

EXPLANATORY MEMORANDUM TO

THE REGULATION (EC) NO 1370/2007 (PUBLIC SERVICE OBLIGATIONS IN TRANSPORT) (AMENDMENT) (EU EXIT) REGULATIONS 2020

2020 No. 504

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.
- 1.2 This memorandum contains information for the Joint Committee on Statutory Instruments.

2. Purpose of the instrument

- 2.1 The UK left the European Union on 31st January 2020. This instrument is required to ensure that the UK has a functioning statute book and will come in to force at the end of the transitional period
- 2.2 The European Union (Withdrawal) Act 2018 (the “EU Withdrawal Act”) will convert the text of directly applicable EU legislation into domestic instruments. This statutory instrument will “correct” retained EU law so that it functions correctly in Great Britain after the end of the transitional period, which is consistent with the withdrawal agreement. This instrument specifically ensures that the legislative framework for the award of Public Service Obligations (PSO) in transport (rail franchises and bus services concessions) will remain legally operable at the end of the transitional period, correcting deficiencies which will arise at the end of the transitional period and ensures that the rules around the direct award of PSO contracts continue to have effect in domestic law at and after the end of the transitional period. The amendments made to retained EU law by this instrument will apply in Great Britain only. Similar amendments applicable in Northern Ireland are expected to be made by Statutory Rules made by the Northern Ireland Executive.

Explanations

What did any relevant EU law do before Brexit?

- 2.3 Regulation 1370/2007¹ is a directly applicable EU Regulation that sets out the conditions under which “competent authorities” may award Public Service Obligation (PSO) contracts to bus operators and to train operating companies (TOCs) outside the general procurement and state aid rules applicable under EU and domestic law. Great Britain has a number of competent authorities who can award PSO contracts, including the Department for Transport and the devolved administrations in Scotland and Wales. PSO contracts covered by this Regulation include passenger rail franchises and bus services concessions.

¹ Regulation (EC) No 1370/2007 of the European Parliament and of the Council of 23 October 2007 on public passenger transport services by rail and by road and repealing Council Regulations (EEC) Nos 1191/69 and 1107/70 (O.J. No. L 315, 3.12.2007, p. 1, as amended by Regulation (EU) 2016/2338 of the European Parliament and of the Council of 14 December 2016 (O.J. No. L 354, 23.12.2016, p. 22)).

- 2.4 The general public procurement rules² do not apply to the award of these PSO contracts. Instead, Regulation 1370/2007 provides for PSO contracts to be awarded either following open competition or directly in some circumstances. Regulation 1370/2007 also allows a competent authority, or a group of competent authorities, to provide transport services “in-house”, or to jointly award PSO contracts to an external operator.
- 2.5 Regulation 1370/2007 provides rules for the award of PSO contracts, including specifying when and how they are competitively tendered and when, in certain circumstances, they can be directly awarded. Amendments made to Regulation 1370/2007 in 2016 by Regulation 2016/2338 (part of a wider legislative package aimed at promoting greater competition in the rail market) narrowed the circumstances where direct awards are permitted, but these revised provisions are only being brought into force gradually and so will only fully apply from 25 December 2023 (see below).
- 2.6 Regulation 1370/2007 also sets out the mandatory content of public service contracts, requiring the competent authority to clearly specify the public service obligations in the contract, and include transparent parameters for compensation of the operator to ensure that the operator will not be over-compensated. The duration of public service contracts awarded following a competition is generally limited to fifteen years for passenger transport services by rail or other track based modes and ten years for coach and bus services. The duration of directly awarded contracts (i.e. contracts awarded without a competition or full competition) is limited to 10 years under the transitional rules applying through to 2023. A longer term is allowed for competitively awarded contracts, where the operator provides significant assets for the services, where exceptional capital investment justifies this, or to reflect the particular geographical situation in which the services operate. In respect of rail, the Regulation also encourages effective and non-discriminatory access to rail rolling stock for all TOCs.
- 2.7 Regulation 1370/2007 provides that when a contract is re-let relevant transfers of staff between operators will be subject to the usual employment law protections (under Directive 2001/23/EC), which have been implemented in domestic law by the Transfer of Undertakings (Protection of Employment) Regulations 2006.
- 2.8 Regulation 1370/2007, as amended by Regulation 2016/2338, contains phased transitional provisions concerning the use of direct award PSO contracts. Under Article 8 of the Regulation, as so amended, the wide power to make direct awards under Article 5(6) will remain in force until 25 December 2023. From that date onwards direct awards will only be possible where they meet the requirements in Article 5(3a), (4), (4a), (4b), or (5), as set out in the amended version of Regulation 1370/2007.
- 2.9 Cases where direct awards will be able to be made under these provisions include exceptional circumstances where the number of other competitions already being run would be likely to affect the quality of bids for a further competition or where, exceptionally, changes are needed to the scope of one or more contracts to optimise the provision of services; in these cases, the award can be for no more than 5 years. Direct awards will also be permitted, without an upper time limit, where the aggregate

² Public sector contracts not covered by Regulation 1370/2007 are subject to the general public procurement rules: The Utilities Contracts Regulations 2016 and Utilities Contracts (Scotland) Regulations 2016; the Public Contracts Regulations 2015 and Public Contracts (Scotland) Regulations 2015; and the Concession Contracts Regulations 2016 and Concession Contracts (Scotland) Regulations 2016.

value or geographical coverage of the relevant PSO falls below certain thresholds. They will also be able to be granted, for up to 10 years, for certain local, regional and suburban networks (e.g. metros) or where a direct award can be justified by relevant structural and geographical characteristics of the market (such as size and demand factors, network complexity, technical or geographic isolation or the services covered by the contract) or where it can be shown that a direct award would result in an improvement in quality of services or cost or efficiency. Direct awards can also be granted, for 2 years only, in emergency cases where there is a disruption of services or an immediate risk of disruption.

Why is it being changed?

- 2.10 Regulation 1370/2007 will be retained as direct EU legislation by section 3 of the EU Withdrawal Act but will contain technical deficiencies that prevent it from operating effectively. The Regulation confers functions in relation to the Commission, which will no longer have those functions in relation to the United Kingdom; it provides for the provision of information to EU entities and its publication in the Official Journal of the EU, which will no longer be appropriate or possible; and it contains inappropriate references to Member States, to EU institutions and to amounts in Euros. This instrument corrects these technical deficiencies to ensure the rules for the award of PSO contracts continue to be clear at and after the end of the transitional period, providing certainty for affected businesses and passengers.

What will it now do?

- 2.11 The amendments made by this instrument will enable the legal framework for Great Britain's rail and bus franchising programme to continue to operate as expected, maintaining the status quo and ensuring certainty for affected businesses and passengers. It will also allow for the effective franchising of bus services in England outside London under existing powers in the Transport Act 2000 as amended by the Bus Services Act 2017. Further information on franchising bus services in England is detailed below.
- 2.12 The existing transitional provisions in Article 8 of Regulation 1370/2007 will be retained into domestic law by section 3 of the EU Withdrawal Act. These provide for the phased implementation of the Article 5 requirements, with gradual changes to the limits on use of the direct award power; competent authorities will therefore continue to be able to make awards as was expected under the EU legislation, also ensuring legal certainty for the industry.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

- 3.1 This instrument was presented to the Sifting Committees for consideration on 16th March 2020. The Sifting Committees reviewed this instrument and agreed that it should remain subject to negative resolution procedure.
- 3.2 Regulation 1370/2007 will be saved as retained EU law at the end of the transitional period by section 3 of the EU Withdrawal Act (as amended by section 25 of the European Union (Withdrawal Agreement) Act 2020) but will contain technical deficiencies and inappropriate references to EU institutions. The amendments made by this instrument remove deficiencies in Regulation 1370/2007 and preserve the legislative framework for the award of PSO contracts under EU law in which the

transport industry operates. This instrument maintains the status quo, so that the franchising of railway and bus services can continue as expected after the transitional period. This instrument seeks to continue with business as usual and ensure rail and bus services continue unaffected at and after the end of the transitional period.

- 3.3 This instrument is an amended version of a draft instrument, with the same title, laid for sifting by the Sifting Committees on 28 January 2019. That draft instrument was approved to be made as a negative instrument by the Sifting Committees on 28 January 2019 but was not finally ‘made’ into law as it contained cross-references to another draft instrument. The other instrument dealt with state aid in the event of the UK exiting the EU without a deal, which was not subsequently required, making those cross-references deficient.
- 3.4 This instrument differs from the version laid for sifting on 28 January 2019 in three respects. First, it no longer deals with the references to state aid which appear in Regulation 1370/2007. Any deficiencies in these cross-references will now be dealt with separately. Second, it no longer includes a specific saving provision for Article 5. This saving provision was required at the time of sifting because Article 5 which relates to direct awards, unlike the rest of the Regulation, did not technically apply until 3 December 2019, after the then anticipated date of the UK’s exit from the EU. The saving provision was included to ensure that this provision, which is integral to the Regulation as a whole, and important for the smooth operation of rail franchising in the UK, became retained EU law as the UK left the European Union alongside the rest of the Regulation; since 3 December 2019, the saving provision has been unnecessary. Third, the instrument laid on 28 January 2019 applied to the whole of the United Kingdom, whereas this instrument applies only to Great Britain. This is because, following the reconvening of the Northern Ireland Assembly, the Northern Ireland Executive has indicated that it wishes to legislate separately in relation to Regulation 1370/2007, which is a devolved matter in Northern Ireland.
- 3.5 This instrument does not make any changes to Article 5(7) of Regulation 1370/2007. When Regulation 1370/2007 came into force the Government considered that no action was required to implement Article 5(7) as review of a franchising decision was already available by way of judicial review. A judicial decision given in the course of recent litigation has indicated that franchising decisions may also be subject to legal challenge through private law mechanisms³. The Government is considering how to respond to this decision and does not consider that it is appropriate to amend this provision of Regulation 1370/2007 until the point has been adequately considered and any necessary consultation carried out. In the meantime, there is no doubt that the UK does provide an effective and rapid means of review of franchising decisions as required by Article 5(7).
- 3.6 Apart from the changes referred to in paragraph 3.4, this instrument is identical to the draft instrument laid for sifting on 28 January 2019 and approved to be made as a negative instrument, save in minor respects (e.g. the substitution of references to the “IP completion date” for references to “exit day”). Provisions in relation to which consent has been sought have not changed in substance. Consent for the previous version of this instrument was received without comment.

³ Secretary of State for Transport v Arriva Rail East Midlands Ltd; Secretary of State for Transport v Stagecoach East Midlands Trains Ltd; Department for Transport v West Coast Trains Partnership Ltd; Secretary of State for Transport v Stagecoach South Eastern Trains Ltd and others. [2019] EWCA Civ 2259.

- 3.7 The provisions in this instrument relating to bus services are a devolved matter in Scotland and Wales. The Scottish and Welsh Governments and the Northern Ireland Executive have been consulted on the contents of this instrument: the Welsh Government has consented to its being made; the Scottish Government has confirmed that, given the similarities between this instrument and the previously sifted instrument, referred to in paragraph 3.2, no further consent is required; and the Northern Ireland Executive has indicated that it will legislate separately for Northern Ireland.

Matters relevant to Standing Orders Nos. 83P and 83T of the Standing Orders of the House of Commons relating to Public Business (English Votes for English Laws)

- 3.8 As the instrument is subject to negative resolution procedure there are no matters relevant to Standing Orders Nos. 83P and 83T of the Standing Orders of the House of Commons relating to Public Business at this stage.

4. Extent and Territorial Application

- 4.1 The territorial extent of this instrument is England and Wales, and Scotland.
- 4.2 The territorial application of this instrument is England and Wales, and Scotland.
- 4.3 This instrument updates cross-references to EU Directives, referring instead where appropriate to relevant domestic regulations for England and Wales and for Scotland, including Scottish Statutory Instruments, without amending them.

5. European Convention on Human Rights

- 5.1 The Parliamentary Under Secretary of State for Transport, Rachel Maclean MP, has made the following statement regarding Human Rights:

“In my view the provisions of the Regulation (EC) No 1370/2007 (Public Service Obligations in Transport) (Amendment) (EU Exit) Regulations 2020 are compatible with the Convention rights.”

6. Legislative Context

- 6.1 This instrument is made in exercise of powers in section 8 of and paragraph 21 of Schedule 7 to the EU Withdrawal Act. It will make minor and technical amendments to address deficiencies arising from the withdrawal of the UK from the European Union, and make further transitional and savings provisions to ensure the legislation operates effectively at the end of the transitional period.
- 6.2 The EU Withdrawal Act makes provision for repealing the European Communities Act 1972 (the “ECA 1972”) and, as amended by the European Union (Withdrawal Agreement) Act 2020 will preserve EU law as it stands at the end of the transitional period, converting this into UK law. It enables the creation of a new body of domestic legislation by converting the text of directly applicable EU legislation into domestic instruments, as well as saving EU-derived domestic legislation which was made to implement the UK’s obligations as an EU Member State.
- 6.3 The EU Withdrawal Act also contains powers to make secondary legislation to enable Ministers and the devolved administrations to fix deficiencies in retained EU law, to ensure that the UK’s legal system continues to function properly outside of the EU.

- 6.4 Regulation 1370/2007 applies to the award of PSO contracts for rail passenger services, and to bus concession services; other bus services contracts are awarded in accordance with the Public Contracts Regulations 2015⁴ and the Public Contracts (Scotland) Regulations 2015⁵.
- 6.5 Regulation 1370/2007 was amended by Regulation 2016/2338, with effect from 24 December 2017. Those amendments were part of the “Fourth Railway Package” the latest package in a wider programme of EU rail legislation since the 1990s aimed at opening the EU rail market to competition. Each package of measures, starting with the First Railway Package, was aimed at progressively liberalising EU rail markets by setting harmonised rules in relation to the allocation of track access and charging and seeking to eliminate potential discrimination in these areas and providing freight and passenger access rights. The packages also harmonised standards, for example in relation to safety, passenger rights, technical standards and licensing. Regulation 1370/2007 was part of the Third Railway Package.
- 6.6 The Fourth Railway Package was made up of various items of EU legislation covering both rail markets (referred to in the EU as the “Market Pillar”) and safety and technical standards (the “Technical Pillar”). Regulation EU 2016/2338 forms part of the Market Pillar, with the aim of promoting a greater use of competitive processes for letting PSO contracts.

7. Policy background

What is being done and why?

- 7.1 This instrument will maintain the status quo, so that the award of PSO contracts can continue as now after the end of the transitional period, either through competitive tendering or by way of a direct award where appropriate, thereby providing certainty and clarity to affected businesses and passengers. This instrument will not expand powers to award PSO contracts nor will it alter who can bid for a PSO contract or the processes used in the bidding process.
- 7.2 In Great Britain, mainline passenger rail and bus services are largely provided by private companies (for rail, train operating companies or TOCs). The majority of rail passenger services are provided under franchise agreements between TOCs and Government that are awarded following a competitive process. Government leads on setting requirements for train services and quality measures, and holds competitions that reward bidders for committing to investment, supporting and developing the business and its people. Bus franchises delivering for passengers are, as far as the Department is aware, not awarded in practice on a basis that falls outside the scope of Regulation 1370/2007 and so are awarded under domestic procurement legislation. So, while Regulation 1370/2007 applies to rail and buses, in practical terms bus services are currently not impacted by this instrument.
- 7.3 TOCs work within contracted requirements on services and fares, designing and delivering a commercial business. They are responsible for serving their customers, delivering contracted commitments, leasing trains and employing staff. Collectively, they return around 97p of every £1 from ticket fares back into running and improving

4 <http://www.legislation.gov.uk/ukxi/2015/102/contents/made>

5 <http://www.legislation.gov.uk/gsi/2015/446/contents>

services. TOCs agree to operate the services Government requires, charge fares to passengers and pay a premium to Government (or in a small number of cases receive a net subsidy). The system of rail franchising, as well as the broader operation of the railway system is currently being considered in the Williams Rail Review, a root and branch review of the rail sector so it works more effectively for passengers and freight. Notwithstanding this review this instrument remains necessary to continue to operate the railway sector before any broader reforms can be made.

- 7.4 The Scottish Government, via Transport Scotland, is the franchising authority for the ScotRail and Caledonian Sleeper franchises and specifies its own criteria for those franchises.
- 7.5 The Welsh Government is the franchising authority for the Wales & Borders franchise.
- 7.6 There are also operating concessions let by Transport for London and Merseyrail.
- 7.7 As regards buses, the Transport Act 1985 deregulated the bus market in Great Britain outside London. Since then the majority of local bus services in England outside London and in Wales and Scotland have been operated on a commercial basis by private sector bus operators although local authorities do have powers under that Act to contract with local bus operators to provide services that they consider ‘socially necessary’ but which are not commercially viable.
- 7.8 The Bus Services Act 2017 now allows local transport authorities in England outside London to reregulate the bus market in their area and award franchises to private sector bus operators on a commercial basis. There are two contract models – the first is a ‘gross cost contract’ which simply involves the local authority paying a fixed fee to the operator of the service, with the local authority retaining all the revenue – and therefore accepting all the risk. This arrangement falls outside the provisions of Regulation 1370/2007, the contracts instead being awarded in accordance with domestic procurement legislation. However, there is also a second model the ‘net cost contract’ under which the operator retains all the income and receives a fixed fee from the local authority. In this type of contract, the risk is shared and so would fall within the PSO provisions of Regulation 1370/2007 (such a contract would be a “service concessions contract” so that the award provisions of Article 5 of 1370/2007 would apply to it). The London bus market remains regulated and its bus services are operated under contract to Transport for London by private sector bus companies. Those contracts are issued on a ‘gross cost’ basis.
- 7.9 This instrument removes obligations on competent authorities to provide information to the Commission, as this will be inappropriate at the end of the transitional period.

8. European Union (Withdrawal) Act/Withdrawal of the United Kingdom from the European Union

- 8.1 This instrument is being made using the powers in section 8 and paragraph 21 of Schedule 7 to the EU Withdrawal Act in order to address failures of retained EU law to operate effectively or other deficiencies arising from the withdrawal of the UK from the EU. In accordance with the requirements of the Act, the Minister has made the relevant statements as detailed in Annex 1 part 2 of this explanatory memorandum.

9. Consolidation

- 9.1 There are currently no plans to consolidate the legislation amended by this instrument.

10. Consultation outcome

- 10.1 The Department for Transport conducted a public consultation⁶ from 24th April 2018 to 8th June 2018. Stakeholders from within the rail sector were also consulted informally prior to the publication of the consultation. The consultation did not include buses as the Department was not aware of any PSO concessions awarded to bus operating companies in Great Britain within the meaning of the Regulation 1370/2007.
- 10.2 Part 1 of the consultation sought views and opinions on separate but related proposals to implement Directive (EU) 2016/2370, the Market Pillar Directive of the Fourth Railway package, in the UK. The Market Pillar Directive, introduced new rules on the independence and impartiality of infrastructure requirements, states the principle of open access and, as with Regulations 1370/2007 and 2016/2338, aims to improve competition on the railways. The Market Pillar Directive was implemented in January 2019 by means of the Railways (Access, Management and Licensing of Railway Undertakings) (Amendment) Regulations 2019 (S.I 2019/82)⁷.
- 10.3 Part 2 of the consultation asked stakeholders for their views on the minor and technical amendments we would need to make to our EU rail markets legislation, including Regulation 1370/2007, to ensure it continued to function effectively should the UK leave the EU without a withdrawal agreement.
- 10.4 The Consultation set out the Department's proposed general approach to making these amendments via three rail markets Brexit SIs including an SI to make corrections to EU Regulation 1370/2007 (this instrument).
- 10.5 Five responses were received to Part 2 of the consultation. Responses did not highlight any specific issues but did highlight the difficulty in identifying impacts on our EU rail markets legislation as a result of leaving the EU without further information on wider impacts of the UK leaving the EU.
- 10.6 In addition to the consultation, officials from the Department held regular meetings with colleagues from the Scottish and Welsh Governments to consider the issues raised in the consultation document in further detail. While rail policy is devolved to Northern Ireland, Department officials also met regularly with officials from the Northern Ireland Executive to ensure consistency of approach with appropriate Northern Ireland regulations that would also be needed to deal with the same issues as they arise in Northern Ireland legislation.
- 10.7 To complement the consultation and to ensure that we identified all the issues for our EU rail markets legislation that could arise from our exit from the EU, the Department held two working groups of stakeholders to consider Brexit and rail markets in more detail. Those invited included passenger and freight operators, providers of cross-border services, industry representatives, the Devolved Administrations and infrastructure managers. These working groups enabled a more detailed discussion on possible impacts of Brexit and enabled the Department to test our thinking and share proposed amendments to our EU rail markets legislation.
- 10.8 As the policy in this instrument has developed, we have shared documents and held regular discussions with key stakeholders including colleagues from the Scottish and

⁶ <https://www.gov.uk/government/consultations/rail-markets-implementing-the-market-pillar>

⁷ <http://www.legislation.gov.uk/ukSI/2019/82/made>

Welsh Government and officials from the Northern Ireland Executive and industry representatives.

10.9 The Government response⁸ to the consultation was published on 21st January 2019.

10.10 Throughout these consultations no specific concerns were expressed about the proposed approach adopted in this instrument.

11. Guidance

11.1 As this instrument will maintain the UK's current framework for the award of PSO contracts in order to provide certainty, and the amendments are minor and technical in nature, the Department is not producing guidance on the amendments provided for in this instrument.

12. Impact

12.1 There is no impact on business, charities or voluntary bodies.

12.2 There is no impact on the public sector.

12.3 An Impact Assessment has not been prepared for this instrument

12.4 There are no costs or benefits to business or the public sector as this instrument makes the minimum legal changes necessary to continue the status quo in rail market franchising. No policy changes are being made. The impact on business will therefore be less than +/- £5 million.

13. Regulating small business

13.1 This instrument has no significant effect on activities that are undertaken by small businesses.

14. Monitoring & review

14.1 As this instrument is made under the EU Withdrawal Act, no review clause is required.

15. Contact

15.1 Selene Wilson telephone: 07977 421 151 or email: selene.wilson@dft.gov.uk or Helen Robinson telephone 07977 419 033 or email helen.robinson@dft.gov.uk at the Department for Transport, can be contacted with any queries regarding this instrument.

15.2 Dan Moore, Director of Rail Strategy and Analysis at the Department for Transport can confirm that this Explanatory Memorandum meets the required standard.

15.3 The Parliamentary Under Secretary of State for Transport, Rachel Maclean MP, can confirm that this Explanatory Memorandum meets the required standard.

⁸ <https://www.gov.uk/government/consultations/rail-markets-implementing-the-market-pillar>

Annex

Statements under the European Union (Withdrawal) Act 2018

Part 1

Table of Statements under the 2018 Act

This table sets out the statements that may be required under the 2018 Act.

Statement	Where the requirement sits	To whom it applies	What it requires
Sifting	Paragraphs 3(3), 3(7) and 17(3) and 17(7) of Schedule 7	Ministers of the Crown exercising sections 8(1), 9 and 23(1) to make a Negative SI	Explain why the instrument should be subject to the negative procedure and, if applicable, why they disagree with the recommendation(s) of the SLSC/Sifting Committees
Appropriate-ness	Sub-paragraph (2) of paragraph 28, Schedule 7	Ministers of the Crown exercising sections 8(1), 9 and 23(1) or jointly exercising powers in Schedule 2	A statement that the SI does no more than is appropriate.
Good Reasons	Sub-paragraph (3) of paragraph 28, Schedule 7	Ministers of the Crown exercising sections 8(1), 9 and 23(1) or jointly exercising powers in Schedule 2	Explain the good reasons for making the instrument and that what is being done is a reasonable course of action.
Equalities	Sub-paragraphs (4) and (5) of paragraph 28, Schedule 7	Ministers of the Crown exercising sections 8(1), 9 and 23(1) or jointly exercising powers in Schedule 2	Explain what, if any, amendment, repeals or revocations are being made to the Equalities Acts 2006 and 2010 and legislation made under them. State that the Minister has had due regard to the need to eliminate discrimination and other conduct prohibited under the Equality Act 2010.
Explanations	Sub-paragraph (6) of paragraph 28, Schedule 7	Ministers of the Crown exercising sections 8(1), 9 and 23(1) or jointly exercising powers in Schedule 2 In addition to the statutory obligation the Government has made a political commitment to include these statements alongside all EUWA SIs	Explain the instrument, identify the relevant law before exit day, explain the instrument's effect on retained EU law and give information about the purpose of the instrument, e.g., whether minor or technical changes only are intended to the EU retained law.

Criminal offences	Sub-paragraphs (3) and (7) of paragraph 28, Schedule 7	Ministers of the Crown exercising sections 8(1), 9, and 23(1) or jointly exercising powers in Schedule 2 to create a criminal offence	Set out the ‘good reasons’ for creating a criminal offence, and the penalty attached.
Sub-delegation	Paragraph 30, Schedule 7	Ministers of the Crown exercising sections 10(1), 12 and part 1 of Schedule 4 to create a legislative power exercisable not by a Minister of the Crown or a Devolved Authority by Statutory Instrument.	State why it is appropriate to create such a sub-delegated power.
Urgency	Paragraph 34, Schedule 7	Ministers of the Crown using the urgent procedure in paragraphs 4 or 14, Schedule 7.	Statement of the reasons for the Minister’s opinion that the SI is urgent.
Explanations where amending regulations under 2(2) ECA 1972	Paragraph 13, Schedule 8	Anybody making an SI after exit day under powers outside the European Union (Withdrawal) Act 2018 which modifies subordinate legislation made under s. 2(2) ECA	Statement explaining the good reasons for modifying the instrument made under s. 2(2) ECA, identifying the relevant law before exit day, and explaining the instrument’s effect on retained EU law.
Scrutiny statement where amending regulations under 2(2) ECA 1972	Paragraph 16, Schedule 8	Anybody making an SI after exit day under powers outside the European Union (Withdrawal) Act 2018 which modifies subordinate legislation made under s. 2(2) ECA	Statement setting out: a) the steps which the relevant authority has taken to make the draft instrument published in accordance with paragraph 16(2), Schedule 8 available to each House of Parliament, b) containing information about the relevant authority’s response to— (i) any recommendations made by a committee of either House of Parliament about the published draft instrument, and (ii) any other representations made to the relevant authority about the published draft instrument, and, c) containing any other information that the relevant authority considers appropriate in relation to the scrutiny of the instrument or draft instrument which is to be laid.

Part 2

Statements required when using enabling powers under the European Union (Withdrawal) 2018 Act

1. Sifting Statement

- 1.1 The Parliamentary Under Secretary of State for Transport, Rachel Maclean MP, has made the following statement regarding use of legislative powers in the European Union (Withdrawal) Act 2018:

“In my view the Regulation (EC) No 1370/2007 (Public Service Obligations in Transport) (Amendment) (EU Exit) Regulations 2020 should be subject to annulment in pursuance of a resolution of either House of Parliament (i.e. the negative procedure)”.

- 1.2 This is the case for the reason that at the end of the transitional period, Regulation 1370/2007 will be saved as direct EU legislation by section 3 of the European Union (Withdrawal) Act 2018, but will contain technical deficiencies and inappropriate references to EU institutions. This instrument corrects these technical deficiencies. This instrument is designed to maintain the status quo, so that the franchising of railway and bus services can continue as expected at the end of the transitional period. Whilst the practice of directly awarding contracts to train operators has been the subject of past Parliamentary criticism, and there has been debate and criticism of franchising in Parliament, the provision does not expand powers to directly award franchises. Such arguments should not have an impact on this SI because the SI itself is not controversial. It merely seeks to continue with business as usual and ensure rail and bus services continue unaffected at the end on the transitional period.

2. Appropriateness statement

- 2.1 The Parliamentary Under Secretary of State for Transport, Rachel Maclean MP, has made the following statement regarding use of legislative powers in the European Union (Withdrawal) Act 2018:

“In my view the Regulation (EC) No 1370/2007 (Public Service Obligations in Transport) (Amendment) (EU Exit) Regulations 2020 do no more than is appropriate.”

- 2.2 This is the case because this instrument only makes the necessary corrections to deficiencies in the retained legislation to allow it to operate effectively at the end of the transitional period. It will make no policy changes.

3. Good Reasons

- 3.1 The Parliamentary Under Secretary of State for Transport, Rachel Maclean MP, has made the following statement regarding use of legislative powers in the European Union (Withdrawal) Act 2018:

“In my view there are good reasons for the provisions in this instrument, and I have concluded they are a reasonable course of action”.

- 3.2 These good reasons ensure the complex rail franchising programme in Great Britain continues with a minimum of disruption at the end of the transitional period. For this

to happen, technical deficiencies in the relevant retained EU legislation must be corrected using this instrument.

4. Equalities

4.1 The Parliamentary Under Secretary of State for Transport, Rachel Maclean MP, has made the following statement regarding use of legislative powers in the European Union (Withdrawal) Act 2018:

“This instrument does not amend, repeal or revoke a provision or provisions in the Equality Act 2006 or the Equality Act 2010 or subordinate legislation made under those Acts.”

4.2 The Parliamentary Under Secretary of State for Transport, Rachel Maclean MP, has made the following statement regarding use of legislative powers in the European Union (Withdrawal) Act 2018:

“In relation to this instrument, I, Rachel Maclean MP have had due regard to the need to eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under the Equality Act 2010.”

4.3 This instrument does not impact upon equality between persons under the 2010 Act. It preserves provisions ensuring fairness and preventing discrimination by competent authorities against rail operators bidding for public service obligation contracts.

5. Explanations

5.1 The explanations statement has been made in section 2 of the main body of this explanatory memorandum.