

PASSENGER RAILWAY SERVICES (PUBLIC OWNERSHIP) BILL

EXPLANATORY NOTES

What these notes do

These Explanatory Notes relate to the Passenger Railway Services (Public Ownership) Bill as brought from the House of Commons on 4 September 2024 (HL Bill 21).

- These Explanatory Notes have been prepared by the Department for Transport in order to assist the reader. They do not form part of the Bill and have not been endorsed by Parliament.
- These Explanatory Notes explain what each part of the Bill will mean in practice; provide background information on the development of policy; and provide additional information on how the Bill will affect existing legislation in this area.
- These Explanatory Notes might best be read alongside the Bill. They are not, and are not intended to be, a comprehensive description of it.

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Overview of the Bill

- 1 The Passenger Railway Services (Public Ownership) Bill (“the Bill”) is a short Bill amending specific provisions in the Railways Act 1993 (“RA93”) to remove the presumption in favour of private sector operation of franchised passenger services to facilitate Government’s commitment to bring such train operations back into public ownership when current franchise contracts end.
- 2 It enables the Secretary of State, the Scottish Ministers and/or the Welsh Ministers (as the appropriate franchising authorities) to secure the provision of designated railway passenger services via contracts with public sector operators (referred to in the Bill as “public sector companies”); and to commence the transition to public sector operation as current contracts reach their end date or contractual break point. The Bill also disapplies the requirement (under regulation 22 of the Public Service Obligations in Transport Regulations 2023/1369 (“the 2023 Regulations”)) to give at least 12 months’ notice before awarding such contracts to public sector companies.
- 3 The Bill removes the power to award franchises to private sector operators via a competitive tendering process and the requirement to publish a statement on how that power will be exercised. However, the Bill enables the Secretary of State to make short further awards or extensions to existing incumbent private sector operators where satisfied that, at that time, it will not be reasonably practicable to provide or to secure the provision of the railway passenger services by awarding a contract to a public sector company.

Policy background

- 4 Current legislation is inconsistent with the Government’s commitment to bring railway passenger services back into public ownership when existing contracts with private sector operators end.
- 5 This Bill is needed because current primary legislation, RA93, was designed to facilitate the privatisation of British Rail in the 1990s and establishes a presumption in favour of private sector operation of passenger services. RA93 empowers the appropriate franchising authority to appoint franchisees following a competitive tender process, and requires the appropriate franchising authority, following appropriate consultation, to publish a statement of policy setting out the circumstances in which they will exercise that power. The current statements of policy reinforce the presumption in favour of franchising to the private sector (by competition where appropriate, or by means of a direct award to a private sector operator otherwise). RA93 also includes provision for the appropriate franchising authority to secure services from a public sector operator, but only as a last resort where a franchise agreement is terminated or otherwise comes to an end, but no further franchise agreement has been entered into in respect of the services.
- 6 Bringing the operation of passenger services back into public ownership is one element of the Government’s broader plan for the railways, which would also create a unified and simplified governance structure that places passengers at the heart of the mission, objectives and incentives for the railway. This broader plan, which is beyond the scope of this Bill, would include establishing a new arm’s length public body – Great British Railways – which would be a directing mind in charge of Britain’s railway infrastructure and services.
- 7 The Government proposes to bring forward further, more extensive primary legislation to address the wider issues later in the Parliamentary session. In the meantime, the purpose of

this Bill is specifically to facilitate the transfer of train operations back into public ownership, in advance of that more extensive legislation.

Legal Background

- 8 The Bill amends RA93 and, in limited circumstances, modifies the application of certain provisions in the 2023 Regulations. The purpose of the Bill is outlined in the policy background section of these Notes. The amendments to RA93 and modified application of the regulatory requirements effected by this Bill are outlined in the commentary on provisions of Bill section of these Notes.
- 9 There is a duty on the Secretary of State, Welsh Ministers and Scottish Ministers as the relevant franchising authorities under RA93 to provide, or secure the provision of, railway passenger services where a franchise agreement delivering such services is terminated or otherwise comes to an end, but no further franchise agreement has been entered into in respect of the services. Under section 30(1) of RA93, this duty arises in circumstances where the relevant franchise agreement is terminated for any reason whatsoever, including when it is terminated by the Secretary of State, Welsh Ministers or Scottish Ministers.
- 10 The Bill amends section 30(1) such that this duty arises simply where a franchise agreement delivering such services is terminated or otherwise comes to an end. A new section 30(1A) provides that the Secretary of State, Welsh Ministers and Scottish Ministers may secure the provision of services for the purposes of fulfilling this duty only by making a direct award of a public service contract to a public sector company in accordance with regulation 17 of the 2023 Regulations. They are prohibited from entering into agreements with private sector franchisees under a new section 25A.
- 11 However, in a new in section 30A(2), the Bill provides an exception to the duty in section 30(1) where the Secretary of State is satisfied that it will not be reasonably practicable to provide, or secure the provision, of the franchised services this way. In this case, the Secretary of State may extend an existing franchising agreement or enter into a new franchise agreement.
- 12 The power to enter into a new franchise agreement is limited in a new section 30A(3)(b) such that the franchisee in relation to the new agreement must be the same person as in the existing agreement, and the term in the new agreement must begin immediately after the term of the existing agreement. This clause does not apply to services in respect of which Scottish Ministers and Welsh Ministers are the appropriate franchising authority as there are no current Scottish or Welsh franchise agreements with private sector franchisees.
- 13 The result of the Bill is that there is now a presumption in favour of public sector companies providing railway passenger services when existing franchise agreements are terminated or come to an end, with private sector operators only engaged should the Secretary of State be 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.

Territorial extent and application

- 14 This Bill extends to England, Wales and Scotland.
- 15 See the table in Annex A for a summary of the position regarding territorial extent and application in the United Kingdom.

Commentary on provisions of Bill

Clause 1: Prohibition on franchise extensions and new franchises

- 16 Subsection (2) removes sections 25 to 26ZA of RA93 and introduces a new section 25A. This new section prohibits appropriate franchising authorities from extending existing franchise agreements or entering into new franchise agreements.
- 17 The only exception is that, where the Secretary of State is the appropriate franchising authority, the Secretary of State may extend an existing franchise agreement or directly award a new franchise agreement to an existing franchisee under section 30A where satisfied that it will not be reasonably practicable to provide, or secure the provision of, railway passenger services under s30(1) by way of awarding a contract to a public sector company. This power may only be exercised in accordance with section 30B. These sections are discussed in more detail in paragraphs 22 to 26 below.
- 18 Subsection (3) amends section 23 of RA93 to provide a duty for the appropriate designating authority to designate such railway passenger services it considers “ought to be provided under section 30 to section 30C.” The amendment replaces the previous duty to designate such services as ones which “ought to be provided under franchise agreements”. It removes the presumption that such services will be provided by private sector franchisees and creates the new presumption that they will be provided by public sector companies. Services previously designated under section 23(1) of RA93 are treated as services designated under the section as amended.

Clause 2: Future provision of services

- 19 Subsection (2)(a) amends section 30(1) of RA93 such that the Secretary of State, Welsh Ministers and Scottish Ministers (as the relevant franchising authorities) have a duty to provide or secure the provision of railway passenger services where a franchise agreement in respect of the services is terminated or otherwise comes to an end.
- 20 Subsection (2)(b) inserts a new section 30(1A) which provides that the relevant franchising authority may fulfil the duty to provide, or secure the provision of, railway passenger services only by making a direct award of a public service contract to a public sector company in accordance with regulation 17 of the 2023 Regulations. The obligation under regulation 22 of the 2023 Regulations (for the competent authority to publish notice of a direct award at least 12 months in advance) has been disapplied in these circumstances.
- 21 Subsection (2)(b) also inserts a new section 30(1C) which provides that the duty in section 30(1) does not apply in respect of services being provided under the new section 30A.
- 22 Subsection (3) inserts new sections 30A to 30C. Section 30A introduces – as a contingency – a new, narrower power for the Secretary of State to extend existing franchise agreements or make direct awards to incumbent private sector operators to ensure continuity of passenger services only where satisfied that it will not be reasonably practicable to provide, or secure the provision of, the relevant services under section 30(1).

- 23 Direct awards made under section 30A are exempted from the 12-month notice requirement which would otherwise apply under regulation 22 of the 2023 Regulations, and the contract duration is limited to a maximum of 2 years by virtue of regulation 9(1)(b) of the 2023 Regulations.
- 24 The section 30A power is not exercisable by the Welsh Ministers or the Scottish Ministers as it is only relevant to services for which the Secretary of State is the appropriate franchising authority (these being the only services which are currently operated under franchise agreements with private sector operators).
- 25 Limitations in section 30A on the power to enter into a new franchise agreement include that the Secretary of State may only do so where the term in the new agreement begins immediately after the term of the existing agreement and the franchisee in the new agreement is the same person as the franchisee in the existing agreement. Section 30B provides that the power to extend or enter into a new franchise agreement must be done by means of formal agreement to extend, or by making a direct award of a public service contract, in accordance with regulation 16 of the 2023 Regulations. For the purposes of section 30B, the Secretary of State is to be treated as entitled to take emergency measures under regulation 16 regardless of whether the requirements in regulation 16(1) (that there is a disruption of services or immediate threat of the same) are met.
- 26 The Secretary of State is empowered, under section 30A(4) to repeal sections 30A and 30B by regulations.
- 27 Section 30C provides the definition of “public sector company” for the purposes of sections 30 to 30B. The definition covers companies which are: wholly owned by the Secretary of State, the Welsh Ministers or the Scottish Ministers; jointly owned by the Secretary of State and the Welsh Ministers; jointly owned by the Secretary of State and the Scottish Minister; and wholly owned subsidiaries of the same (by virtue of the definition in section 58 of the Railways Act 2005).

Clause 3: Consequential Provision

- 28 Subsections (2) to (7) concern consequential amendments made by regulations. The Secretary of State may also, by regulations, make provision that is consequential on the Bill. Regulations must be made by statutory instrument. Where such regulations amend primary legislation, they are subject to the affirmative procedure. In all other cases, they are subject to the negative procedure.

Clause 4: Extent, commencement and short title

- 29 The Bill extends to England, Wales and Scotland and comes into force on the day it is passed.

Schedule: Consequential amendments

- 30 The concept of franchising is referenced throughout RA93. As the Bill implements a shift away from private sector franchising, towards operation of designated railway passenger services by public sector companies, the Schedule includes amendments to RA93 consequential on the Bill.

Commencement

- 31 The Act will come into force on the day it is passed.

Financial implications of the Bill

- 32 Transitioning provision of services to the public sector will result in a saving of fixed and performance-based management fees currently paid to private sector train operators. This could be £110m–£150m per annum once all franchised contracts have expired (anticipated by October 2027) with a proportion of these savings achieved each year in the interim as individual services transfer.
- 33 Whilst all services will transfer as their existing contracts end there are costs associated with the transfer from a private sector operator to a public sector company (mobilisation and due diligence costs) estimated at £1m to £1.5m per transaction. This is consistent with costs associated with transition following any competed franchise award.

Parliamentary approval for financial costs or for charges imposed

- 34 The Bill will require services currently provided by private sector franchisees to be provided instead by public sector companies. Financial assistance is currently provided by the Secretary of State, and it is likely that public sector companies would similarly need financial assistance. It is at least theoretically possible that the expenditure incurred will increase as a result.
- 35 The Bill also allows for franchises to be extended, and new franchises to be entered into, in certain limited circumstances. Exercising these powers may also involve expenditure, which will need to be met by the Secretary of State.
- 36 The House of Commons agreed a money resolution for the Bill on 29 July 2024.

Compatibility with the European Convention on Human Rights

- 37 Section 19 of the Human Rights Act 1998 requires the Minister in charge of a Bill in either House of Parliament to make a statement about the compatibility of the provisions of the Bill with the Convention rights (as defined in section 1 of that Act).
- 38 In the opinion of the Secretary of State for Transport, the provisions of the Bill are compatible with the Convention rights and she has made a statement to this effect. The Bill does not affect the terms or duration of existing franchise agreements, nor does it directly affect franchise assets. Rail franchises are by design “portable businesses” and so there a number of provisions in franchise agreements that seek to ensure assets funded by the appropriate franchising authority can be transferred to a successor at nil value. In a limited number of scenarios, a franchisee may have “self-funded” an asset. Where this is the case, there is a mechanism to compensate the outgoing franchisee. As, in those circumstances, the franchisee will be compensated for their assets, in accordance with the terms agreed by them in the franchise agreement, there is no “deprivation” within the meaning of Article 1 of Protocol 1 to the Convention. No other ECHR rights are relevant.

Statement under section 20 of the Environment Act 2021

- 39 Lord Hendy of Richmond Hill CBE, Minister of State for Rail is of the view that the Bill as brought from the House of Commons does not contain provision which, if enacted, would be environmental law for the purposes of section 20 of the Environment Act 2021. Accordingly, no statement under that section has been made.

Statement under section 13C of the European Union (Withdrawal) Act 2018

- 40 Lord Hendy of Richmond Hill CBE, Minister of State for Rail is of the view that the Bill as brought from the House of Lords does not contain provisions which, if enacted, would affect trade between Northern Ireland and the rest of the United Kingdom. Accordingly, no statement under section 13C of the European Union (Withdrawal) Act 2018 has been made.

Annex A – Territorial extent and application in the United Kingdom

Provision	England	Wales		Scotland		Northern Ireland	
	Extends to E & W and applies to England?	Extends to E & W and applies to Wales?	Legislative Consent Motion process engaged?	Extends and applies to Scotland?	Legislative Consent Motion process engaged?	Extends and applies to Northern Ireland?	Legislative Consent Motion process engaged?
Clause 1	Yes	Yes	Yes	Yes	Yes	No	No
Clause 2	Yes	Yes	Yes	Yes	Yes	No	No
Clause 3	Yes	Yes	Yes	Yes	Yes	No	No
Clause 4	Yes	Yes	Yes	Yes	Yes	No	No
Schedule	Yes	Yes	Yes	Yes	Yes	No	No

Subject matter and legislative competence of devolved legislatures

- 41 The main subject matter of the Bill is the provision of rail passenger services. However, the Bill also touches on procurement because of the modified application of the Public Service Obligations in Transport Regulations 2023. Under both the Scotland Act 1998 and the Government of Wales Act 2006, “railway services” constitute a reserved matter whereas procurement is a devolved matter. The provisions of the Bill which relate to procurement also relate to railway services and would therefore be outside the legislative competence of both the Scottish Parliament and the Senedd.
- 42 Although railway services are reserved, the Railways Act 1993 confers duties and powers on the Scottish and Welsh Ministers by making them the appropriate designating authority or the appropriate franchising authority of relevant services (see section 23 of the RA93).

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