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HEALTH AND SAFETY COMMISSION

PROPOSED NEW RAILWAY AND OTHER TRANSPORT SYSTEM SAFETY REGULATIONS

A Paper by Elizabeth Gibby

Advisor(s): Robin Foster and Peter Hornsby

Cleared by Nick Starling and Allan Sefton on 16 July 2004

ISSUE

1. To seek the Commission's agreement to publish a consultative document (CD) on proposed new safety regulations for the railway, and an Approved Code of Practice (ACoP) on the management of risks from fatigue.

TIMING

2. Urgent. If final agreement for new regulations is to be sought from HSC before the end of the Rail Delivery Programme in March 2005, the CD must be published at the beginning of September 2004.

RECOMMENDATION

3. That the Commission:
 - gives a view on the issues highlighted in paragraphs 7,11,16,24,27, and 29;
 - agrees to the publication of the draft CD at Appendix A in September, subject to adjustments to tidy the draft regulations, ACoP and CD, and ensure correct cross-referencing (paragraph 33).

BACKGROUND

4. HSC endorsed the proposed outline architecture of new regulatory safety requirements for the railway in March (HSC/04/25), which followed analysis of the

response to the HSC's Discussion Document "Safety on the Railway – Shaping the Future" (the DD). The proposals for new regulations are designed to cover all railway and most other guided transport systems, with appropriate differences applied to ensure that the regulation is proportionate to the risk and character of operation. The proposed regulations will enable the Government to implement the safety management and certification aspects of the EC Railway Safety Directive (2004/49/EC) (RSD) in relation to Great Britain. The RSD applies to the high speed and conventional interoperable railway which, as extended by a recent amending Directive, will progressively cover all railways and rolling stock except those reserved for a strictly local, historical or touristic use or infrastructure which is functionally isolated from the rest of the railway system. EU Member States are obliged to implement the RSD's provisions by 30 April 2006.

5. The remainder of the RSD will be implemented by DfT in the main through the forthcoming regulations on the working methods of the new Rail Accident Investigation Branch (RAIB). By the HSC proposing the single set of safety regulations, three sets of regulations introduced at privatisation of British Rail: the Railway Safety Case Regulations, the Railways and Other Transport Systems (Approval of Works, Plant, and Equipment Regulations) (ROTS) and the Railway Safety Critical Works (RSCW) Regulations will all be revoked. This marks the biggest change in safety regulation for the railways and other guided transport systems since privatization, and the transition from one regime to another needs to be orderly and sensible, and requires careful preparation and planning for both duty holders and HSE as the regulator.

ARGUMENT

6. The basis for the new safety certification part of the Regulations is the RSD. In making the Regulations we have kept to the principle agreed by HSC that the duties applied outside the interoperable railway should be proportionate to the risk and character of the operation. The name of the Regulations reflects the Statutory Instrument Practice (SIP) guidelines that this must reflect the content and scope of the regulations. HSE has been concerned that the abbreviation of the title (ROTSS) would be confusing given that this package and the interoperability regulations have and will disapply the current ROTSS regulations. RIAC confirmed that we should seek a different title. This is currently being explored, within the constraints of SIP guidelines.

Safety management systems and safety certificates/authorisations

7. There a number of provisions in the Directive which are not entirely clear. In conjunction with the Solicitor's Office, we have done our best to interpret them in a way that reflects the Directive's intention. We do not believe that the risk of the European Commission challenging our proposed implementing provisions is large. Nevertheless, as is often the case in implementing directives, there are some points, arising from the lack of clarity in the RSD, which give rise to small to moderate risks and we must therefore draw these points to the Commission's attention. A note of them is at Annex 1 to this paper. Point 5 of Annex 1 is about the proposed arrangements for allowing affected operators to see and make

representations to HSE on applications for a certificate or authorisation. The CD could invite comment on an option of extending these arrangements to relevant trade unions and the Rail Passenger Council. **The Commission is invited to say whether it wishes to include such an option.**

8. The proposed requirements for safety management systems, safety certificates and safety authorisations, and associated procedures, are based on the provisions of the RSD and will supersede existing requirements for safety cases. To keep the Safety Case Regulations in place for non-interoperable railways would be confusing and difficult. We therefore propose extending the requirements for the interoperable railway, with suitable modifications, to non-interoperable railways. The CD seeks comments on these modifications (question 7). We also propose applying these modified requirements to other guided transport systems.
9. In extending the scope of the proposals to non-interoperable railways we have taken the opportunity to suggest adjustments in scope compared with the existing Safety Case Regulations. The most important of these is to exclude from the requirements for safety certificates/authorisations (but not from the duty to maintain a safety management system) transport systems operating at no more than 40 kph, and tramways regardless of speed. The resulting exclusion of most heritage railways is consistent with current policy, as nearly all heritage railways are subject to HSE exemptions, and tramways are not required to have safety cases. In addition, in line with an overwhelming wish of respondents to the DD, operators working solely within possessions would not require safety certificates or authorisations, and would not be required to have a SMS meeting the requirements of Schedule 1. Such operators would, however, be subject to the requirements for safety critical work – see paragraph 12-16 below.

Risk assessment

10. The draft Regulations include duties to undertake risk assessment to ensure safe operation of the transport system, and to implement necessary risk control measures (draft regulation 19). The requirement is more specific and contains some additional detail compared with the equivalent requirements of the Management of Health and Safety at Work Regulations 1999, for example by requiring additional matters to be recorded, and they omit the proviso in the Management Regulations that the recording requirements do not apply to employees with five or less employees (this may be relevant to, for example, some small heritage railways). The inclusion of these duties contributes to a balanced package of requirements, focusing not only on permissioning but on placing safety duties squarely on transport operators.

Annual reports

11. The RSD requires operators on the interoperable railway to submit an annual report to the safety authority covering specified issues including the achievement of internal safety targets, data on safety indicators, and the results of internal audits. Arguably it might be reasonable to extend a similar requirement, modified as appropriate, to other holders of safety certificates or authorisations. These include major operators such as the London Underground, which carries more passengers than the whole of the main network; but also smaller operators such as the Glasgow Underground. However, it could be argued that this goes beyond the requirements

of the Directive and is excessive regulation. If the requirement for annual reports were to be extended to other safety certificate and authorisation holders, some of the safety indicators on which the interoperable railway is required to report (Schedule 3 to the draft Regulations) would require adjustment. **Does HSC wish to extend the current draft regulation on annual reports to non-interoperable transport systems at this stage, or alternatively (as in the current draft CD) to invite views on whether it should be extended.**

Safety Critical Work

12. The main requirements in the current regulations are that employees need to be competent and fit if they undertake safety critical work and that safety critical workers do not work such hours as could cause fatigue, which could endanger safety on the transport system. The majority of respondents to the DD and evaluation study of the regulations thought that regulatory requirements are needed for safety critical work. Many respondents wanted the requirements to be subsumed into the regulations dealing with safety cases. This is not possible under the new 'European Model' in the RSD as there are no specific requirements to have a competence management system in order to obtain a safety certificate/authorisation. However, Annex 2 of the RSD does refer to 'national safety rules' concerning requirements for staff executing safety critical tasks in the list of such rules to be notified to the EC. The Commission agreed in March (HSC/04/25) that Regulations should be prepared for those carrying out safety critical work.
13. The aim of the proposed regulations on this issue is to have an effective, transparent and risk based regulatory framework in place. That framework will ensure that those in control of workers carrying out safety critical work, adequately manage their worker's competence, fitness and risks from fatigue so that the health and safety of persons on a transport system is not significantly affected by that work.
14. The proposals outlined in Chapter 3 of the CD have been developed in accordance with the new European Model and reflect the views of stakeholders who have contributed to the study evaluating the regulations and the DD. The existing RSCW Regulations will be revoked and replaced by new regulations (part 4 of the draft regulations in Annex A of the CD). Considerable research has been undertaken on fatigue since the original regulations were made. The management of fatigue is a complex issue and many factors now have to be taken into account. HSE considers that duty holders need to be given more flexibility in the arrangements they adopt to manage fatigue as compared with the arrangements needed for competence and fitness. It is proposed to revoke the existing Approved Code of Practice (ACoP) and replace it with a more up to date and better targeted ACoP on the management of risks from fatigue in the rail sector (Annex B of the CD).
15. The key changes to the current regulations are:
 - placing duties on persons in control of safety critical work. The proposals are drafted to maintain the existing duties between employer and employee, and to also include the contractual or sub-contractual arrangements where there is no 'employment' relationship, or where there are volunteers;

- focusing on safety critical tasks rather than job titles e.g. dispatching a train rather than being a guard. Safety critical tasks are now defined in four categories in relation to those tasks associated with vehicles, those on the transport system, those in relation to worker safety on the track, and those relating to practical training in safety critical tasks;
- requiring assessors to be competent and to carry out impartial and objective assessments. The requirement for an ‘assessor’ was not part of the RSCW Regulations; and
- extending the provisions relating to fatigue to include other factors rather than just hours of work e.g. design of work patterns, travel time and lifestyle factors.

16. **Does HSC agree the proposed approach for safety critical work?**

Safety Verification for the Non-interoperable Railway

17. In applying the Commission’s policy of withdrawing from approval of new and altered rail works, plant and equipment HSE has developed, and secured broad stakeholder agreement to, an approach for non-interoperable transport systems that:

- Reflects the nature of, and the risks from, metros, heritage railways, tramways, people-movers and other transport systems in scope;
- Sits alongside the European requirements that apply to the interoperable railway, but
- Is simpler than the costly requirements for interoperability, which are driven by the need for technical compatibility and single market considerations, but which are not applicable to non-interoperable transport systems.

18. In essence, the present system for approval by HSE of all new or altered works, plant and equipment (and an associated long list of dispensations set out in General Notices) would be replaced by a risk-based system of safety verification by a competent person before taking into service new or altered infrastructure or vehicles:

- a) Where there are significant changes of design or construction compared with the infrastructure or vehicles already in use on the transport system; and
- b) Which are capable of significantly increasing an existing risk, or creating a significant new risk to the safety of:
 - Passengers on the transport system; or
 - The public where the transport system operates in a street or other public place; or
 - The public using a level crossing, except where the level crossing is subject to a statutory order under the Level Crossings Act 1983.

19. In contrast to the interoperability regime, where conformity checking is undertaken by notified bodies appointed by Government, competent persons would be appointed by duty holders, who would be responsible for ensuring that they appoint competent persons who are:
 - Competent in terms of skills, knowledge, experience and resources; and
 - Sufficiently independent to ensure objectivity.
20. There is a specific requirement that the competent person is appointed at such time before selection or completion of the design of the new or altered infrastructure or vehicles as will enable any matters relating to safety raised by the competent person to be taken into account (draft regulation 32(2)). This is very much in line with HSC's policy to encourage safety at the design stage. There is no equivalent provision now in ROTS, though HMRI presently encourage duty holders to discuss applications for approval at an early stage.
21. Further details of the proposals for safety verification are set out in Chapter 4 of the Consultative Document. There are, however, a number of specific issues of which HSC should be aware, and on which HSE would like HSC to provide a steer.

Maintenance of safety standards

22. The draft requirements represent an important shift from approval by HSE to safety verification by a competent person. The HSC should be aware that, to our knowledge, the proposals would have the effect of making non-interoperable rail, tram and other guided transport systems the only transport systems where the design and construction of passenger-carrying 'vehicles' is not formally approved by Government (though it should be noted that, unlike railway operators, operators of buses, boats and aircraft are not subject to safety management permissioning covering all risks, including risks from new and altered plant and equipment). In addition the use of the risk-based criteria in paragraph 18 above is intended to reduce the number of occasions for which safety verification is required compared to approval now under ROTS (for the purposes of the Regulatory Impact Assessment (RIA) we estimated a 20% reduction). The HSC, will therefore need to be satisfied that Section 1(2) of the Health and Safety at Work Etc Act will be met i.e. that the proposed new provisions will maintain health and safety standards¹.
23. HSE believes that there are good arguments that standards would be maintained overall because the new regulations that will replace ROTS, the safety case regulations and the safety critical work regulations will for the first time require operators of all non-interoperable transport systems to:
 - Undertake risk assessment for their transport operation to identify the measures needed to ensure safe operation, and implement the measures identified;
 - Establish and maintain a written safety management system addressing all categories of risk and containing the basic elements in Schedule 1 of the draft regulations; and

¹ Although ROTS was made under Section 41 of the Transport and Works Act 1992, Section 117(1) of the Railways Act 1993 has the effect of making various provisions, including those relating to the proper construction and safe operation of the transport systems in question, existing statutory provisions under HSWA. Therefore Section 1(2) of HSWA applies.

- Obtain a safety certificate or authorisation, and so obtain permission from HSE to operate by securing HSE's agreement to their safety management system (except for tramways and for other non-interoperable transport systems where the maximum line speed never exceeds 40 kph²).

24. Is HSC content that in moving from a system of approval by HSE to safety verification by a competent person, and from three separate sets of regulations to a single set of integrated regulations with a coherent scope, overall standards of safety are being maintained?

Approved Safety Principles

25. In moving from a regime of approval by HSE to safety verification by a competent person it becomes necessary to set out in the new regulations the requirements that must be met for a competent person to issue a safety verification certificate. This is not addressed in ROTS, which sets out a simple requirement for approval by HSE and procedures for obtaining approval, but does not specify the safety criteria that must be met. As there are presently few detailed safety standards across the various modes that make up the non-interoperable sector, the draft regulations specify the requirements that must be met by reference to 'Approved Safety Principles', which will be developed by HSE and presented to HSC for approval following wide consultation (draft regulation 31). These safety principles would address safety in the design and construction of non-interoperable transport systems, and would drive the future development by industry of more detailed sector specific standards, e.g. for tramways, and heritage railways. The principles would sit alongside the existing 'Essential Requirements' under the European rail interoperability regime, which are legal requirements covering technical compatibility, reliability and availability, and environmental protection, as well as safety. The preparation of such safety principles is part of a project on standards, which is being taken forward under the HSE Rail Delivery Programme. The intention is to consult widely on draft safety principles early in 2005, and then to bring them to HSC for approval.
26. However, we recognise that the Safety Principles may not be approved before the regulations come into force. The draft regulations therefore include as an interim provision of principles for safety verification of non-interoperable transport systems set out in Schedule 4 of the regulations, which have been prepared by officials within HSE Rail on the basis of Part 1 of HSE's published 'Railway Safety Principles and Guidance' (HS(G)153/1). There is, however, a risk that in publishing the CD as it presently stands without draft Approved Safety Principles, HSC could be said to be consulting on an incomplete package of proposals. On the other hand, the risk is arguably small because there will be wide consultation on both the CD and the future draft Approved Safety Principles, and the principles in Schedule 4 will provide a good basis for the development of the Approved Safety Principles.

² Presently tramways and other guided transport systems are outside the scope of the safety case regulations. They are within scope of the proposed new requirements, but an exclusion for tramways and low speed non-interoperable transport systems maintains the present position under the safety case regulations whereby tramways are not subject to safety management permissioning, and HMRI exempt individual rail heritage operators operating at low speeds from the requirement to have an accepted safety case.

- 27. Does HSC agree the preparation of, and wide consultation on, Safety Principles for the design and construction of non-interoperable transport systems, which would be presented to the Commission for approval?**

Notification

28. Draft regulation 33 provides for a notice to the person who appointed the competent person, if that competent person is minded to refuse to issue a certificate, and for the dutyholder to make representations before the competent person makes a decision. The draft regulation currently includes a provision that in these circumstances the competent person should copy the notice to HSE (draft regulation 33(a)). The view of HSC is sought on whether such a requirement is appropriate. On the one hand it could be argued that such a requirement would provide a check against the duty holder appointing another competent person with a view to continuing to introduce the infrastructure or vehicles in question, and would provide a mechanism for HSE to intervene where there may be doubt as to the standard of safety required. On the other hand the provision could be perceived as ‘telling teacher’ and could be open to misuse. It may also put HMRI inspectors in a difficult position of having to arbitrate in a dispute, and may be perceived as seeking to maintain an element of HSE approval for design integrity.
- 29. Does HSC consider that there should be a provision that where a competent person is minded not to issue a safety verification certificate they should be required to notify HSE?**

Definition of the Interoperable Railway

30. The draft regulations distinguish provisions for the interoperable railway and for non-interoperable transport systems. Currently, the draft regulations define “interoperable railway” by reference to the relevant European Directives. This is a holding definition, which will be aligned with the definition developed by DfT in implementing the interoperability directives. HSE is working closely with DfT, who have already concluded a consultative exercise to implement the conventional interoperability directive, but are considering alternative implementation options in the light of responses received. DfT have made clear their policy intention that the interoperable railway will embrace almost all the mainline network, including substantially all Network Rail controlled infrastructure. Their definition of “interoperable railway” will be available well before we bring the responses to the CD, and the final draft regulations, back to HSC in March 2005.

Guided Buses

31. The draft regulations and CD make clear that “other systems of guided transport” does not include guided or trolley buses. This reflects the views of the great majority of the respondents to the DD who agreed that, as buses are subject to other requirements under road transport legislation enforced by other authorities, HSE’s very limited involvement in approving aspects of these vehicles should be discontinued. The exclusion of guided and trolley buses presently appears in square brackets in the draft regulations and CD because, until very recently, it has been difficult to engage DfT on this issue. However, this appears to be resolved and we hope to agree a policy with DfT officials before the end of July.

Transition

32. If HSC is content with the CD then the launch will go ahead at the beginning of September. Results of the consultation will be provided to RIAC in February 2005 prior to returning to HSC in March to gain agreement for the final advice to go to Ministers. However, even though new regulations should be available for Ministerial agreement in April 2005, the “coming into force” date will be later that year. This will initiate transition arrangements so that the UK railway and other guided transport systems are converted to the new system over 18 months to two years. The transition period is vital to allow sufficient notice to be given to duty holders to prepare for the changed regime. It will also enable good co-ordination to be achieved between the date of coming into force of these regulations and the new provisions on interoperability being led by DfT. The RSD does not actually allow any transitional period. However, by submitting the new regulations for Ministerial agreement a year in advance of the deadline, it will mean that both duty holders and HMRI will be able to manage the processes of change and ensure that under implementation of the RSD is addressed as much as possible. Thus implementation will be underway, but not complete, by the EU’s deadline of April 2006 (see under “Transitional Provisions” in Annex 1).

Finalising the text

33. Editing and cross-referencing of the CD and the regulations is an on-going process, and thus the current draft may not be fully accurate with cross-referencing of paragraph numbers etc. Indeed given the speed that this work is being conducted, some further amendments may be required to the text presented to HSC for their meeting on 3 August. **Is HSC content for HSC to make further adjustments, in line with HSC’s policies, to the regulations, ACoP and CD prior to publication?**

Non-regulatory schemes

34. The DD also included proposals for the development of non-regulatory accredited certification systems for supplier accreditation and the licensing of signallers and drivers. Although HSC has agreed that a regulatory approach is not appropriate, HSE considered it helpful to stakeholders to include an update on progress made on supplier accreditation and licensing in the CD (Chapter 5). The development of such systems should assist duty holders in complying with the new regulations being proposed. A more detailed update and analysis on industry progress on these issues is discussed in HSC Paper 04/52.

CONSULTATION

35. HSE has conducted the process of producing this CD in an open iterative manner, engaging with industry stakeholders as widely as possible, starting during 2002 with evaluations of the existing regulations. The proposals for the architecture of the regulations arose from the analysis of an iterative process with industry and other stakeholders, which culminated in the DD. Some of the detail of the proposals for draft regulations have been shared with certain industry stakeholders in the last few weeks e.g. the Confederation of Passenger Transport, the Heritage Rail Association, the Project Steering Group with representatives from the SRA, ORR, DfT, RSSB, passengers and Trade Unions as well as the safety critical working

group with representatives across the industry. The draft regulations were also the subject of discussion at an open meeting on 28 June, at which three members of HSC attended to listen to the dialogue. Several members of RIAC also attended the open meeting prior to the RIAC discussion on 8 July. RIAC were generally content with the proposals, and agreed with the view expressed by one member that the package was “remarkable” given the complexity of the material and the consensus achieved from an industry known for diverse views.

36. Consultation and joint working continues with HSE’s Solicitors, HSE’s Economists and HMRI. An initial RIA has been submitted to the Cabinet Office in line with the new procedures for the Panel for Regulatory Accountability.

PRESENTATION

37. Provided HSC are content, the CD will be launched on 6 September, the date having been cleared and agreed with the No 10 press office. The CD will be published on HSE’s website, and hard copies will be made available to those who request them. During the 12 weeks statutory consultation period, dialogue will be actively sought with industry stakeholders. This will include open meetings in London, York and a Scottish venue. In addition other presentations on the CD will be made in response to the needs of different stakeholder groups e.g., the Heritage Railway Association have already requested their own presentation and seminar for their members. A contribution to these meetings by DfT staff leading on interoperability will also be sought.
38. The time-table for the HSC/E work on this new safety regulatory framework is being driven by Ministerial commitments made and agreed in March 2003 between DfT, DWP and HSC/E. Ministers are expecting a reformed regulatory regime to be presented to them by the Spring of 2005. Ministers confirmed in February 2004 following the announcement of the DfT Rail Review that the work on regulatory reform should continue to the same time-table along with other projects in HSE’s Rail Delivery Programme.
39. The consultation period will follow on from that on the proposed new RAIB regulations, which we believe is due to start in August, and will be followed by consultation led by DfT on proposed new requirements for interoperability (time-table not yet confirmed). Each of these consultative exercises is substantive and, in our view, warrants separate consultation. HSE and DfT are working closely so common factors come together. Some members of RIAC wanted these consultation exercises brought together. This would be problematical given that two are Departmental and this is an HSC consultation. By slowing down this and the RAIB consultation to the timetable of the DfT consultation on interoperability, Ministers would need to agree to a delay in the starting date for RAIB operation. In addition Ministers would need to agree to the slower delivery of the Rail Delivery Programme, which would require a further injection of resources to HSE for 2005/06 and require plans for the closure of the Cullen Legislation Division to be revisited. Later delivery of the safety regulations would also squeeze the time available for transition from a safety case regime to the European certification

system, thus increasing the risk of infraction proceedings in this regard, as well as delaying possible cost savings to industry.

40. The consultation period may also overlap with policy proposals for any new primary legislation, which the Government may propose following the Rail Review. Finally, the consultation may coincide with legal proceedings being taken by CPS and BTP following the Hatfield incident in 2000. This may attract extra attention to the proposals to change the safety arrangements for the rail industry.

COSTS AND BENEFITS

41. In line with Cabinet Office guidance an initial RIA was prepared which considered the impact of changes on safety management in general, the management of safety critical work, and safety verification for the replacement for ROTS. The Cabinet Office Regulatory Impact Unit has recommended that the new Panel for Regulatory Accountability clears the initial version. Further analysis has now developed more detailed financial information for a partial RIA as Appendix C in the draft CD. The final RIA will accompany the final advice on draft regulations from HSC to Ministers in Spring 2005, once further information has been gathered as part of the consultation process in the Autumn. However, although all change brings opportunity costs, and for individual duty holders that change may be considerable (e.g. revocation of ROTS), given that the new regulatory framework for the certification and authorisation of duty holders will be more streamlined, more targeted to risk, with less bureaucratic process producing better regulation, the total economic cost of these regulations is judged as likely to be low.

FINANCIAL/RESOURCE IMPLICATIONS FOR HSE

42. The cost of taking this work forward in the current financial year can be met from the existing funding agreed by Ministers for the Rail Delivery Programme (to be completed by March 2005). The future impact of the legislative change for HMRI's costs is currently being considered as part of the organisational changes being delivered within this financial year. In the future, resources for HMRI, as for HSE will be subject to the constraints of the SR2004 settlement for all public sector activity. As planned, the Cullen Legislation team in Policy Group will close on 31 March 2005.
43. In general, once the new regulatory regime is delivered and working, the impact of the new regulations is not expected to significantly change the net costs of HMRI. Initially, the impact overall is likely to be broadly neutral, even though, there will be changes in the way HMRI works with the new regulatory framework. Once the new regulations come into force, while less HMRI resource will be required for the scrutiny of information in the processes of certification and authorisation, any released resource could then be used for the frontline inspection activity as required by the RSD. When HMRI has confidence the new arrangements are effective, there may be less intervention, which could lead to savings.

44. The financial impact of the proposed legislation on HMRI costs may differ during the transition period compared to when the new system is working fully. In changing to this new certification system, there will be new concerns and potential weaknesses introduced by the new scheme which will have to be closely monitored through assessment and inspection. Thus there may be additional transition costs to meet these concerns, which are currently unquantifiable.
45. The impact on charging from these particular proposals *on their own* once the new regime is delivered should be broadly neutral. However, in the short-term provided staff currently engaged on non-chargeable work for the Rail Delivery Programme are returned to front-line chargeable duties in 2005/06, there may be short-term increases in income. The Fees Regulations governing the activities for which charges are made will require significant revision.

ENVIRONMENTAL IMPLICATIONS

46. None specifically, although the RSD is one of a number of European Directives which are attempting to revitalize the rail industry by 2010 to produce a modal shift from road to rail across the European Union. Such a shift would be positive for the environment in the reduction of consumable fuel in the road sector.

OTHER IMPLICATIONS

Devolution Implications

47. The Welsh Assembly and Scottish Executive will be consulted. The Scottish Executive responded to the DD. Northern Ireland (NI) officials have been engaged in the process of development of these proposals, and HSE is currently discussing how best to achieve the policy aim of NI officials of having a separate safety authority in NI.

European Implications

48. These proposals will implement safety management and certification aspects of the RSD in Great Britain. HSE has discussed with DfT officials the position for the Channel Tunnel, where it would be eminently sensible to have binational arrangements whereby the safety authority (the Intergovernmental Commission) issues safety certificates and authorisations for the Tunnel as a whole. Implementation within the Channel Tunnel would then fall to DfT working with their French counterparts.

Small and Medium Sized Enterprises

49. The majority of heritage railways, some tramways and operators of specialised transport systems such as people movers and monorails are likely to be classed as small businesses. The new regulations will now bring into scope of the safety critical work provisions approximately 6000 volunteers in the heritage sector. The Heritage Railway Association already recommends its members to follow the principles of the current safety critical work regulations and is broadly content with the new proposals.

ACTION

50. HSC is invited to

- give a view on the issues highlighted in paragraphs 7, 11, 16, 24, 27, and 29;
- agree to the publication of the draft CD at Appendix A in September, subject to adjustments to tidy the draft regulations, ACoP and CD, and ensure correct cross-referencing (paragraph 33).

16 July 2004

Points in the draft Regulations where there is a small to moderate risk of challenge by the European Commission

1. Procedures for major changes to safety management systems

It is not clear from RSD what changes require amended certificates or authorisations, and which can be merely notified to HSE. This is exacerbated by inconsistencies between the provisions relating to certificates and authorisations; and also by a lack of clarity as what is meant by ‘major changes to the conditions of a certificate’, requiring us to take a view on what it means within the spirit of the Directive. Because of these inconsistencies and lack of clarity, some risk is unavoidable. We have taken the view that it does not make sense for the Regulations to be inconsistent in their treatment of certificates and authorisations. We have therefore implemented a provision in Article 11.2 in such a way as to require infrastructure managers to both obtain an amended authorisation for substantial changes to the infrastructure and to notify major changes to the safety management system, although the latter requirement is not clearly apparent in the Directive.

2. Exclusion of transport undertakings that operate solely within engineering possessions

The operators of vehicles (for example road-rail vehicles) within engineering possessions are out of scope of the draft Regulations (regulation 3(1) and 4(1)). This reflects overwhelming support for such an exclusion on the part of respondents to the DD. The RSD contains no such explicit exclusion. However the RSD defines railway undertaking as an undertaking where the activity of which is to provide transport of goods and/or passengers’. This can be interpreted as excluding at least some vehicles within possessions, on the basis that they do not provide such transport. Furthermore the definition of railway undertaking in the German and French texts include the words ‘services for [transport of goods and/or passengers]’ which tends to confirm that vehicles within possessions are not intended to be covered as they would only be carrying their own goods for maintenance use.

3. Requirements for safety management systems

Regulation 5(1) requires each operator’s SMS to be “established to ensure that the interoperable railway...can achieve the CSTs and...is in conformity with national safety rules and safety requirements laid down in TSIs.” Interpreted literally, this places a considerable burden on each individual operator, since he is only one operator on the interoperable railway. We have therefore inserted a provision, not in RSD, to the effect that an operator’s safety management system has to be *taken together with the safety management systems of other relevant operators* when considering whether it meets the requirements (regulation 5(2)). In addition, where the Directive requires that the safety management system should ensure the control of *all risks* [to safety] the draft Regulations refer to the control of “all categories of

risk". We believe these adjustments are necessary because of the nature of the Directive's provisions and that they are within the spirit of the Directive.

4. Revocation of certificates and authorisations

Articles 10.5 paragraph 4 and 11.2 paragraph 3 *require* the safety authority to revoke a certificate or authorisation if the holder no longer satisfies the conditions for a certification which it has issued. The meaning of "conditions" is unclear. We interpret it as referring to the basic requirements to (1) establish and maintain a safety management system that meets the RSD's requirements and (2) to conform to the provisions necessary to ensure safe operation, i.e. network-specific TSIs and national safety rules including rail legislation and Railway Group Standards relevant to that operation, and the draft Regulations provide accordingly. If HSE considers that the operator is no longer adhering to these requirements it must revoke the certificate, but revocation is stayed until the holder has been given an opportunity to make representations and any appeal to the Secretary of State has been heard.

5. Arrangements to inform operators about applications for safety certificates etc

Regulations 17(2)-(7) require operators to send a copy of an application for a new or amended certificate or authorisation to any "affected operator" and provide for these to make representations to HSE on the application within 28 days. (In the case of the infrastructure manager, "affected operator" would be all transport undertakings using that infrastructure.)

Article 17 of the RSD contains decision-making principles and states: "The safety authority shall carry out its tasks in an open, non-discriminatory and transparent way. *It shall allow all parties to be heard and give reasons for its decisions.*" The Solicitors Office considers, having regard also to the Explanatory Memorandum that accompanied the proposed draft of the Directive and to the Directive as a whole, that the draft Regulations should arguably go further and apply the provisions on making representations to any affected person, which would include relevant trade unions and passenger organisations. However we think this would introduce further delays into the assessment process (since all representations would have to be carefully considered) without clear safety benefits. The current and proposed Regulations require the operator to consult employee representatives.

6. Transitional provisions

The RSD contains no transitional provisions. It follows that, strictly, all certificates and authorisations must be issued by 30 April 2006. However, to ensure a smooth transition from the existing to the new regime it is important that applications are received over a reasonable period so that HMRI can assess them properly and without undue delay. (HSE is required to come to a decision within 4 months of receiving all relevant information although there is a power to request additional information). New operators starting operations after October 2005 (when it is likely that the Regulations will come into force) will be required to obtain a certificate or authorisation. However existing operators will be required to obtain a safety certificate or authorisation by various deadlines depending on when their periodic

review under the existing Safety Case Regulations would have fallen due, with a final deadline of probably October 2007. In addition, a transport operator who succeeds (eg takes over a franchise from) a safety case holder during this transitional period will be able to adopt and comply with the existing safety case provided he obtains a certificate or authorisation within 6 months.

During the transitional period, a notice of acceptance of a safety case will be deemed to be a safety certificate. Safety cases cover most of the matters required under the RSD. Also, some certificates and authorisations are likely to be issued by or in advance of the RSD's deadline. These points limit the extent to which the UK could be said to have fallen short of full implementation of the RSD.