

Legislative Consent Memorandum

Passenger Railway Services (Public Ownership) Bill

Background

1. This memorandum has been lodged by Fiona Hyslop, Cabinet Secretary for Transport, under Rule 9B.3.1(a) of the Parliament's standing orders. The Passenger Railway Services (Public Ownership) Bill was introduced in the House of Commons on 18 July 2024. The Bill can be found at [Passenger Railway Services \(Public Ownership\) Bill - Parliamentary Bills - UK Parliament](#)

Content of the Passenger Railway Services (Public Ownership) Bill

2. The Bill amends the Railways Act 1993 (RA93) to remove the presumption that rail passenger services "ought" to be delivered by franchises and to bring their operation into public ownership on the termination of any existing franchise agreements. The Bill removes the current franchising powers of the Secretary of State, the Scottish Ministers and the Welsh Ministers and inserts a prohibition on extending or entering into new franchise agreements (except in exceptional circumstances which apply only to the Secretary of State).

3. This will mean that the duty contained in section 30(1) of RA93, which requires the relevant franchising authority to provide or secure the provision of rail passenger services where a franchise agreement in respect of the services is terminated or otherwise comes to an end, will become the default mechanism for the provision of services. Under the current model, the Scottish Ministers are the franchising authority for rail passenger services in Scotland, meaning that they are responsible for specifying, letting, and managing contracts (franchise agreements) with franchisees for the provision of ScotRail and Caledonian Sleeper services. At present, however, there are no franchise agreements in place for either franchise and services are being provided by the Scottish Ministers through arrangements with wholly owned companies in furtherance of their section 30(1) duty (known as the "operator of last resort"). Under the Bill, franchising authorities providing or securing the provision of services via this duty would become the default across the whole of Great Britain, but the duty will exist on an ongoing basis - rather than as a "last resort" only in circumstances where no further franchise agreement has been entered into in respect of the services.

4. The Bill is comprised of 4 clauses and a schedule:

Clause 1 (Prohibition on franchise extensions and new franchises)

5. Removes sections 25 to 26ZA of the RA93 (which contained franchising authorities' powers for awarding franchise agreements and the requirement for publication of a statement of policy in the exercise of those powers) and replaces them with a new section 25A which provides that existing franchise agreements may not be extended or new franchise agreements entered into, except by the Secretary of State in accordance with the new section 30A (temporary continuation of franchises). The Scottish Ministers and Welsh Ministers may not enter into a franchise agreement without exception. This reflects the fact that there are no franchise agreements in place in Scotland (or Wales), where rail passenger services are already operated under the duty at section 30(1) of RA93.

6. Imposes, through amendments to section 23 RA93, a duty on the Secretary of State, the Scottish Ministers and the Welsh Ministers (as the appropriate designating authorities) to designate such rail passenger services (other than services which are, by virtue of section 24, exempt from designation) as they consider ought to be provided under sections 30 to 30C as amended. This replaces the previous duty at section 23 to designate services which ought to be provided under franchise agreements.

7. Allows the Scottish Ministers, where they are designating Scotland only services, to also designate cross-border services which they consider should be provided together with any Scotland-only services or a particular class of them and which are not exempt from such designation by virtue of section 24.

8. Provides that existing designations made under section 23 of RA 93 are to be treated as having been made under that section as amended.

Clause 2 (Future provision of services)

9. Amends section 30(1) of RA93 so that relevant franchising authorities' duty to provide or secure the provision of services where a franchise agreement in respect of those services is terminated or otherwise comes to an end exists on an ongoing basis and not only where there is no franchise agreement in place for the relevant services.

10. Inserts a new section 30(1A) into RA93 which provides that franchising authorities may secure the provision of services in furtherance of the duty at section 30(1) only by making a direct award of a public service contract to a public sector company in accordance with regulation 17 (general direct award provision for rail) of the Public Service Obligations in Transport Regulations 2023 (the 2023 Regulations).

11. Disapplies the requirement in regulation 22 of the 2023 Regulations to publish a notice of award of a such a contract 1 year in advance.

12. Inserts a new section 30A providing, as a contingency, a power to the Secretary of State to temporarily extend existing franchise agreements and enter into new ones with incumbent franchisees where “satisfied that it will not be reasonably practicable to provide, or secure the provision of, the franchised services under section 30(1) when the existing agreement comes to an end”. Certain limitations on the exercise of this power are included in section 30A and new section 30B.

13. Inserts a new section 30C which defines terms including “public sector company”.

Clause 3 (Consequential provision)

14. Provides for consequential amendments contained in the schedule.

15. Gives a power to the Secretary of State to make provision that is consequential on the Act by regulations. This power is broad. Clause 3(4) provides that - in addition to making consequential, supplementary, incidental, transitional or saving provision - such regulations may make “different provision for different purposes”.

Clause 4 (Extent, commencement and short title)

16. Provides that the Act would extend to England, Wales, and Scotland and come into force on the day on which it is passed.

Schedule

17. Makes consequential amendments to the RA93, mainly to remove references to franchising where appropriate.

Provisions which relate to Scotland

18. The Bill as a whole extends to Scotland. The UK Government’s view is that the provisions of the Bill - with the exception of clause 2(3) - alter the Scottish Ministers’ rail franchising functions in relation to services for which the Scottish Ministers are the appropriate franchising authority and therefore engage the legislative consent process in the Scottish Parliament.

19. The Scottish Government considers that the legislative consent of the Scottish Parliament is required as regards the provisions identified by the UK Government. However, it also considers that legislative consent is required in relation to clause 2(3). The reasons are as follows:

Clause 1 (Prohibition on franchise extensions and new franchises)

20. This will remove the current powers and functions of the Scottish Ministers at sections 25 to 26ZA of RA93 as the franchising authority for rail passenger services in Scotland. It will also impose a new duty on the Scottish Ministers as regards the designation of rail passenger services which require to be provided under section 30 of the RA93. As such, it will alter the executive competence of the Scottish Ministers and engages the legislative consent process.

Clause 2 (Future provision of services)

21. Clause 2(2)(a) will amend the Scottish Ministers' duty at section 30(1) to provide, or secure the provision of, rail passenger services where a franchise agreement in respect of those services is terminated or otherwise comes to an end so that it exists on an ongoing basis and not only where no franchise agreement is in place in respect of the services. Clause 2(2)(b) will insert new section 30(1A) which will remove Scottish Ministers' ability, as a contracting authority, to determine appropriate procedure under the 2023 Regulations for the award of any public service contract they may make in furtherance of their duty at section 30(1). Consequently, clause 2(2) will alter the executive competence of the Scottish Ministers and engages the legislative consent process.

22. Clause 2(3) inserts new sections 30A and 30B which will give the Secretary of State a contingency power as regards the temporary continuation of existing franchises. The UK Government considers clause 2(3) does not alter the Scottish Ministers' functions and does not engage the legislative consent process. A letter outlining the UK Government's devolution analysis said including an equivalent power for the Scottish Ministers was not considered necessary or appropriate as Scottish services are already in public ownership. However, clause 2(3) also inserts a new section 30C which defines the terms "direct award", "public service contract", "public sector company" and "the 2023 Regulations". As these terms appear at new section 30(1A), their definitions impact how its provisions for arrangements for delivery of the Scottish Ministers' duty at section 30(1) are to be understood. For this reason, it is considered that clause 2(3) does alter the executive competence of the Scottish Ministers and engages the legislative consent process.

Clause 3 (Consequential provision) and Schedule

23. Clause 3(1) makes provision for the consequential amendments in the schedule. These are required to effect the removal of franchising from RA93 and ensure that its provisions, notably section 24 (exemption of passenger services from section 23(1)), will continue to operate effectively. Accordingly, they will alter the executive competence of the Scottish Ministers and engage the legislative consent process.

Reasons for considering legislative consent

24. Section 28(8) of the Scotland Act 1998 recognises that the UK Government will not normally legislate with regard to devolved matters without the consent of the Scottish Parliament. Devolution Guidance Note 10 states that Bills require the consent of the Scottish Parliament if they contain provision applying to Scotland and which are for devolved purposes or if they alter the legislative competence of the Scottish Parliament or the executive competence of the Scottish Ministers.

25. As described above, the Scottish Government is presently of the view that all clauses of the Bill (including clause 2(3)) alter the executive competence of the Scottish Ministers. There was consultation with Scottish Government officials about the Bill as soon as practicable after the new UK Government took office, and a noticeable desire to seek and reflect the views of the Scottish Ministers.

26. The Scottish Government is of the view that the provisions of the Bill are in line with the policy aims and objectives of the Scottish Ministers, for a fully publicly owned railway to deliver for the people of Scotland. The Bill would allow the Scottish Ministers to secure the provision of Scottish rail passenger services by public sector companies by default and on an ongoing basis, rather than as a “last resort” only in circumstances where no further franchise agreements have been entered into in respect of the services under a franchising model that the Scottish Ministers have publicly criticised.

27. Were legislative consent not given, and if the Bill was amended to exclude Scotland, there would arguably be stronger public ownership frameworks for the provision of rail passenger services in the rest of the UK than in Scotland, the opposite of the current situation. The Scottish Ministers’ ambitions for the railways seek to deliver safe, accessible, reliable, affordable and efficient services, which are best delivered through full public ownership. This Bill would create the framework of the presumption of permanent public ownership, and remove the temporary intention of the current “operator of last resort” duty. It would give greater certainty and stability from which the Scottish Government can continue to provide exceptional passenger railway services for the people of Scotland.

28. The Scottish Government’s position is that there will be EU alignment issues in connection with the Bill because it removes the presumption that contracts for the provision of rail passenger services will be secured by way of a competition which is a key element of EU procurement law, notably Regulation EC 1370/2007 (on public passenger transport services by rail and by road) and impacts how equivalent UK procurement rules contained in the 2023 Regulations are to be applied. The Scottish Government considers that the benefits of this Bill (as summarised above) outweigh the risk to EU alignment. Giving legislative consent would be in line with Scottish Ministers’ approach of seeking EU alignment but allowing for deviation where it provides the best option for Scotland.

Consultation

29. There has been limited consultation by the UK Government on the provisions within this Bill with stakeholders.

Financial implications

30. There are no new financial implications identified at this stage.

Conclusion

31. The Scottish Government recommends that the Scottish Parliament gives its consent to the provisions of the Passenger Railways Services (Public Ownership) Bill in so far as those provisions alter the executive competence of the Scottish Ministers.

Draft Motion on Legislative Consent

32. The draft motion, which will be lodged by the Cabinet Secretary for Transport, is:

“That the Parliament agrees that all provisions of the Passenger Railway Services (Public Ownership) Bill, introduced in the House of Commons on 18 July 2024, so far as these matters alter the executive competence of the Scottish Ministers, should be considered by the UK Parliament.”

Scottish Government
August 2024

This Legislative Consent Memorandum relates to the Passenger Railway Services (Public Ownership) Bill (UK legislation) and was lodged with the Scottish Parliament on 1 August 2024

Passenger Railway Services (Public Ownership) Bill – Legislative Consent Memorandum

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