

# Net Zero, Energy and Transport Committee

## 28<sup>th</sup> Meeting, 2023 (Session 6)

Tuesday, 3 October 2023

### UK subordinate legislation: consideration of consent notification

#### Introduction

1. This paper supports the Committee's consideration of a 'type 1' consent notification sent by the Scottish Government relating to the following proposed UK statutory instrument (SI)— Public Service Obligations in Transport Regulations 2023

#### Process for parliamentary scrutiny of consent notifications in relation to UK statutory instruments

2. The process for the Scottish Parliament's consideration of consent notifications is set out in a [Protocol on scrutiny by the Scottish Parliament of consent by Scottish Ministers to UK secondary legislation in devolved areas arising from EU Exit](#).

3. The Protocol provides for the Scottish Parliament to scrutinise the Scottish Government's decisions to consent to certain subordinate legislation made by the UK Government: specifically, UK Government subordinate legislation on matters within devolved competence in areas formerly governed by EU law. It sets out a proportionate scrutiny approach and categorises SI notifications as 'type 1' or 'type 2'.

4. Type 2 applies where all aspects of the proposed instrument are clearly technical (e.g., they merely update references in legislation that are no longer appropriate following EU exit) or do not involve a policy decision. These are notified retrospectively, after the Scottish Government has given its consent.

5. All other proposals are type 1. In this case, the Scottish Parliament's agreement is sought *before* the Scottish Government gives consent to the UK Government making subordinate legislation in this way. Each type 1 notification must be considered by the relevant Committee.

**6. The Committee's role in relation to type 1 notifications is to decide whether it agrees with the Scottish Government's proposal to consent to the UK**

## **Government making Regulations within devolved competence, in the manner that the UK Government has indicated to the Scottish Government.**

7. If Members are content for consent to be given, the Committee will write to the Scottish Government accordingly. The Committee may also wish to note any issues in its response or request that it be kept up to date on any relevant developments.

8. If the Committee is not content with the proposal, however, it may recommend that the Scottish Government should not give its consent (more detail on the options available to the Committee in relation to this particular notification is given below). In that event, the Scottish Ministers have 14 days under the Protocol to respond to the Committee's recommendation. They could—

- Agree. If so, the Scottish Ministers would then withhold their consent.
- Not agree. If so, Parliament will debate the issue.

9. If the Parliament agrees to the Committee's recommendation that the Scottish Ministers should not consent, the Protocol provides that the Scottish Ministers should "normally not consent" to the UKSI. However, the Protocol also provides that if the Scottish Ministers consider that the Committee's proposed alternative cannot be achieved, they may consent to the UK SI. If so, they must explain why they are doing so to the Scottish Parliament.

## **Public Service Obligations in Transport Regulations 2023**

10. On 8 September 2023, the Minister for Transport wrote to the Committee to notify the Scottish Government's proposal to consent to the UK SI. This correspondence is in **Annexe A**. The SI notification is available in **Annexe B** and the summary notification in **Annexe C**. The UK Government intends to lay the UK SI on **16 October**.

11. The Scottish Government has asked the Committee to respond to the consent notification by **6 October**.

12. These Regulations are made under section 14 of the Retained EU Law (Revocation and Reform) Act 2023. They will revoke EU regulation 1370/2007 on public passenger transport services by rail and by road ("R1370") and replace it with, as stated in the notification, "bespoke procurement and subsidy control rules in respect of public service obligations for rail and road transport services". The regulations contain a mix of devolved and reserved provision.

13. The SI notification states that the framework created by these regulations "largely mirrors R1370 in terms of its practical effect and accordingly maintains a process for creating public service obligations and awarding public service contracts for rail and road transport which is generally less onerous than the processes in place under general procurement law".

14. The SI Notification highlights that current EU law “...contains broad-ranging direct award powers in relation to public service contracts for rail, allowing such contracts to be awarded without a competition, when permitted by domestic law (which is principally found in the Railways Act 1993)”. It is worth noting that the 1993 Act, which provides the legislative basis for the current system of rail franchising in Great Britain, is due to be replaced. The UK Government announced the end of rail franchising [in September 2020](#) and set out plans for fundamental reform of the British rail industry in [Great British Railways: The Williams-Shapps Plan for Rail](#) in May 2021. This proposed a complete restructuring of the rail industry, the main changes being the replacement of the franchising system and the creation of Great British Railways (GBR) as a “guiding mind” for the industry. GBR will assume ownership of the rail infrastructure from Network Rail, collect fare revenue, plan the network, and set most fares and timetables. Passenger rail services will be provided by private operators delivering services specified by Government in management contracts. The implications of this for Scotland are not yet clear, although there is a general commitment in the paper that:

“The devolved authorities in Scotland and Wales have a range of devolved powers in relation to rail which they will continue to exercise, as will TfL [Transport for London] and other metropolitan authorities, in relation to rail and light rail in their areas.”

15. The “operator of last resort” powers being used to provide publicly owned ScotRail and Caledonian Sleeper, set out in the Railways Act 1993, are due to continue. It is currently unclear when the legislation required to introduce these changes will be laid in the UK Parliament and their possible implications for the provision of Scottish rail services.

## Next steps

16. If the Committee wishes to approve the proposal to consent to the SI, it may, in doing so, set out any observations or concerns in its letter to the Scottish Government that it thinks are relevant.

17. If the Committee is not content with the proposal, however, it may make one of the following recommendations—

- I. That the Scottish Government should not give its consent to the provision being made in a UK SI and that the Scottish Government should instead produce an alternative Scottish legislative solution<sup>1</sup>;
- II. That the Scottish Government should not consent to the provision being made in a UK SI laid solely in the UK Parliament and should instead request that the provision be included in a UK SI laid in both Parliaments under the joint procedure; or

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<sup>1</sup> Though note that the current proposal relates to both devolved and reserved areas so a Scottish legislative solution could only replicate some of this provision.

- III. That the provision should not be made at all (that is, that the Scottish Government should not consent to the provision being included in a UK SI, nor should the Scottish Government take forward an alternative Scottish legislative solution).

18. If the Committee recommends that the Scottish Government should not consent, it should write to the Scottish Government, setting out which of the options for non-consent (see above), reflects its view.

Clerks  
Net Zero, Energy and Transport Committee

**Annexe A: Correspondence from the Cabinet Secretary for Transport, Net Zero and Just Transition**

Edward Mountain MSP  
Convener  
Net Zero, Energy and Transport Committee  
Scottish Parliament  
*By email:* netzero.committee@parliament.scot

CC. UKSIs@parliament.scot

8 September 2023

Dear Convener

**The Public Service Obligations in Transport Regulations 2023  
EU EXIT LEGISLATION – PROTOCOL WITH SCOTTISH PARLIAMENT**

I am writing in relation to the protocol on obtaining the approval of the Scottish Parliament to proposals by the Scottish Ministers to consent to the making of UK secondary legislation affecting devolved areas arising from EU Exit.

That protocol, as agreed between the Scottish Government and then Parliament, accompanied the letter from the then Cabinet Secretary for Government Business and Constitutional Relations, Michael Russell MSP, to the Conveners of the Finance & Constitution and Delegated Powers and Law Reform Committees on 4 November 2020 and replaced the previous protocol that was put in place in 2018.

I attach a Type 1 notification which sets out the details of the SI which the UK Government propose to make and the reasons why I am content that Scottish devolved matters are to be included in this SI. Please note, we are yet to have sight of the final SI and they are not available in the public domain at this stage. We will, in accordance with the protocol, advise you when the final SI is laid and advise you as to whether the final SI is in keeping with the terms of this notification.

Extensive engagement has been required between the Scottish Government and the UK Government's Department for Transport to work through the proposed SI to ensure respect for devolution. Agreement was only reached on the final drafting points on 31 August 2023, and this has resulted in the notification being issued later than is ideal, and as a consequence will not provide the Committee with the 28 days required to consider a notification.

I am copying this letter to the Convener of the Delegated Powers and Law Reform Committee.

I look forward to hearing from you by 6 October 2023.

Yours sincerely

**FIONA HYSLOP**

**Annexe B: NOTIFICATION TO THE SCOTTISH PARLIAMENT****Name of the SI(s) (if known) or a title describing the policy area**

The Public Service Obligations in Transport Regulations 2023

**Is the notification Type 1 or Type 2**

Type 1

**A brief overview of the SI (including reserved provision)**

The Public Service Obligations in Transport Regulations 2023 (PSOTR) are included in the UK SI programme which forms part of the UK Government's Retained EU Law (Revocation and Reform) Act 2023 ("REUL Act") implementation and will revoke and replace EU Regulation 1370/2007 of the European Parliament and of the Council of 23 October 2007 on public passenger transport services by rail and by road ("R1370").

R1370 is directly applicable retained EU law which makes provision about the creation of public service obligations and the award and subsidy control treatment of public service contracts in relation to rail and road transport. It sets out sector-specific procurement and subsidy control rules, which are generally less onerous than the regimes applicable to other contracts for services or service concessions granted by contracting authorities under the Public Contracts (Scotland) Regulations 2015, Utilities Contracts (Scotland) Regulations 2016 and Concession Contracts (Scotland) Regulations 2016. R1370 relates to reserved matters (namely public service obligations in respect of rail and subsidy control) and devolved matters (namely public service obligations in respect of road transport).

PSOTR revokes R1370 and replaces it with bespoke procurement and subsidy control rules in respect of public service obligations for rail and road transport services. The framework created by PSOTR largely mirrors R1370 in terms of its practical effect and accordingly maintains a process for creating public service obligations and awarding public service contracts for rail and road transport which is generally less onerous than the processes in place under general procurement law.

Certain of the rail direct award powers under R1370 are due to expire on 25 December 2023 under a sunset provision in R1370. Part of the DfT's rationale for revoking and replacing R1370 is due to its wish, in particular, to reinstate the powers to make direct awards of rail public service contracts. This would in principle also enable the Scottish Government to continue to make direct awards in the same way that they can now. This is effectively a matter of reserved UKG policy since the process for awarding rail contracts is a reserved matter.

The effect of PSOTR largely mirrors R1370 and in awarding a public contract under the Public Contracts (Scotland) Regulations 2015 (based on EU Directives).

Officials are of the view that the provisions contained in the PSOTR would not negatively impact Scotland's alignment with the EU, with the possible exception of reserved rail matters. It may be necessary to consider this further in the event of constitutional change.

The PSOTR are made under sections 14(1) of the Retained EU Law (Revocation and Reform) Act 2023.

The PSOTR are planned to be laid on **16 October 2023**.

### **Details of the provisions that Scottish Ministers are being asked to consent to.**

The Scottish Ministers are being asked to consent to the provisions of the PSOTR which relate to public service obligations and contracts for road transport services since these are devolved matters.

As R1370 is being revoked and replaced on a UK basis and contains a mix of reserved and devolved provision, it is more practical and efficient for the revocation to be made on a UK wide basis.

### **Does the SI relate to a common framework or other scheme?**

No

### **Summary of stakeholder engagement/consultation**

The UK Government has consulted with all devolved administrations and has continued to engage with Transport Scotland over the SI.

### **A note of other impact assessments, (if available)**

The UK Government has not undertaken a full impact assessment on the basis that no significant impact is foreseen on the private, voluntary or public sector.

### **Summary of reasons for Scottish Ministers' proposing to consent to UK Ministers legislation**

The PSOTR will largely maintain in force the current rules in relation to public service obligations for rail and road passenger transport services under R1370, These include processes for the Scottish Ministers to award rail passenger contracts (subject to the provisions of the Railways Act 1993) and processes for local transport authorities to award concession contracts in respect of local bus services. Given that both R1370 and the PSOTR establish a legislative framework applying to devolved and reserved transport modes it is considered expedient to consent to the PSOTR being made on a UK basis. The Scottish Ministers are content that the policy reflected in the PSOTR, including the application of different procurement objectives in relation to contracts being awarded by Scottish contracting authorities, demonstrates respect for devolution.

Officials are of the view that the provisions contained in the PSOTR would not negatively impact Scotland's alignment with the EU, with the possible exception of reserved rail matters. R1370 currently contains broad-ranging direct award powers in relation to public service contracts for rail, allowing such contracts to be awarded without a

competition, when permitted by domestic law (which is principally found in the Railways Act 1993). These provisions are due to expire at EU level on 25 December 2023 under a sunset provision in R1370, but are being retained as a matter of domestic law in the PSOTR. This matter is reserved to the UK Parliament, though it may be necessary to consider this further in the event of constitutional change.

**Intended laying date (if known) of instruments likely to arise**

UK Government intends to lay the SI on 16 October 2023

**If the Scottish Parliament does not have 28 days to scrutinise Scottish Minister's proposal to consent, why not?**

Agreement was only reached on the final drafting points on 31 August 2023, and this has resulted in the notification being issued late, and as a consequence will not provide the Committee with the 28 days required to consider a notification.

**Information about any time dependency associated with the proposal**

PSOTR includes provisions to reinstate the powers to make direct awards of UK rail PSO contracts which are due to expire on 25 December 2023 under a sunset provision in R1370.

**Are there any broader governance issues in relation to this proposal, and how will these be regulated and monitored post-withdrawal?**

No

**Any significant financial implications?**

There are no significant financial implications.



**Annexe C: SI NOTIFICATION: SUMMARY**

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| <b>Title of Instrument</b>                               | Public Service Obligations in Transport Regulations 2023 (PSOTR Regulations)   |
| <b>Proposed laying date at Westminster</b>               | 16 October 2023  |
| <b>Date by which Committee has been asked to respond</b> | No later than 6 October 2023   |
| <b>Power(s) under which SI is to be made</b>             | The PSOTR are made under sections 14(1) of the Retained EU Law (Revocation and Reform) Act 2023.   |
| <b>Categorisation under SI Protocol</b>                  | Type 1   |
| <b>Purpose</b>   | <p>The PSOTR will revoke and replace existing EU Regulation 1370/2007 on public service obligations in the field of passenger transport ("R1370").</p> <p>The PSOTR will also make consequential amendment to primary legislation and secondary legislation.</p> |
| <b>Other information</b>                                 | N/A  |
| <b>SG Policy contact:</b>                                | Oi Hang Chu  |