

EXPLANATORY MEMORANDUM TO
THE MANDATORY TRAVEL CONCESSION (ENGLAND) (AMENDMENT)
REGULATIONS 2018

2018 No. 385

1. Introduction

- 1.1 This explanatory memorandum has been prepared by the Department for Transport and is laid before Parliament by Command of Her Majesty.

2. Purpose of the instrument

- 2.1 The Mandatory Travel Concession (England) (Amendment) Regulations 2018 (“the 2018 Regulations”) amend the Mandatory Travel Concession (England) Regulations 2011 (“the 2011 Regulations”) to remove the sunset clause following the outcome of the Post Implementation Review (“PIR”) in April 2016 required under the 2011 Regulations. Without the 2018 Regulations, the arrangements in the 2011 Regulations will cease to have effect on 12th May 2018. The 2011 Regulations maintain the existing framework for reimbursing bus operators participating in the English National Concessionary Travel Scheme (“ENCTS”), which guarantees off-peak free travel to older and eligible disabled people.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

- 3.1 None.

Other matters of interest to the House of Commons

- 3.2 As this instrument is subject to negative resolution procedure and has not been prayed against, consideration as to whether there are other matters of interest to the House of Commons does not arise at this stage.

4. Legislative Context

- 4.1 The 2018 Regulations will enable the reimbursement arrangements for the ENCTS established in the 2011 Regulations to continue in their current form. The provision of concessionary travel has been governed by legislation since the mid-1980s.
- 4.2 The Transport Act 1985 set out provisions relating to discretionary travel concessions including the reimbursement of bus operators. The Travel Concession Schemes Regulations 1986, S.I. No. 77, were made using powers in the Transport Act 1985 and provided further details about the calculation of reimbursement payments, including specifying that operators should be reimbursed on a 'no better and no worse off' basis.
- 4.3 The Transport Act 2000 set out provisions relating to the mandatory travel concession scheme outside London and the reimbursement of bus operators. This Act also introduced a national minimum half fare concession for people who had reached state retirement age and those with an eligible category of disability. In 2006, the concession was extended to provide free off-peak travel within the respective authority's boundaries.

- 4.4 The Concessionary Bus Travel Act 2007 (Variation of Reimbursement and Other Administrative Arrangements) Order 2010, S.I. No. 1179, moved responsibility for administering the concession from lower tier district councils to upper tier county councils.
- 4.5 The 2011 Regulations provide a framework for the reimbursement of bus operators participating in the concessionary fares scheme. They help to substantiate the "no better, no worse off" principle. They also allow Travel Concession Authorities ("TCAs") to request certain types of information from operators to calculate reimbursement rates more accurately. They introduced protections for operators, and realigned the balance of risk inherent in the appeals mechanism.
- 4.6 Regulation (EC) 1370/2007 (which replaced European Regulation No. 1191/69) has relevance for concessionary travel schemes as it sets out rules for the calculation of 'compensation' in order to ensure both over, and under, compensation are avoided. The Regulation was considered in a Judicial Review case in November 2009 brought by a number of operators, including Stagecoach and First Group, against the Secretary of State for Transport regarding the reimbursement of bus operators. The outcome of the case demonstrated that the legislative framework contained in the Transport Act 1985 and the Transport Act 2000 was compatible with the European Regulation.

5. Extent and Territorial Application

- 5.1 The extent of this instrument is England and Wales.
- 5.2 The territorial application of this instrument is England.

6. European Convention on Human Rights

- 6.1 As the instrument is subject to negative resolution procedure and does not amend primary legislation, no statement is required.

7. Policy background

What is being done and why

- 7.1 The ENCTS allows free off-peak local bus travel to older and eligible disabled people in England to ensure that no older or disabled person is prevented from travelling by bus by cost alone. There are currently over 9 million holders of these passes, with a cost of around £1 billion a year. These regulations will enable the ENCTS to continue in its current form.
- 7.2 The funding for concessionary fares is routed through local government departmental expenditure limits by formula grant¹. This is then used to reimburse operators carrying concessionary passengers on their services. Reimbursement is undertaken on the principle that bus operators should be financially no better off and no worse off as a result of taking part in the scheme. Reimbursement rates are calculated on an average fare basis and it is a matter for negotiation between the TCAs and bus operators. The Department for Transport is not party to the negotiations. However, the 2011 Regulations provide that if an operator disputes the reimbursement offered by a TCA it may appeal to the Secretary of State.

¹ Formula grant is the grant that is distributed to communities based on population numbers.

- 7.3 Before the 2011 Regulations, there was no legislation that detailed the principles of reimbursement arrangements between TCAs and bus operators. The 2011 Regulations set out procedural arrangements for statutory mandatory travel concession schemes under the Transport Act 2000. They clarify that the Secretary of State has the ability to review and adjust by lowering or raising the revenue reimbursement rates or additional cost payments being offered by TCAs when considering bus operator applications. They also improve other aspects of existing regulations, such as provisions enabling TCAs to request data for calculating average fares.
- 7.4 The 2011 Regulations included a sunset and review clause, introduced as part of the wider political scrutiny on regulations taking place at the time. These two clauses ensure that instruments are reviewed and the future of the instrument is considered to ensure that any unnecessary legislation is revoked and legislation which imposes a burden is regularly reviewed.
- 7.5 The Government made a renewed commitment in 2017's Conservative general election manifesto² to continue with the benefit of the free bus pass for older and disabled people. In order to ensure continued effective implementation of the scheme, robust mechanisms need to be in place to ensure concessionary passengers have access to operator services, and operators receive reimbursement accordingly. The continuation of the 2011 Regulations will continue to provide a method for challenge and testing the final decisions on reimbursement and give clarity.

Consolidation

- 7.6 Due to the small textual amendment to the 2011 Regulations, the Department for Transport does not intend to consolidate the 2011 and 2018 Regulations.

8. Consultation outcome

- 8.1 The 2018 Regulations do not amend substantively the 2011 Regulations. Therefore, a consultation has not been carried out for the 2018 Regulations. However, the 2018 Regulations are fulfilling the outcome of the PIR required to be undertaken by the 2011 Regulations. To complete the PIR, a small-scale survey of affected stakeholders was carried out to help the Department understand the effect of the legislation within both local authorities and the bus industry, and in particular to confirm that no significant unintended consequences or unforeseen burdens had been created. The exercise took the form of a discussion document circulated to local authorities and bus industry representatives, with responses through an online survey.
- 8.2 The Disabled Persons' Transport Advisory Committee, the Government's statutory advisors on transport for disabled people, were also invited to comment. However they advised that the 2011 Regulations had minimal impact on the experience of national concession bus permit holders and their input was not necessary.
- 8.3 Overall, there were 14 respondents to the online survey, out of around 95 organisations which were invited to participate. Of these:

eight were local authorities (five Unitary and three County Councils);
three were Passenger Transport Executives;
two were contractors for local authorities; and
one was a trade organisation.

² Page 66 of the manifesto at www.conservatives.com/manifesto.

Whilst respondents represented a cross-section of affected stakeholders, the sample size was relatively small. Both the quantitative and qualitative responses provided a useful indication of the effect of the 2011 Regulations, which has informed the overall assessment of their efficacy.

- 8.4 On the balance of evidence informing the PIR's conclusion, the 2011 Regulations received strong support, with its findings also supporting the PIR's objectives and rationale for intervention. The amendment of the 2011 Regulations will preserve the Regulations, removing the expiry date and not inserting any further requirement to review the Regulations' efficacy as no change to the policy is anticipated.
- 8.5 The PIR can be found at: <https://www.gov.uk/government/publications/mandatory-travel-concession-england-regulations-2011-post-implementation-review>.
- 8.6 It should be noted that the reimbursement guidance, which is the Department's preferred model for reimbursement calculations, was informed by an extensive programme of research by the Institute of Transport Studies. The views of representatives of local government and bus operators were also taken into account by the Department.

9. Guidance

- 9.1 Guidance on the Department's preferred reimbursement method is available at: <https://www.gov.uk/government/publications/guidance-on-reimbursing-bus-operators-for-concessionary-travel>, and is updated annually, most recently in September 2017. There is no statutory requirement to follow this guidance and operators and TCAs can decide to use a local version for the purpose of calculations.

10. Impact

- 10.1 There is no new impact envisaged with the amendment of the 2011 Regulations. The original impact assessment for the 2011 Regulations expected a small transition cost but after that only ongoing benefits. As all impacts were expected to be small anyway, it would not be proportionate to update that analysis and the Department has concluded that no further costs are likely from making the changes permanent. Therefore, since the scheme is continuing without change, an impact assessment for the 2018 Regulations is not deemed necessary. The impact assessment for the 2011 Regulations can be found at: <http://www.legislation.gov.uk/ukxi/2011/1121/impacts>.
- 10.2 There is no new impact expected on the private and voluntary sectors.
- 10.3 There is no new impact expected on the public sector.

11. Regulating small business

- 11.1 The instrument applies to activities that are undertaken by small businesses. However, as there will be no amendments to any requirements, restrictions or conditions in relation to business activity the instrument is regarded as a low impact measure.
- 11.2 The original impact assessment cited a small transition cost on business while the scheme was being first rolled out, as front-loaded costs were expected at the time. Following this only ongoing benefits were expected, and the impact on business very small.

12. Monitoring & review

- 12.1 The amendment of the 2011 Regulations engages section 28(1) of the Small Business, Enterprise and Employment Act 2015 and consideration of the duty to review the instrument which is being amended. The 2011 Regulations contained a one-off review clause which required the Secretary of State to review their operation after five years. The PIR was undertaken and published in April 2016.
- 12.2 Nusrat Ghani MP, Parliamentary Under Secretary of State for Transport, has made the following statement: “Having had regard to sections 28 to 32 of the Small Business, Enterprise and Employment Act 2015 and the Statutory Review Guidance for Departments published under section 31(3) of that Act, I have decided that it is not appropriate to make provision for further review of the Mandatory Travel Concession (England) Regulations 2011 in the Mandatory Travel Concession (England) (Amendment) Regulations 2018. A review of the 2011 Regulations would be disproportionate, taking into account the economic impact of the regulations and would be undesirable for the particular policy reasons set out below.”
- 12.3 Only a small number of those involved in the reimbursement arrangements expressed an interest and commented in the PIR. The PIR determined that there was strong support for the 2011 Regulations and the principles which underpinned the arrangements. Therefore, the PIR recommended that the 2011 Regulations should be renewed and continue without alteration or amendment. Given the positive response to the 2011 Regulations and the small number of participators in the PIR in 2016, it would be a disproportionate burden on TCA and operator time to undertake a further review.
- 12.4 Furthermore there has been a decline in the number of appeal applications received by the Department since the coming into force of the 2011 Regulations demonstrating that operators are content with the current arrangements for calculating reimbursements.

13. Contact

- 13.1 Hanan El Omrani at the Department for Transport, telephone: 07584 144 783 or email: Hanan.elomrani@dft.gsi.gov.uk can answer any queries regarding the instrument.