EUROPEAN
COMMISSION

Brussels, 27.7.2020
COM(2020) 623 final

2020/0161 (COD)

Proposal for a

# REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

## amending Directive (EU) 2016/798, as regards the application of railway safety and interoperability rules within the Channel Fixed Link

# EXPLANATORY MEMORANDUM

## 1. CONTEXT OF THE PROPOSAL

### • Reasons for and objectives of the proposal

The Treaty between France and the United Kingdom of Great Britain and Northern Ireland concerning the construction and operation by private concessionaires of a Channel Fixed Link, signed at Canterbury on 12 February 1986 (hereafter "The Treaty of Canterbury") established an Intergovernmental Commission to supervise all matters concerning the construction and operation of the Channel Fixed Link.

Until the end of the transition period put in place by the Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community[1], the Intergovernmental Commission is the national safety authority within the meaning of Article 3(7) of Directive (EU) 2016/798 of the European Parliament and the Council,[2] which is competent for the Channel Fixed Link.

In accordance with Article 3(7) of Directive (EU) 2016/798, a national safety authority may be a body entrusted by several Member States with the tasks regarding railway safety. However, after the end of the aforementioned transition period, the Intergovernmental Commission will be a body established by a Member State and a third country. Directive (EU) 2016/798 does not foresee the possibility of a national safety authority as a body entrusted by a Member State and a third country. Therefore, unless otherwise provided, after the end of the transition period, Union law will no longer be applicable to the part of the Channel Fixed Link under the jurisdiction of the United Kingdom.

In order to ensure the safe and efficient operation of the Channel Fixed Link, it is necessary to have a single safety authority responsible for the whole of this infrastructure, which should remain the Intergovernmental Commission. This requires amending Directive (EU) 2016/798.

In a parallel and related initiative, the Commission also proposes the adoption of a decision of the European Parliament and Council empowering France to negotiate and conclude under certain conditions an international agreement that would maintain the Intergovernmental Commission as the single national safety authority for the Channel Fixed Link[3]. Such an agreement would ensure that the Intergovernmental Commission complies with the provisions of Union law applicable to National Safety Authorities, and in particular Directive (EU) 2016/798, and Directive (EU) 2016/797[4] and Regulation (EU) 2016/796[5] in the Channel Fixed Link. This agreement would provide that, in cases of emergency, the French national safety authority might temporarily assume competence over the part of the Channel Fixed Link under French jurisdiction. It would also provide that, when a dispute before the arbitration tribunal set up by the Treaty of Canterbury raises a question of interpretation of Union law, that tribunal must refer that question to the Court of Justice of the European

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1 OJ L 29, 31.1.2020, p. 7.

2 Directive (EU) 2016/798 of the European Parliament and of the Council of 11 May 2016 on railway safety, OJ L 138, 26.5.2016, p. 102.

3 COM (2020) 622.

4 Directive (EU) 2016/797 of the European Parliament and of the Council of 11 May 2016 on the interoperability of the rail system within the European Union, OJ L 138, 26.5.2016, p. 44.

5 Regulation (EU) 2016/796 of the European Parliament and of the Council of 11 May 2016 on the European Union Agency for Railways and repealing Regulation (EC) N°881/2004, OJ L138, 26.5.2016, p. 1.

Union. Finally, under the proposed empowerment decision, the Commission would authorise France to conclude the agreement after checking that it fulfils the conditions laid down in the empowerment decision.

Taking account of this Commission Proposal for an empowerment decision addressed to France, the present Proposal aims at amending Article 3(7) of Directive (EU) 2016/798, which defines the notion of "national safety authority", both for the purposes of railway safety under that Directive and railway interoperability under Directive (EU) 2016/797. The objective is to allow a body entrusted by a Member State and a third country with the tasks regarding railway safety and interoperability on the basis of an international agreement concluded or authorised by the EU to be considered as a national safety authority under Union law.

In addition, the present Proposal would provide that, where necessary for reasons of railway safety, the Member State concerned should make use without delay of the right afforded by the agreement with the third country concerned, whereby the national safety authority is entitled to assume sole competence over the part of the rail infrastructure situated in that Member State. The proposal would also provide that the European Court of Justice would have jurisdiction to give a ruling at the request of an arbitration tribunal set up by an international agreement such as the one that France should be empowered to negotiate and conclude with the United Kingdom.

- **Consistency with existing policy provisions in the policy area**

This proposal is an amendment with a very limited scope of Directive (EU) 2016/798 that would address some of the consequences ensuing from the fact that that Directive will no longer apply to the United Kingdom. The proposed terms are strictly limited to what is necessary in this respect, to ensure safe and efficient cross-border operations, and complement existing provisions. This proposal is thus fully consistent with the existing legislation.

- **Consistency with other Union policies**

The proposal concerns railway safety and interoperability, amending Directive (EU) 2016/798 to deal specifically with the situation of the Channel Fixed Link after the withdrawal of the United Kingdom from the Union.

## 2. LEGAL BASIS, SUBSIDIARITY AND PROPORTIONALITY

- **Legal basis**

The legal basis is Article 91(1) of the Treaty on the Functioning of the European Union (TFEU).

- **Subsidiarity (for non-exclusive competence)**

As the proposal seeks an amendment of Directive (EU) 2016/798 that is necessary for the purposes described above, its objective can only be achieved through an act at the level of the Union.

- **Proportionality**

The proposed Regulation is considered proportionate as it is capable of ensuring the safe and efficient operation of the Channel Fixed Link and avoiding disruptions through providing for

a limited and necessary legal change. It does not go beyond what it necessary to achieve this objective.

- **Choice of the instrument**

This proposal contains a limited set of provisions to address a very specific situation and none of them requires transposition in national legislation. Taking this into consideration a regulation of the European Parliament and Council appears to be an adequate form of legal act.

## 3. RESULTS OF EX-POST EVALUATIONS, STAKEHOLDER CONSULTATIONS AND IMPACT ASSESSMENTS

- **Ex-post evaluations/fitness checks of existing legislation**

Not applicable, as the proposal is an amendment of existing legislation and it is very limited in scope.

- **Stakeholder consultations**

The very limited scope of the amendment of Directive (EU) 2016/798 does not require consulting publicly on the proposal.

- **Collection and use of expertise**

This proposal has been subject to in-house legal and technical analysis to ensure the proposed measure achieves its intended purpose, but is at the same time limited to what is strictly necessary.

- **Impact assessment**

An impact assessment is not needed, given that there are no materially different policy options available except for the one proposed.

- **Regulatory fitness and simplification**

Not applicable

- **Fundamental rights**

The proposal has no impact on the application or protection of fundamental rights.

## 4. BUDGETARY IMPLICATIONS

Not applicable

## 5. OTHER ELEMENTS

- **Implementation plans and monitoring, evaluation and reporting arrangements**

Not applicable.

- **Explanatory documents (for directives)**

Not applicable

- **Detailed explanation of the specific provisions of the proposal**

The Proposal consists of two elements:

(1) Through the insertion of a new indent in Article 3(7) of Directive (EU) 2016/798, a body entrusted by a Member State and a third country with tasks regarding railway safety on the basis of an international agreement concluded or authorised by the Union could be considered as a national safety authority under Union law.

(2) Under a new paragraph 4 inserted in Article 16 of Directive (EU) 2016/798, specific rules would be established for the application of Union railway safety and interoperability rules when the safety authority for a single piece of engineering structure is established by a Member State and a third country pursuant to an international agreement concluded or authorised by the Union. In particular, this provision provides for the duty of the Member State concerned to take all the necessary measures to ensure that Union law is applied at all times. It also provides that the European Court of Justice is competent for rendering preliminary rulings on issues of interpretation of Union law when they are raised in disputes between the Member State and the third country concerned in the areas of railway safety and interoperability.

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THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 91 thereof,

Having regard to the proposal from the European Commission,

After transmission of the draft legislative act to the national parliaments,

Having regard to the opinion of the European Economic and Social Committee[6],

Having regard to the opinion of the Committee of the Regions[7],

Acting in accordance with the ordinary legislative procedure,

Whereas:

(1) Article 16 of Directive (EU) 2016/798 of the European Parliament and Council[8] requires Member States to establish national safety authorities to be entrusted with the tasks specified in relation to railway safety. In accordance with Article 3(7) of Directive (EU) 2016/798, a national safety authority may be not only an authority established unilaterally by the Member State concerned but, alternatively, a body entrusted by several Member States with those tasks in order to ensure a unified safety regime.

(2) The Treaty between France and the United Kingdom of Great Britain and Northern Ireland concerning the construction and operation by private concessionaires of a Channel Fixed Link, signed at Canterbury on 12 February 1986 ("the Treaty of Canterbury") established an Intergovernmental Commission to supervise all matters concerning the concerning the construction and operation of the Channel Fixed Link.

(3) Until the end of the transition period put in place by the Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community[9] ("the transition period"), the Intergovernmental Commission is the national safety authority within the meaning of Article 3(7) of Directive (EU) 2016/798 responsible for the Channel Fixed Link.

(4) After the end of the transition period, the Intergovernmental Commission will be a body established by a Member State and a third country. Unless otherwise provided, it would no longer be a national safety authority under Union law and Union law would no longer be

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6 OJ C , , p. .

7 OJ C , , p. .

8 Directive (EU) 2016/798 of the European Parliament and of the Council of 11 May 2016 on railway safety, OJ L 138, (OJ L 138, 26.5.2016, p. 102).

9 OJ L 29, 31.1.2020, p. 7.

applicable to the part of the Channel Fixed Link under the jurisdiction of the United Kingdom.

(5) To ensure the safe and efficient operation of the Channel Fixed Link, it would be beneficial to retain the Intergovernmental Commission as the single safety authority responsible for the whole of this infrastructure.

(6) To that end, Decision XXX/XX authorises France, under certain conditions, to negotiate, sign and conclude an agreement whereby the Intergovernmental Commission established through the Treaty of Canterbury is maintained as the safety authority competent for the application of Union law within the Channel Fixed Link.

(7) It is necessary to adapt Directive (EU) 2016/798 to take account of that particular situation.

(8) To this effect, specific rules should be established regarding competent authorities, as well as regarding the duties of the Member State concerned to take all the necessary measures to ensure that Union law is applied at all times by the common competent authority or, failing this, by its own competent authority. Dispute settlement between the Member State concerned and the third country in the areas of railway safety may raise issues of interpretation of Union law. Consequently, the Court of Justice of the European Union should be made competent for rendering preliminary rulings on such issues,

(9) This Regulation should be adopted as a matter of urgency, so as to ensure that the necessary provisions are in place at the end of the transition period. It is therefore appropriate to provide for an exception to the eight- week period referred to in Article 4 of Protocol No 1 on the role of national Parliaments in the European Union, annexed to the Treaty on European Union, to the Treaty on the Functioning of the European Union and to the Treaty establishing the European Atomic Energy Community.

(10) This Regulation should enter into force as a matter of urgency on the day following that of its publication in the Official Journal of the European Union.

HAVE ADOPTED THIS REGULATION:

*Article 1*

Directive (EU) 2016/798 is amended as follows:

(a) In Article 3, point 7 is replaced by the following:

‘ 7. ‘national safety authority’ means

– the national body entrusted with the tasks regarding railway safety in accordance with this Directive,

– any body entrusted by several Member States with those tasks in order to ensure a unified safety regime,

– any body entrusted by a Member State and a third country with those tasks in order to ensure a unified safety regime, provided that the Union has concluded an agreement to this effect with the third country concerned or that a Member State has concluded such agreement in accordance with an authorisation granted by the Union to this effect.’

(b) In Article 16, the following paragraph is added:

‘4. Where a single piece of engineering structure is partly situated in a third country and partly situated in a Member State, that Member State may designate, in addition to the national

safety authority otherwise competent for its territory, and in accordance with the Article 3, point (7) third indent, and with an international agreement concluded by the Union or authorised by it, a safety authority competent specifically for that engineering structure and all other elements of the rail infrastructure linked to it ('the specific safety authority'). In accordance with that agreement, the national safety authority may temporarily assume the competence for the part of the infrastructure situated in that Member State's territory.

In the context of any international agreement as referred to in the first subparagraph, the Member State concerned shall take all measures at its disposal under such agreement to ensure that the specific safety authority complies with the applicable provisions of Union law. To this effect, and where necessary for reasons of railway safety, the Member State concerned shall make use without delay of the right afforded by the agreement with the third country concerned, whereby the national safety authority is entitled to assume sole competence over the part of the rail infrastructure situated in the Member State concerned.

Where a dispute submitted to arbitration in accordance with an international agreement referred to in the first subparagraph raises a question of interpretation of a provision of Union law, the Court of Justice of the European Union shall have jurisdiction to give a ruling on the question at the request of the arbitration tribunal set up to resolve disputes under that international agreement.

The provisions of Union law governing procedures brought before the Court of Justice of the European Union in accordance with Article 267 TFEU shall apply mutatis mutandis to requests for a ruling of the Court of Justice of the European Union made pursuant to the third subparagraph.

In the cases brought before the Court of Justice of the European Union in accordance with the third subparagraph:

(a) the third country that is a party to the international agreement referred to in the first subparagraph may participate in the proceedings before the Court of Justice of the European Union in the same way as a Member State;

(b) lawyers authorised to practise before the courts or tribunals of that third country shall be entitled to represent or assist any parties to such proceedings before the Court of Justice of the European Union. In such cases, those lawyers shall be treated in every respect as lawyers authorised to practise before courts of Member States representing or assisting a party before the Court of Justice of the European Union.

Where the specific safety authority fails to comply with any ruling of the Court of Justice of the European Union delivered in accordance with the third subparagraph, the Member State concerned shall without delay make use of the right afforded by the international agreement with the third country referred in the first subparagraph, whereby the national safety authority is entitled to assume sole competence over the part of the rail infrastructure situated in the Member State concerned.'

*Article 2*

This Regulation shall enter into force on the day following that of its publication in the *Official Journal of the European Union*.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels,

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| *For the European Parliament* | *For the Council* |
| *The President* | *The President* |