulted on a proposed Approved List and asked if there were any:

- systems on the list that should not be there; and
- systems not on the list that should be.

Four respondents thought that the vehicles and infrastructure listed under regulation 2A(1)(b)¹ of ROGS should not appear on the list. This is because they are considered to be part of the “mainline railway” for safety purposes.

We agree that such vehicles and infrastructure should be removed from the list of exclusions. Those systems are rightly excluded from the Railways (Interoperability) Regulations 2011 (RIR11), but should be covered by the mainline railway requirements in ROGS as they are part of the mainline railway. Island line (Isle of Wight) will still be on the exclusion list as this is a functionally separate system, which is not considered to comprise part of the mainline railway.

Network Rail suggested that the following should be on the list:

- the Central Wales line;
- the Conway Valley line;
- the Cambrian line (from Dovey Junction to Phllweli);
- the Hastings to Ashford line;

¹ Networks that are functionally separate from the rest of the mainline railway and intended only for the operation of local, urban or suburban passenger services, as well as transport undertakings operating solely on these networks.

- the East Suffolk line (from Outten Broad junction to Westerfield junction);
- the Exmouth line; and
- the Far North, Kyle and Oban (west of Crainlarich) lines

These lines are all part of the existing mainline railway and are covered by Network Rail's safety authorisation. Mainline standards have to apply. Most carry freight traffic including one to a nuclear power station. The lines are not considered to be for local use so cannot be excluded from the mainline railway.

Railfuture thought that the list should include all designated community rail routes. Although some of these are excluded from RIR11, they are considered to be part of the mainline railway and will therefore not be on the list.

Heritage Railway Association (HRA) suggested that tramways should not be added to the Approved List because they are already excluded from the definition of "railway". They also suggest that in the definition of "tramway" in regulation 2(1) of ROGS, the words "or any part" should be replaced by "a predominant part". This avoids certain sections of the mainline railway that are street-running and operate by line of sight being caught.

We note that this amendment has also been considered by the Law Commission during its review of level crossing legislation. But whilst ORR accepts HRA's suggestion, we believe that it is more appropriate to wait until the Law Commission produces its final report before considering what further amendments to ROGS should be made. We also think that adding tramways to the Approved List avoids part of the mainline railway which may fit the definition of "tramway" being excluded.

Issuing safety certificates

Most respondents agreed with the proposal to issue one certificate instead of two for those operating on both mainline and non-mainline railways. Passenger Focus/London Travelwatch had no objection to this in principle, provided that

- a) operators are required to deliver comparable safety outcomes irrespective of the class of certificate sought and issued, and
- b) non-mainline operators running on the mainline system are still required to consult Passenger Focus and/or London TravelWatch (as appropriate) when making applications for safety certificates.

ORR [guidance to ROGS](#) (page 33) points out that Passenger Focus and/or London TravelWatch must be consulted.

Removal of safety verification for mainline transport operators

No respondent objected to the proposal to remove from ROGS any reference to safety verification on the mainline railway following the introduction of the CSM for risk evaluation and assessment. Safety verification under ROGS will continue to apply for non-mainline operators.

Affected parties

None of the respondents objected to the proposal to make the 28-day 'affected parties' consultation period run concurrently with the ORR's four month processing time.

Monitoring arrangements for controllers of safety-critical work

Six respondents agreed with the proposal to amend regulation 24(1)(d) of ROGS so that controllers of safety-critical work have **suitable and sufficient** arrangements for monitoring the competence and fitness of anyone under his or her management. Three (ATOC, Freightliner and First Group) objected.

The main objections were around:

- '*so far as is reasonably practicable*' (SFAIRP) at the start of regulation 24(1) already has good legal definition and should be enough without adding 'suitable and sufficient'; and
- This is already covered by other arrangements such as regulation 19 of ROGS, which also requires effective monitoring.

ORR was not convinced by the arguments from those objecting. Although "suitable and sufficient" appears in regulation 19, which concerns risk assessment, the change is about arrangements for monitoring the competence and fitness of those carrying out safety-critical work, not risk assessment.

ORR considers on the basis of operational experience and legal advice that enforcement of this provision will be assisted if we include the "suitable and sufficient" wording and it is not enough to rely on the "reasonably practicable" language at the beginning of regulation 24. The Regulations therefore includes an amended regulation 24(1)(d) with the words "suitable and sufficient".

ORR's Railway Safety Publication 1 '[Developing and Maintaining Staff Competence](#)' provides detailed guidance on monitoring the competence and fitness of staff – see in particular:

- Principle 10: Monitoring and re-assessing staff performance; and
- Appendix 1: Fitness

Annual safety reports

Ten respondents either did not comment or did not have any interest in the proposal to remove from ROGS the requirement for non-mainline operators to send annual safety reports to ORR. Five agreed with the proposal, although three had reservations. Two did not agree.

Disagreement was mainly because:

- the metro and light rail operators are major public transport undertakings carrying as many passengers as many mainline operators; and
- safety performance data will not be readily available to members of the public if the operator is not required by law to produce a report.

Those with reservations were concerned that non-mainline operators running on part of the mainline would no longer be included with the statistics used for safety risk modelling.

We considered all these comments but took the view that on balance the requirement could not be justified.

The Regulations therefore remove the requirement for non-mainline operators to send annual safety reports to ORR because:

- the administrative burden and costs are removed from the duty holder;
- the administrative burden is removed from ORR, which sees little value in receiving the reports and does not use them in a regulatory way;
- it satisfies the Government's agenda to:
 - reduce regulation and costs on businesses;
 - seek alternatives to regulation; and
 - end gold-plating; and
- ORR inspectors can obtain any relevant information by other means if and when they require it.

Non-mainline operators that run on the mainline still have a statutory duty to co-operate with transport operators on the mainline railway (Regulation 22 of ROGS) to ensure that the necessary information is available for safety risk modelling.

ORR will continue to encourage non-mainline operators to make safety performance data available publicly.

Passenger Focus/London TravelWatch suggested that regulation 21 of ROGS should be amended to place a duty on operators to make their annual safety reports available online.

ORR would need to consult on such a change. We did not do so as part of this exercise but will consider this further when we next review ROGS.