

**EXPLANATORY MEMORANDUM TO**  
**THE REGULATION (EC) NO 1370/2007 (PUBLIC SERVICE OBLIGATIONS IN**  
**TRANSPORT) (AMENDMENT) (EU EXIT) REGULATIONS 2019**

**2019 NO. [XXXX]**

**1. Introduction**

- 1.1 This explanatory memorandum has been prepared by the Department for Transport and is laid before Parliament by Act.
- 1.2 This memorandum contains information for the Joint Committee on Statutory Instruments and the Sifting Committees.

**2. Purpose of the instrument**

- 2.1 The European Union (Withdrawal) Act 2018 (the “EU Withdrawal Act”) will convert the text of directly applicable EU legislation into domestic instruments. This instrument ensures that the legislative framework for the award of Public Service Obligations (PSO) in transport (rail franchises and bus services concessions) will remain legally operable on and after exit day. The instrument corrects a number of deficiencies which will arise as a result of EU withdrawal and ensures that the rules around the direct award of PSO contracts continue to have effect in domestic law on and after exit day.

***Explanations***

*What did any relevant EU law do before exit day?*

- 2.2 EU rail markets legislation has focussed on liberalising rail markets and opening previously closed markets in EU member states to greater competition. Regulation 1370/2007<sup>1</sup> is a directly applicable EU Regulation that sets out the conditions under which “competent authorities” may award Public Service Obligation (PSO) contracts to bus operators and to train operating companies (TOCs) outside the general procurement and state aid rules applicable under EU and domestic law. The UK has a number of competent authorities who can award PSO contracts, including the Department for Transport and the devolved administrations. PSO contracts covered by this Regulation include passenger rail franchises and bus services concessions.
- 2.3 The general public procurement rules<sup>2</sup> do not apply to the award of these PSO contracts. Instead, Regulation 1370/2007 provides for PSO contracts to be awarded either following open competition or directly in some circumstances. Regulation 1370/2007 also allows a competent authority, or a group of competent authorities, to

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<sup>1</sup> Regulation (EC) No 1370/2007 of the European Parliament and of the Council of 23 October 2007 on public passenger transport services by rail and by road and repealing Council Regulations (EEC) Nos 1191/69 and 1107/70 (O.J. No. L 315, 3.12.2007, p. 1, as amended by Regulation (EU) 2016/2338 of the European Parliament and of the Council of 14 December 2016 (O.J. No. L 354, 23.12.2016, p. 22)).

<sup>2</sup> Public sector contracts not covered by Regulation 1370/2007 are subject to the general public procurement rules: The Utilities Contracts Regulations 2016 and Utilities Contracts (Scotland) Regulations 2016; the Public Contracts Regulations 2015 and Public Contracts (Scotland) Regulations 2015; and the Concession Contracts Regulations 2016 and Concession Contracts (Scotland) Regulations 2016.

provide transport services “in-house”, or to jointly award PSO contracts to an external operator.

- 2.4 Regulation 1370/2007 provides rules for the award of PSO contracts, including specifying when and how they are competitively tendered and when, in certain circumstances, they can be directly awarded. Amendments made to Regulation 1370/2007 in 2016 by Regulation 2016/2338 (part of a wider legislative package aimed at promoting greater competition in the rail market) narrowed down the circumstances where direct awards are permitted, but these revised provisions are only being brought into force gradually and so will only fully apply from 24 December 2023 (see below)
- 2.5 Regulation 1370/2007 also sets out the mandatory content of public service contracts, requiring the competent authority to clearly specify the public service obligations in the contract, and include transparent parameters for compensation of the operator to ensure that the operator will not be over-compensated. The duration of public service contracts awarded following a competition is limited to fifteen years for passenger transport services by rail or other track based modes and ten years for coach and bus services. The duration of directly awarded contracts (i.e. contracts awarded without a competition or full competition) is limited to 10 years under the transitional rules applying through to 2023. A longer term is also allowed under these transitional rules in some cases, where the operator provides significant assets for the services, where exceptional capital investment justifies this, or to reflect the particular geographical situation in which the services operate. In respect of rail, the Regulation also requires effective and non-discriminatory access to rail rolling stock for all TOCs.
- 2.6 Regulation 1370/2007 provides that when a contract is re-let relevant transfers of staff between operators will be subject to the usual employment law protections (under Directive 2001/23/EC), which have been implemented in domestic law by the Transfer of Undertakings (Protection of Employment) Regulations 2006.
- 2.7 Regulation 1370/2007, as amended by Regulation 2016/2338 contains phased transitional provisions concerning the use of direct award PSO contracts. Article 8 of the Regulation requires Member States, when making direct awards, to work towards full compliance with the terms of the amended Article 5, setting out when direct awards can be made, by 3<sup>rd</sup> December 2019, but with the existing wider direct award power in Article 5(6) to continue to be available until 24<sup>th</sup> December 2023. After that time direct awards will only be possible where they meet the requirements in Article 5(3a), (4), (4a), (4b), or (5), as set out in the amended version of Regulation 1370/2007.
- 2.8 Cases where direct awards will be able to be made under these new provisions include exceptional circumstances where the number of other competitions already being run would be likely to affect the quality of bids for a further competition or where, exceptionally, changes are needed to the scope of one or more contracts to optimise the provision of services; in these cases, the award can be for no more than 5 years. Direct awards will also be permitted, without an upper time limit, where the aggregate value or geographical coverage of the relevant PSO falls below certain thresholds. They will also be able to be granted, for up to 10 years, for certain local, regional and suburban networks (e.g. metros) or where a direct award can be justified by relevant structural and geographical characteristics of the market (such as size and demand factors, network complexity, technical or geographic isolation or the services covered by the contract) or where it can be shown that a direct award would result in an

improvement in quality of services or cost or efficiency. Direct awards can also be granted, for 2 years only, in emergency cases where there is a disruption of services or an immediate risk of disruption.

- 2.9 Regulation 1370/2007 also provides a sectoral exemption from the general state aid rules, releasing competent authorities from the need to acquire prior state aid approval in each case before awarding a PSO contract, providing the award complies with the terms of the Regulation and, for direct awards, where the compensation terms of the PSO contract comply with the requirements of the Annex to the Regulation.
- 2.10 Separate Regulations are being brought forward by the Department for Business, Energy and Industrial Strategy, which will ensure that the retained EU state aid law operates effectively and provides for a functioning state aid regime to be in place on and after exit day. Once the UK has left the EU, the Commission will cease to have authority to approve and monitor new aid granted by public authorities in the UK. The policy after exit is to have a UK body in place to regulate state aid and to deal with approvals and ensure that the regime is working effectively. These Regulations, the State Aid (EU Exit) Regulations 2019 which have been laid in Parliament under the affirmative procedure will provide for the CMA to become the independent regulator with functions to regulate state aid.

*Why is it being changed?*

- 2.11 Regulation 1370/2007 will be retained as direct EU legislation by section 3 of the EU Withdrawal Act, but will contain technical deficiencies that prevent it from operating effectively. The Regulation confers functions in relation to the Commission, which will no longer have those functions under EU law in relation to the United Kingdom; it provides for the provision of information to EU entities and its publication in the Official Journal of the EU, which will no longer be appropriate or possible; and it contains inappropriate references to Member States, to EU institutions and to amounts in Euros. This instrument corrects these technical deficiencies to ensure the rules for the award of PSO contracts continue to be clear on and after exit day.
- 2.12 The instrument uses powers in s.23(6) of, and paragraphs 23(3) and (5) of Schedule 7 to, the EU Withdrawal Act to save Article 5 of Regulation 1370/2007 and for it to be treated as “retained EU law” as defined in the Act. Article 5 provides a limited power for competent authorities to directly award PSO contracts as described above. Current practice in the UK already substantially complies with Article 5 and by saving Article 5 in the instrument we are ensuring certainty for competent authorities and those business who deliver PSO contracts.
- 2.13 The absence of Article 5 on and after exit day would leave a gap in the legislation creating legal uncertainty, since competent authorities would be required to work towards requirements that are missing from the legislation. Therefore, it is considered appropriate to save Article 5 to ensure that Regulation 1370/2007 continues to operate effectively.
- 2.14 Reflecting consultation responses from industry which preferred continuity of the provisions in Regulation 1370/2007, including the Regulation 2016/2338 amendments, we have therefore provided for Article 5 to be retained and to become “retained EU law” along with the rest of the Regulation. Retaining the detailed requirements in Article 5 offers greater clarity and legal certainty before and after exit day so is appropriate.

What will it now do?

- 2.15 The amendments made by this instrument will enable the legal framework for the UK's rail and bus franchising programme to continue to operate as expected, maintaining the status quo. It will also allow for the effective franchising of bus services in England outside London under existing powers in the Transport Act 1985 and the Bus Services Act 2017. See paragraph 7.21 below for further information on franchising bus services in England.
- 2.16 The existing transitional provisions in Article 8 of Regulation 1370/2007 will be retained into domestic law by section 3 of the EU Withdrawal Act. These provide for the phased implementation of the Article 5 requirements, with gradual changes to the limits on use of the direct award power; competent authorities will therefore continue to be able to make awards as was expected under the EU legislation, also ensuring legal certainty for the industry.
- 2.17 Further transitional provision is made to ensure continuity for PSO contracts, competitions and direct award processes that are in progress as at exit day.

### **3. Matters of special interest to Parliament**

*Matters of special interest to the Joint Committee on Statutory Instruments and the Sifting Committees*

- 3.1 This instrument is being laid for sifting by the Sifting Committees.
- 3.2 Regulation 1370/2007 will be saved as direct EU legislation on exit day by section 3 of the EU Withdrawal Act but will contain technical deficiencies and inappropriate references to EU institutions. The amendments made by the instrument remove deficiencies in Regulation 1370/2007 and preserve the legislative framework for the award of PSO contracts under EU law in which the transport industry operates. This instrument maintains the status quo, so that the franchising of railway and bus services can continue as expected after exit day. The instrument seeks to continue with business as usual and ensure rail and bus services continue unaffected post exit day. Therefore, it is considered appropriate that the instrument should be made under the negative procedure.
- 3.3 The amendments made by this instrument ensure there is no diminution in both the rights to compete for PSO contracts or the ability for competent authorities to directly award contracts where appropriate. The instrument will not change current state aid or procurement rules exemptions in respect of the award of PSO contracts; the wider procurement and state aid rules will be retained into domestic law by the EU Withdrawal Act and will be amended by other instruments.
- 3.4 This instrument also provides for the saving of Article 5 of Regulation 1370/2007 using the powers in section 23(6) of and paragraph 23(3) of Schedule 7 to the EU Withdrawal Act. It then provides for Article 5 to be "retained EU law" along with the rest of the Regulation, using the power in paragraph 23(5) of Schedule 7.
- 3.5 Article 5 provides a limited power to directly award franchises without the need for a full procurement competition, a sector-specific provision reflecting the need to secure the continuity of public transport, including in urgent situations. However, the interplay between the wording of Article 8 of Regulation 1370/2007 (as recently amended by Regulation (EU) 2016/2338) and section 3(3) of the EU Withdrawal Act means that Article 5 will not be retained EU law under section 3.

- 3.6 Section 3 of the EU Withdrawal Act incorporates direct EU legislation so far as it was “operative” immediately before exit day. Until 24<sup>th</sup> December 2017, Article 5 was “operative” within the meaning of the EU Withdrawal Act, but Member states were not obliged to comply fully with its terms until 3<sup>rd</sup> December 2019. However, the amendment to Regulation 1370/2007<sup>3</sup> that came into force on 24 December 2017 changed the wording of the relevant transitional provision in Article 8(2), providing that Article 5 shall only “apply” from 3<sup>rd</sup> December 2019. Article 5 will not therefore be “operative” within the meaning of section 3 of the EU Withdrawal Act on exit day.
- 3.7 However, Article 8(2) continues to impose the obligation on competent authorities to gradually comply with Article 5, and that “operative” provision will be retained into domestic law on exit day. This leaves a gap in the legislation creating legal uncertainty, since competent authorities will be required to work towards requirements that are missing from the legislation. Therefore, it is considered appropriate to save Article 5 to ensure that Regulation 1370/2007 continues to operate effectively and to remove this uncertainty. As noted above, this is done by saving Article 5 as “retained EU law” under section 23(6) of and paragraph 23(3) and (5) of Schedule 7 to the EU Withdrawal Act.
- 3.8 The instrument accordingly also corrects technical deficiencies in Article 5 (as retained EU law) under section 8(1).
- 3.9 Legislative consent is required from both the Scottish and Welsh Ministers as we are legislating in relation to bus services. Official-level consent has been received from Scotland and Ministerial consent is subject to the outcome of the Scottish parliamentary process on 30<sup>th</sup> January 2019. Consent from the Welsh Ministers is dependent on their clarification of and consent to the future UK state aid framework put forward by the Department for Business, Energy and Industrial Strategy’s State Aid (EU Exit) Regulations 2019, which were laid in Parliament under the affirmative procedure on 21<sup>st</sup> January 2019. This instrument will not be made without the legislative consent of the Welsh Ministers

***Matters relevant to Standing Orders Nos. 83P and 83T of the Standing Orders of the House of Commons relating to Public Business (English Votes for English Laws)***

- 3.10 As the instrument is subject to negative resolution procedure there are no matters relevant to Standing Orders Nos. 83P and 83T of the Standing Orders of the House of Commons relating to Public Business at this stage.

**4. Extent and Territorial Application**

- 4.1 The territorial extent of this instrument is England, Wales, Scotland and Northern Ireland.
- 4.2 The territorial application of this instrument is England, Wales, Scotland and Northern Ireland.
- 4.3 The instrument updates cross-references to EU Directives, referring instead where appropriate to Northern Ireland Statutory Rules and to Scottish Statutory Instruments

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<sup>3</sup> See Article 1(9) of Regulation (EU) 2016/2338 of the European Parliament and of the Council of 14 December 2016 (O.J. No. L 354, 23.12.2016, p. 22).

without amending those instruments. The instrument also updates cross references to relevant regulations for England, Wales and Northern Ireland and Scotland.

## **5. European Convention on Human Rights**

5.1 Andrew Jones MP, Parliamentary Under-Secretary of State for Transport at the Department for Transport, has made the following statement regarding Human Rights:

“In my view the provisions of the Public Service Obligations in Transport (Amendment etc.) (EU Exit) Regulations 2019 are compatible with the Convention rights.”

## **6. Legislative Context**

6.1 This instrument is made in exercise of powers in sections 8 and 23 of and paragraphs 21 and 23 of Schedule 7 to the EU Withdrawal Act. It will make minor and technical amendments to address deficiencies arising from the withdrawal of the UK from the European Union, and make further transitional and savings provisions to ensure the legislation operates effectively after exit day.

6.2 The EU Withdrawal Act makes provision for repealing the European Communities Act 1972 (the “ECA 1972”) and will preserve EU law as it stands at the moment of withdrawal, converting this into UK law. It enables the creation of a new body of domestic legislation by converting the text of directly applicable EU legislation into domestic instruments, as well as saving EU-derived domestic legislation which were made to implement the UK’s obligations as an EU Member State.

6.3 The EU Withdrawal Act also contains powers to make secondary legislation to enable Ministers and the devolved administrations to fix deficiencies in retained EU law, to ensure that the UK’s legal system continues to function properly outside of the EU.

6.4 Regulation 1370/2007 applies to the award of PSO contracts for rail passenger services, and to bus concession services; other bus services contracts are awarded in accordance with The Public Contracts Regulations 2015<sup>4</sup> and the Public Contracts (Scotland) Regulations 2015<sup>5</sup>.

6.5 Regulation 1370/2007 was amended by Regulation 2016/2338, with effect from 24 December 2017. Those amendments were part of the “Fourth Railway Package” the latest package in a wider programme of EU rail legislation since the 1990s aimed at opening the EU rail market to competition. Each package of measures, starting with the First Railway Package, was aimed at progressively liberalising EU rail markets by setting harmonised rules in relation to the allocation of track access and charging and seeking to eliminate potential discrimination in these areas and providing freight and passenger access rights. The packages also harmonised standards, for example in relation to safety, passenger rights, technical standards and licensing. Regulation 1370/2007 was part of the Third Railway Package.

6.6 The Fourth Railway Package was made up of various items of EU legislation covering both rail markets (referred to in the EU as the “Market Pillar”) and safety and technical standards (the “Technical Pillar”). Regulation EU 2016/2338 forms part of

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4 <http://www.legislation.gov.uk/uksi/2015/102/contents/made>

5 <http://www.legislation.gov.uk/gsi/2015/446/contents>

the Market Pillar, with the aim of promoting a greater use of competitive processes for letting PSO contracts.

## **7. Policy background**

### *What is being done and why?*

- 7.1 The instrument will maintain the status quo, so that the franchising of railway and bus services can continue as now after exit day. The instrument will not expand powers to award PSO contracts nor will it alter who can bid for a PSO contract or the processes used in the bidding process. The instrument maintains current exemptions in respect of state aid and procurement rules for the award of PSO contracts.
- 7.2 In Great Britain, mainline passenger rail and bus services are largely provided by private companies (for rail, train operating companies or TOCs). The majority of rail passenger services are provided under a franchise agreement between TOCs and Government that is awarded following a competitive process. Government leads on setting requirements for train services and quality measures, and holds competitions that reward bidders for committing to investment, supporting and developing the business and its people. Bus franchises are awarded under domestic procurement legislation so while Regulation 1370/2007 applies to rail and buses, in practical terms bus services will not be impacted by the instrument.
- 7.3 TOCs work within contracted requirements on services and fares, designing and delivering a commercial business. They are responsible for serving their customers, delivering contracted commitments, leasing trains and employing staff. Collectively, they return 97p of every £1 from ticket fares back into running and improving services. Each TOC agrees to operate the services Government requires, charge fares to passengers and pay a premium to Government (or in a small number of cases receive a net subsidy).
- 7.4 In recent years, the Department for Transport's policy regarding the rail franchises it awards has been to re-let franchises every seven to ten years. There are 15 franchises for which the Department is primarily responsible.
- 7.5 The Scottish Government, via Transport Scotland, is the franchising authority for the ScotRail and Caledonian Sleeper franchises, and specifies its own criteria for those franchises.
- 7.6 The Welsh Government is the franchising authority for the Wales & Borders franchise.
- 7.7 There are also operating concessions let by TfL and Merseyrail.
- 7.8 PSO Contracts in Northern Ireland are awarded in accordance with the duty in section 1 of the Transport Act (Northern Ireland) 2011, which requires the Department for Infrastructure to secure the provision of public passenger transport services with due regard to accessibility, economy, efficiency, safety of operation and sustainability. The Department for Infrastructure currently satisfies this duty through a single, directly awarded PSO contract with Translink covering all transport services in NI, including the cross-border rail service with the Republic of Ireland. This single PSO contract was issued 4 years ago and still has another 3 years left to run.

- 7.9 As well as preserving current rules for the award of PSO contracts the instrument also saves the rules, procedures and circumstances for when competent authorities can directly award PSO contracts.
- 7.10 Regulation 2016/2338 amended Regulation 1370/2007 by setting out in detail the circumstances in which PSO contracts may be directly awarded, and the requirements to be satisfied when making such awards. Member States are required to work towards full compliance with these more detailed requirements by 3rd December 2019, however competent authorities in the UK already comply with these requirements in practice.
- 7.11 Section 3(1) of the EU Withdrawal Act states that directly applicable EU legislation which is operative immediately before exit day, will be retained into domestic law on exit day. The effect of this section is to preserve Regulation 1370/2007, including the duty in Article 8 to work towards compliance with Article 5 by 3rd December 2019. However, due to the wording of the EU Regulation's Article 8 (2) transitional provisions, as amended by Regulation 2016/2338, the actual obligations in Article 5 are not themselves retained by this section. This is because section 3(3) of the Act states that direct EU law is operative immediately before exit day only if:
- in the case of anything which comes into force at a particular time and is stated to apply from a later time, it is in force and applies immediately before exit day,
  - in the case of a decision which specifies to whom it is addressed, it has been notified to that person before exit day, and
  - in any other case, it is in force immediately before exit day.
- 7.12 Regulation 2016/2338 amended the wording in Article 8(2) so that rather than Article 5 applying immediately, there was a phased obligation to comply with its terms in full and Article 5 is stated not to “apply” until 3rd December 2019, after exit day. Until 3rd December 2019, the Article 8(2) obligation to work towards compliance with its terms does apply, and between that date and 24th December 2023 Article 8(2) provides further transitional limits on the duration of contracts awarded under the wider direct award power.
- 7.13 The loss of Article 5 would create a gap on the face of the legislation as to the power of competent authorities to directly award PSO contracts outside the general procurement rules; this creates unhelpful legal uncertainty, particularly for business. As well as fixing deficiencies in Article 5, the instrument also provides for Article 5 to be saved and to be retained EU law, so that Regulation 1370/2007 as a whole continues to operate effectively in the UK.
- 7.14 The direct award of PSO contracts is an important tool that the Department for Transport and other competent authorities use to manage the highly complex rail franchising programme to secure advantages for passengers, taxpayers and communities. As of August 2018, 6 out of 15 train operating companies in Great Britain hold direct awards.
- 7.15 Under Section 23 of the Railways Act 1993, the Secretary of State is under a duty to secure the provision of rail passenger services, and section 26 empowers him to do this by issuing an invitation to tender and awarding a franchise to the bidder, or by other means and requires him (under subsections (4A) and (4B) of that section) to set out a statement of policy on the circumstances when he will issue invitations to tender and when he will not and how he will award a franchise in such cases. The Secretary



of State has published such a statement describing how he proposes to exercise that franchising power. The section 26 statement sets out when it is appropriate to use direct awards as well as franchise competitions, and refers to the detailed requirements in Regulation 1370/2007 which ensure fairness, transparency and non-discrimination in the award of PSO contracts. The instrument will provide certainty as to the continuity of the franchising programme after exit day as it is now, allowing competent authorities to ensure continuity of services when unexpected problems occur. This includes the use of planned direct awards, to ensure that procurement competitions can be timetabled to allow bidders and authorities to devote adequate resources to them. This is important to ensure that passengers and taxpayers obtain maximum benefits from the franchising programme.

- 7.16 The Article 5 direct award power similarly clarifies how the Secretary of State is to exercise the duty under section 30 of the Railways Act 1993 to ensure the continuity of rail passenger services as the “Operator of Last Resort”. Section 30 of the Railways Act provides that if a franchise is terminated or there are no acceptable private bids, the Secretary of State for Transport can take over the franchise as an operator of last resort. Article 5 sets out clear procedural requirements for such situations that ensure public law requirements of fairness and non-discrimination are satisfied.
- 7.17 The loss of the Article 5 would therefore lead to uncertainty for the industry. The rail industry and competent authorities have been anticipating the amended Article 5 for several years. Ensuring it is retained in effect in Regulation 1370/2007 will ensure certainty on the procedures that will be in place on and after exit day.
- 7.18 For Northern Ireland, this instrument ensures that the Article 5 power will continue to be available to allow further direct awards at the end of the current Translink contract, where this continues to satisfy the Department’s wider statutory duties to secure the provision of transport services.
- 7.19 Regulation 1370/2007 also provides a sector-specific exemption from the EU state aid rules, allowing competent authorities to award PSO contracts under the Regulation without requiring prior state aid approval. When the UK leaves the EU, the Government intends that the UK will implement its own state aid regime. The policy intention is to mirror the EU state aid law as far as practical as this is familiar to both aid givers and beneficiaries and should reassure them that this is a continuation of the existing regime, but with the CMA taking on the majority of the roles currently carried out by the Commission. The state aid exemption in Regulation 1370/2007 will be retained.
- 7.20 This instrument removes obligations on competent authorities to provide information to the Commission, as this will be inappropriate after exit day. Under the new domestic state aid regime, it is intended that the CMA will be empowered to actively monitor compliance with the UK state aid regime. These provisions will ensure that there will be no diminution of transparency and oversight of state aid compliance.
- 7.21 PSO contracts are not currently used in respect of buses because the only bus services that local authorities are permitted to provide under contract would be ones that are not commercially viable or where a commercial operator has not expressed any interest in running it. These require the local authority to pay the operator to run them.
- 7.22 The Transport Act 1985 deregulated the bus market outside London. Since then the majority of local bus services in England outside London are operated on a commercial basis by private sector bus operators. However, under the 1985 Act, local

authorities have powers to contract with local bus operators to provide services that they consider ‘socially necessary’ but which are not commercially viable. The Bus Services Act 2017 also allows local transport authorities in England outside London to reregulate the bus market in their area and award franchises to private sector bus operators on a commercial basis. There are two contract models - a ‘gross cost contract’ which simply involves the local authority paying a fixed fee to the operator of the service, with the local authority retaining all the revenue – and therefore accepting all the risk. This arrangement falls outside the provisions of Regulation 1370/2007. However, it is also possible to award ‘net cost contracts’ where the operator retains all the income and receives a fixed fee from the local authority. In this type of contract, the risk is shared and so would fall within the PSO provisions of Regulation 1370/2007 (these contracts would be a “service concessions contract” so that the award provisions of Article 5 of 1370/2007 would apply to them). The London bus market remains regulated and its bus services are operated under contract to Transport for London by private sector bus companies. Those contracts are issued on a ‘gross cost’ basis.

- 7.23 This instrument applies to land transport which is a transferred matter for Northern Ireland under the Northern Ireland Act 1998. The UK Government remains committed to restoring devolution in Northern Ireland. This is particularly important in the context of EU Exit where we want devolved Ministers to take the necessary actions to prepare Northern Ireland for exit. We have been considering how to ensure a functioning statute book across the UK including in Northern Ireland for exit day absent a Northern Ireland Executive. In the continued absence of a Northern Ireland Executive, the window to prepare Northern Ireland's statute book for exit is narrowing. UK Government Ministers have therefore decided that in the interest of legal certainty in Northern Ireland, the UK Government will take through the necessary secondary legislation at Westminster for Northern Ireland, in close consultation with the Northern Ireland departments. This is one such instrument

## **8. European Union (Withdrawal) Act/Withdrawal of the United Kingdom from the European Union**

- 8.1 This instrument is being made using the powers in section 8 and paragraph 21 of Schedule 7 to the EU Withdrawal Act in order to address failures of retained EU law to operate effectively or other deficiencies arising from the withdrawal of the UK from the EU. The instrument is also made under the powers in section 23(6) of, and paragraph 23(3) and (5) of Schedule 7 to, the EU Withdrawal Act to preserve Article 5 of Regulation 1370/2007 as retained EU law. In accordance with the requirements of the Act, the Minister has made the relevant statements as detailed in Annex 1 part 2 of this EM.

## **9. Consolidation**

- 9.1 There are currently no plans to consolidate the legislation amended by this instrument.

## **10. Consultation outcome**

- 10.1 The Department for Transport conducted a public consultation<sup>6</sup> from 24th April 2018 to 8th June 2018. Stakeholders from within the rail sector were also consulted

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<sup>6</sup> <https://www.gov.uk/government/consultations/rail-markets-implementing-the-market-pillar>

informally prior to the publication of the consultation. The consultation did not include buses as a result of there currently being no PSO concessions awarded to bus operating companies in Great Britain within the meaning of the Regulation 1370/2007.

- 10.2 Part 1 of the consultation sought views and opinions on separate but related proposals to implement Directive (EU) 2016/2370, the Market Pillar Directive of the Fourth Railway package in the UK. The Market Pillar Directive, which comes into effect before the UK leaves the EU, introduces new rules on the independence and impartiality of infrastructure requirements, it states the principal of open access and, as with Regulations 1370/2007 and 2016/2338, aims to improve competition on the railways.
- 10.3 Part 2 of the consultation asked stakeholders for their views on the minor and technical amendments we would need to make to our EU rail markets legislation, including Regulation 1370/2007, to ensure it continued to function effectively should the UK leave the EU without a withdrawal agreement.
- 10.4 The Consultation set out the Department's proposed approach to making these amendments via three rail markets EU Exit SIs:
  - An SI to make corrections to EU Regulation 1370/2007 (this instrument);
  - An SI to make corrections to the Railways (Access, Management and Licensing of Railway Undertakings) Regulations 2016, the Regulations that would need to be amended to implement the Market Pillar Directive and a number of directly applicable EU Implementing Regulations, and
  - An SI to amend the Railway (Licensing of Railway Undertakings) Regulations 2005.
- 10.5 In addition to the consultation, officials from the Department held regular meetings with colleagues from the Scottish and Welsh Governments to consider the issues raised in the consultation document in further detail. While rail policy is devolved to Northern Ireland, Department officials also met regularly with officials from the Northern Ireland Executive to ensure consistency of approach with appropriate Northern Ireland regulations that would also be needed to deal with the same issues as they arise in Northern Ireland legislation.
- 10.6 Five responses were received to Part 2 of the consultation. Responses did not highlight any specific issues but did highlight the difficulty in identifying impacts on our EU rail markets legislation as a result of leaving the EU without further information on wider impacts of the UK leaving the EU.
- 10.7 To complement the consultation and to ensure that we identified all the issues for our EU rail markets legislation that could arise from our exit from the EU, the Department held two working groups of stakeholders to consider EU exit and rail markets in more detail. Those invited included passenger and freight operators, providers of cross-border services, industry representatives, the Devolved Administrations and infrastructure managers. These working groups enabled a more detailed discussion on possible impacts of EU exit and enabled the Department to test our thinking and share proposed amendments to our EU rail markets legislation.

10.8 Since the consultation, we have shared a draft of this instrument with key stakeholders including colleagues from the Scottish and Welsh Government and officials from the Northern Ireland Executive. We have also shared a draft of the instrument with rail industry representatives.

10.9 The Government response<sup>7</sup> to the consultation was published on 21<sup>st</sup> January 2019.

## **11. Guidance**

11.1 As the instrument will maintain the UK's current framework for the award of PSO contracts, and the amendments are minor and technical in nature, the Department is not producing guidance on the amendments provided for in this instrument.

## **12. Impact**

12.1 There is no impact on business, charities or voluntary bodies.

12.2 There is no impact on the public sector.

12.3 An Impact Assessment has not been prepared for this instrument

12.4 There are no costs or benefits to business or the public sector as this instrument makes the minimum legal changes necessary to continue the status quo in rail market franchising. No policy changes are being made. The impact on business will therefore be less than +/- £5 million.

12.5 This instrument is not “novel or contentious” in itself, as it maintains the status quo and preserves the existing legislative framework for the award of PSO contracts. There are no significant wider adverse impacts - social, environmental, financial or economic.

## **13. Regulating small business**

13.1 The instrument applies to activities that are undertaken by small businesses.

## **14. Monitoring & review**

14.1 As this instrument is made under the EU Withdrawal Act, no review clause is required.

## **15. Contact**

15.1 Selene Wilson telephone: 07977 421 151 or email: [selene.wilson@dft.govc.uk](mailto:selene.wilson@dft.govc.uk) or Peter Lovitt telephone 07970 312 085 or email [peter.lovitt@dft.gov.uk](mailto:peter.lovitt@dft.gov.uk) at the Department for Transport, can be contacted with any queries regarding the instrument.

15.2 Dan Moore, Director, Rail EU Exit at the Department for Transport department can confirm that this Explanatory Memorandum meets the required standard.

15.3 Andrew Jones MP, Parliamentary Under-Secretary of State for Transport at the Department for Transport, can confirm that this Explanatory Memorandum meets the required standard.

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<sup>7</sup> <https://www.gov.uk/government/consultations/rail-markets-implementing-the-market-pillar>

# Annex

## Statements under the European Union (Withdrawal) Act 2018

### Part 1

#### Table of Statements under the 2018 Act

This table sets out the statements that may be required under the 2018 Act.

Statement	Where the requirement sits	To whom it applies	What it requires
Sifting	Paragraphs 3(3), 3(7) and 17(3) and 17(7) of Schedule 7	Ministers of the Crown exercising sections 8(1), 9 and 23(1) to make a Negative SI	Explain why the instrument should be subject to the negative procedure and, if applicable, why they disagree with the recommendation(s) of the SLSC/Sifting Committees
Appropriate-ness	Sub-paragraph (2) of paragraph 28, Schedule 7	Ministers of the Crown exercising sections 8(1), 9 and 23(1) or jointly exercising powers in Schedule 2	A statement that the SI does no more than is appropriate.
Good Reasons	Sub-paragraph (3) of paragraph 28, Schedule 7	Ministers of the Crown exercising sections 8(1), 9 and 23(1) or jointly exercising powers in Schedule 2	Explain the good reasons for making the instrument and that what is being done is a reasonable course of action.
Equalities	Sub-paragraphs (4) and (5) of paragraph 28, Schedule 7	Ministers of the Crown exercising sections 8(1), 9 and 23(1) or jointly exercising powers in Schedule 2	<p>Explain what, if any, amendment, repeals or revocations are being made to the Equalities Acts 2006 and 2010 and legislation made under them.</p> <p>State that the Minister has had due regard to the need to eliminate discrimination and other conduct prohibited under the Equality Act 2010.</p>
Explanations	Sub-paragraph (6) of paragraph 28, Schedule 7	<p>Ministers of the Crown exercising sections 8(1), 9 and 23(1) or jointly exercising powers in Schedule 2</p> <p>In addition to the statutory obligation the Government has made a political commitment to include these statements alongside all EUWA SIs</p>	Explain the instrument, identify the relevant law before exit day, explain the instrument's effect on retained EU law and give information about the purpose of the instrument, e.g., whether minor or technical changes only are intended to the EU retained law.

Criminal offences	Sub-paragraphs (3) and (7) of paragraph 28, Schedule 7	Ministers of the Crown exercising sections 8(1), 9, and 23(1) or jointly exercising powers in Schedule 2 to create a criminal offence	Set out the ‘good reasons’ for creating a criminal offence, and the penalty attached.
Sub-delegation	Paragraph 30, Schedule 7	Ministers of the Crown exercising sections 10(1), 12 and part 1 of Schedule 4 to create a legislative power exercisable not by a Minister of the Crown or a Devolved Authority by Statutory Instrument.	State why it is appropriate to create such a sub-delegated power.
Urgency	Paragraph 34, Schedule 7	Ministers of the Crown using the urgent procedure in paragraphs 4 or 14, Schedule 7.	Statement of the reasons for the Minister’s opinion that the SI is urgent.
Explanations where amending regulations under 2(2) ECA 1972	Paragraph 13, Schedule 8	Anybody making an SI after exit day under powers outside the European Union (Withdrawal) Act 2018 which modifies subordinate legislation made under s. 2(2) ECA	Statement explaining the good reasons for modifying the instrument made under s. 2(2) ECA, identifying the relevant law before exit day, and explaining the instrument’s effect on retained EU law.
Scrutiny statement where amending regulations under 2(2) ECA 1972	Paragraph 16, Schedule 8	Anybody making an SI after exit day under powers outside the European Union (Withdrawal) Act 2018 which modifies subordinate legislation made under s. 2(2) ECA	Statement setting out: a) the steps which the relevant authority has taken to make the draft instrument published in accordance with paragraph 16(2), Schedule 8 available to each House of Parliament, b) containing information about the relevant authority’s response to— (i) any recommendations made by a committee of either House of Parliament about the published draft instrument, and (ii) any other representations made to the relevant authority about the published draft instrument, and, c) containing any other information that the relevant authority considers appropriate in relation to the scrutiny of the instrument or draft instrument which is to be laid.

## **Part 2**

### **Statements required when using enabling powers under the European Union (Withdrawal) 2018 Act**

#### **1. Sifting Statement**

- 1.1 Andrew Jones MP, Parliamentary Under-Secretary of State for Transport at the Department for Transport, has made the following statement regarding use of legislative powers in the European Union (Withdrawal) Act 2018:
- 1.2 “In my view the Regulation (EC) No 1370/2007 (Public Service Obligations in Transport) (Amendment) (EU Exit) Regulations 2019 should be subject to annulment in pursuance of a resolution of either House of Parliament (i.e. the negative procedure)”.
- 1.3 This is the case for the reason that when the UK leaves the EU, Regulation 1370/2007 will be saved as direct EU legislation by section 3 of the European Union (Withdrawal) Act 2018, but will contain technical deficiencies and inappropriate references to EU institutions. This instrument corrects these technical deficiencies. This instrument is designed to maintain the status quo, so that the franchising of railway and bus services can continue as expected after exit day. Whilst the practice of directly awarding contracts to train operators has been the subject of past Parliamentary criticism, and there has been debate and criticism of franchising in Parliament, the provision does not expand powers to award franchises. These arguments should not have an impact on this SI because the SI itself is not controversial. It merely seeks to continue with business as usual and ensure rail and bus services continue unaffected post exit day.

#### **2. Appropriateness statement**

- 2.1 Andrew Jones MP, Parliamentary Under-Secretary of State for Transport at the Department for Transport, has made the following statement regarding use of legislative powers in the European Union (Withdrawal) Act 2018:
- 2.2 “In my view the Regulation (EC) No 1370/2007 (Public Service Obligations in Transport) (Amendments) (EU Exit) Regulations 2019 do no more than is appropriate.”
- 2.3 This is the case because the instrument only makes the necessary corrections to deficiencies in the retained legislation to allow it to operate effectively after exit day. It will make no policy changes. The saving of Article 5 is consistent with this approach because it will maintain the pre-exiting status quo and maintains legal certainty for the longer term.

#### **3. Good Reasons**

- 3.1 Andrew Jones MP, Parliamentary Under-Secretary of State for Transport at the Department for Transport, has made the following statement regarding use of legislative powers in the European Union (Withdrawal) Act 2018:
- 3.2 “In my view there are good reasons for the provisions in this instrument, and I have concluded they are a reasonable course of action”.

- 3.3 These good reasons ensure the UK’s complex rail franchising programme continues with a minimum of disruption after exit. For this to happen, technical deficiencies in the relevant retained EU legislation must be corrected using this instrument. Second, the savings provision retains the detailed Article 5 requirements in Regulation 1370/2007 which clarify how the Secretary of State and other competent authorities will fulfil their wider statutory duties to ensure continuity of rail and bus passenger services.

#### **4. Equalities**

- 4.1 Andrew Jones MP, Parliamentary Under-Secretary of State for Transport at the Department for Transport, has made the following statement regarding use of legislative powers in the European Union (Withdrawal) Act 2018:
- 4.2 “The instrument does not amend, repeal or revoke a provision or provisions in the Equality Act 2006 or the Equality Act 2010 or subordinate legislation made under those Acts.”
- 4.3 Andrew Jones MP, Parliamentary Under-Secretary of State for Transport at the Department for Transport, has made the following statement regarding use of legislative powers in the European Union (Withdrawal) Act 2018:
- 4.4 “In relation to the instrument, I, Andrew Jones have had due regard to the need to eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under the Equality Act 2010.”
- 4.5 This instrument does not impact upon equality between persons under the 2010 Act. It preserves provisions ensuring fairness and preventing discrimination by competent authorities against rail operators bidding for public service obligation contracts.

#### **5. Explanations**

- 5.1 The explanations statement has been made in section 2 of the main body of this explanatory memorandum.