

PASSENGER RAILWAY SERVICES (PUBLIC OWNERSHIP) BILL

Memorandum from the Department for Transport to the Delegated Powers and Regulatory Reform Committee

A. INTRODUCTION

1. This memorandum has been prepared for the Delegated Powers and Regulatory Reform Committee to assist with its scrutiny of the Passenger Railway Services (Public Ownership) Bill (“the Bill”). The Bill was introduced in the House of Commons on 18 July. This memorandum identifies the provisions of the Bill that confer powers to make delegated legislation. It explains in each case why the power has been taken and explains the nature of, and the reason for, the procedure selected.

B. PURPOSE AND EFFECT OF THE BILL

2. The Government was elected with a Manifesto commitment to bring the railways back into public ownership as franchise agreements with existing private sector operators expire or are broken through a failure to deliver. The Bill will enable the delivery of that policy as quickly as possible and mitigate the risk of a successful challenge that exists in the absence of legislative change.
3. To achieve the policy aim, the Bill amends the Railways Act 1993 (“the 1993 Act”) and, in limited circumstances, modifies the application of certain provisions in the Public Service Obligations in Transport Regulations 2023 (“the 2023 Regulations”).

Amendments to the 1993 Act:

4. The 1993 Act was introduced to privatise the railways in Great Britain. It created a regime for franchising rail passenger services to private-sector operators. Under s. 23(1), rail passenger services are designated as services which ‘ought to be provided under franchise agreements’.

5. The 1993 Act and the statutory policy statement made under it (pursuant to s.26(4A), “the s. 26 statement”) establish the following presumptions:
 - i. designated services will be provided by private-sector operators under franchise agreements;
 - ii. franchise agreements will ordinarily be awarded following a competitive tender process;
 - iii. where it is not possible to appoint a franchisee following a competitive tendering process, direct awards will be made to private-sector operators;
 - iv. only where it is not possible or is otherwise inappropriate to appoint a private-sector franchisee, the services will be provided by a public-sector operator.
 - v. the public-sector operator will provide the services only until another private-sector franchisee is appointed.

6. The Bill is designed to remove these presumptions so that the “appropriate franchising authority” (Scottish Ministers in relation to Scottish franchise agreements, Welsh Ministers in relation to Wales-only services and Welsh components of Welsh services under Welsh franchise agreements, the Secretary of State in relation to any other franchise agreement, s. 23(2) of the 1993 Act), can only appoint a public-sector operator to provide the services except when it is not reasonably practicable to do so. The public-sector operator will be appointed without issuing an invitation to tender (i.e. via a “direct award”).

7. The 1993 Act includes a duty (s. 30) for the appropriate franchising authority to provide, or secure the provision of, rail passenger services where a franchise agreement is terminated or otherwise comes to an end, but this duty operates only in circumstances where it has not been possible to appoint a private-sector franchisee. In other words, it provides for services to be operated by public-sector operators, but only as a measure of last resort.

Modified application of the 2023 Regulations:

8. Direct awards of public service contracts are made pursuant to, and in accordance with, the 2023 Regulations. When the s. 30 duty has previously been engaged and services have been directly awarded to a public sector operator (DfT OLR Holdings Limited, “DOHL”, or companies owned by the Scottish or Welsh Ministers), the awards have been made pursuant to Articles

5(5) and (6) of Regulation (EC) No 1370/2007. Following the UK's exit from the European Union, that Regulation has been replaced by the 2023 Regulations, regs. 16 and 17 of which are the equivalents of Art. 5(5) and (6) respectively.

9. At least 12 months before making a direct award under reg. 17 of the 2023 Regulations, the "competent authority" (this would be the appropriate franchising authority which is subject to the s. 30 duty) is required to publish specified information relating to the proposed contract (reg. 22). As compliance with that requirement would significantly slow down the transfer of services into public operation, the Bill disapplies it in relation to direct awards made by the competent authority to a public-sector operator under s. 30.

10. Under the Bill, the Secretary of State would retain a power to extend existing franchise agreements or to make further direct awards to incumbent operators, but only where it would not be reasonably practicable to appoint a public-sector operator at that point in time. The policy intention is that this power would only be exercised in exceptional circumstances, with any extended/further franchise agreement being an interim measure until a public-sector operator could be appointed. As the award must be made in accordance with reg. 16 of the 2023 Regulations, the franchise agreement awarded may last for no longer than 2 years (reg. 9 of the 2023 Regulations). This power (the new s. 30A of the 1993 Act) is exercisable only by the Secretary of State; there are no existing private-sector franchise agreements in either Scotland or Wales, so this power is not relevant to Scottish or Welsh Ministers. A new s. 30B provides the procedure for exercising the power under s. 30A.

C. DELEGATED POWERS

11. The Bill includes a power to repeal the new ss. 30A and 30B of the 1993 Act by regulations. It is expected that this power would be exercised once these sections cease to be of any practical effect.

12. The Bill also includes a power to make consequential amendments. Whilst every effort has been made to identify, and address, the necessary consequential amendments, given the speed with which the Bill has been developed and the

high volume of legislation relating to railway services, it is considered prudent to include the power.

Clause 2: Future provision of services

Power conferred on the Secretary of State.

Power exercised by regulations.

Parliamentary Procedure: Negative resolution procedure.

Context and Purpose

13. This provision (s. 30A(4)) allows the Secretary of State to repeal ss. 30A and 30B of the 1993 Act. Section 30A is a new power inserted into the 1993 Act by the Bill to allow the Secretary of State to extend existing franchise agreements or to directly award new franchise agreements to existing franchisees. This power would be exercised only in exceptional circumstances where a transfer of the relevant service to a public-sector operator was not considered reasonably practicable. Section 30B provides the procedure for the exercise of the power under s. 30A.

14. Where the s. 30A power is exercised to make a new direct award, the new franchise agreement may be no longer than 2 years in duration. This is because s. 30A is designed to provide a temporary solution, only until the service in question could be transferred to a public-sector operator. Section 30A is limited to existing franchise agreements, of which there are ten remaining. Once all of these agreements end and the relevant services have been brought under public control, ss. 30A and 30B will cease to be of any practical effect, at which point the Secretary of State may wish to repeal them.

Justification for taking the power

15. The power would enable the Secretary of State to remove ss. 30A and 30B from the 1993 Act once they become obsolete. This is desirable both for ensuring that

the legislation is “tidied up” and for making it clear that the Bill represents a clear step away from the existing regime of private-sector franchising.

Justification for the procedure

16. This power is exercisable by regulations which would be subject to the negative resolution procedure. This procedure is considered appropriate in light of the limited scope of the power and the fact that it is intended to be exercised only for the purpose of removing (then) obsolete provisions from the 1993 Act.

Clause 3(2): Consequential provision

Power conferred on the Secretary of State.

Power exercised by regulations.

Parliamentary Procedure: Affirmative procedure if the regulations made modify primary legislation, but negative resolution procedure in other cases.

Context and Purpose

17. This provision allows the Secretary of State to make such consequential changes as are necessary to ensure the smooth transition of services from the private to the public sector and to make supplementary, incidental, transitional and saving provisions.

Justification for taking the power

18. The powers conferred by this clause are limited by the fact that any amendments made under this regulation-making power must be genuinely consequential on provisions in the Bill.

19. Whilst every effort has been made to identify, and address, the necessary consequential amendments in the Bill, given the speed with which the Bill has been developed, the high volume of legislation relating to railway services and

the importance of ensuring that rail passenger services continue to run without disruption, it is considered prudent to include the power.

Justification for the procedure

20. This power permits the amendment or revocation of primary legislation, meaning it is a “Henry VIII” power. As such it is considered appropriate that it is subject to the affirmative resolution procedure, insofar as the amendments relate to primary legislation, in order to ensure full and effective scrutiny of its use.

21. With respect to all other amendments, the power will be subject to the negative resolution procedure, as the limited impact of such changes means that there is less need for in-depth Parliamentary scrutiny.

Department for Transport

4 September 2024