

EXPLANATORY MEMORANDUM TO

THE TRANSPORT ACT 1985 (AMENDMENT) REGULATIONS 2019

2019 No. 572

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 These Regulations amend the provisions in the Transport Act 1985 (“the 1985 Act”) that enable not-for-profit organisations to operate a vehicle carrying more than 8 passengers under a permit rather than a Public Service Vehicle (“PSV”) operator’s licence. The 1985 Act is amended to make clear that a permit can only be applied for and held by an organisation that is exempt from the directly applicable EU Regulation setting out the PSV operator licensing requirements. These Regulations also give effect to an exemption that is available to Member States to exempt, from all or some of the requirements of the EU Regulation, national transport operations only having a minor impact on the transport market because of the short distances involved.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

- 3.1 None.

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)

- 3.2 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 Great Britain.
4.2 The territorial application of this instrument is Great Britain.

5. European Convention on Human Rights

- 5.1 Nusrat Ghani, Parliamentary Under Secretary of State for Transport, has made the following statement regarding Human Rights:

“In my view the provisions of the Transport Act 1985 (Amendment) Regulations 2019 are compatible with the Convention rights.”

6. Legislative Context

- 6.1 These Regulations are being made to fully align and clarify the relationship between EU Regulation 1071/2009 (“the EU Regulation”)¹ establishing the licensing requirements for operators of road transport services and sections 18 to 23 of the 1985 Act that enable not-for-profit organisations to operate road passenger transport services without a PSV operator’s licence, as would otherwise be required by section 12 of the Public Passenger Vehicles Act 1981 (“the 1981 Act”). These Regulations also make available to not-for-profit organisations a new exemption allowed by the EU Regulation for national transport operations that have a minor impact on the transport market because of the short distances involved.
- 6.2 The EU Regulation came into force in December 2011 and is directly applicable. In Great Britain all operators to whom the EU Regulation applies must hold a PSV operator’s licence issued pursuant to the 1981 Act. Section 18 of the 1985 Act exempts any vehicle used under a permit granted under section 19 or section 22 of the 1985 Act, from the requirement under section 12 of the 1981 Act to hold a PSV operator’s licence. This enables not-for-profit organisations to run passenger transport services under a permit.
- 6.3 The EU Regulation provides exemptions for operators engaged in road passenger transport services exclusively for non-commercial purposes or that have a main occupation other than that of road passenger transport operator, which do not require domestic implementation. By contrast, the short distance exemption requires implementation by Member States.
- 6.4 When the EU Regulation came into force, the 1985 Act was not amended to clarify that only organisations that meet one of the exemptions from the EU Regulation are eligible to apply for and hold a permit. In addition, the exemption allowing Member States to exclude national transport operations with a minor impact on the transport market because of the short distances involved was not implemented.

7. Policy background

What is being done and why?

- 7.1 The section 19 and 22 permits system was designed to recognise the value of not-for-profit organisations that provide services of social/charitable benefit where their profit-making counterparts would not, often in relation to isolated or vulnerable people. The UK is unique among European Countries in the range and scope of such services provided.
- 7.2 When the EU Regulation was negotiated, the Government’s view was that community transport operators would fall under the exemption for operators engaged in road passenger transport exclusively for 'non-commercial' purposes. This was on the basis that 'not-for-profit' equated to 'non-commercial'. However, this position has been challenged by some commercial operators. They have raised objections that permit holders are competing unfairly as they are not subject to the same regulatory requirements as PSV licence holders and so benefit from lower costs.
- 7.3 Following an investigation by the Driver and Vehicle Standards Agency, the Government recognised that the assumption that any organisation meeting the ‘not-

¹ Regulation (EC) No1071/2009 establishing common rules concerning the conditions to be complied with to pursue the occupation of road transport operator and repealing Council Directive 96/26/EC.

for-profit' requirements of the permit system was exempt from the EU Regulation was no longer sustainable. Instead the Government acknowledged that this needed to be determined on a case by case basis. In July 2017, the Department for Transport wrote to permit issuers explaining this and stating that it would consult on the issue.

- 7.4 As part of determining the best approach to clarify how the EU Regulation fits with the domestic permit regime, the Department considered relying on a code of conduct or just issuing guidance. However, these approaches would not have provided the legal clarity needed or given effect to the short distance exemption. For these reasons making legislation, as well as issuing guidance, was the option that was consulted on.
- 7.5 There has been significant Parliamentary interest in the Department's position on community transport since the July 2017 letter was issued. The Transport Select Committee published its report on "Community transport and the Department for Transport's proposed consultation" on 11 December 2017 and a Westminster Hall debate on the report was held on 10 May 2018.

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

- 8.1 This instrument does not relate to withdrawal from the European Union / trigger the statement requirements under the European Union (Withdrawal) Act.

9. Consolidation

- 9.1 Consolidation is unnecessary because these Regulations amend the 1985 Act.

10. Consultation outcome

- 10.1 The Government's "Consultation on the use of section 19 and section 22 permits for road passenger transport in Great Britain" ran for 12 weeks from 8 February to 4 May 2018. The consultation sought views on:
- amending the 1985 Act to provide greater legal certainty as to how it fits with the EU Regulation;
 - implementing the exemption for national transport operations with a minor impact on the market because of the short distances involved; and
 - draft guidance as to the interpretation of the exemptions from the EU Regulation.
- 10.2 Nearly 500 consultation responses were received, and over 550 people attended workshops held across Great Britain during the consultation period. Views were received from a wide range of stakeholders including permit-holders and issuers; applicants or potential applicants for permits; people and organisations who rely on services provided by permit-holders; holders of PSV operator licences; and their respective representative organisations and private individuals. The majority of responses were from those who supported the community transport sector.
- 10.3 The consultation primarily sought views in respect of each exemption from the EU Regulation: the non-commercial exemption; the main occupation exemption; and the implementation of the short distance exemption. It also asked a number of detailed context questions so that the Government could get a better understanding of the community transport sector to feed into the final impact assessment.

- 10.4 The responses to the consultation highlighted that there is no consensus amongst stakeholders on how the non-commercial exemption should be interpreted. This is at the heart of the current debate on community transport. Views were divided, between those who think the EU Regulation should apply to all operators to ensure a level playing field and those who believe that 'not-for-profit' does equate to 'non-commercial'.
- 10.5 In December 2018 solicitors acting on behalf of the Bus and Coach Association applied to the High Court for permission to judicially review the Department's current position in respect of community transport. Specifically, they are challenging the Department's approach to the non-commercial exemption. While the judicial review process is ongoing the Department will not make any further statements about what "exclusively for non-commercial purposes" means. This means that this aspect of the draft guidance that formed part of the Government consultation on community transport in 2018 will not be finalised until the outcome of the judicial review is known. The Department will then amend the guidance to bring it in line with the court's decision.
- 10.6 On the main occupation exemption, the issues raised reflected the opposing positions of the community transport and commercial sectors. Commercial organisations wanted a level playing field and were worried about larger organisations which might have a significant, but not main, part of its occupation as road passenger transport operator. Community transport operators thought that main occupation should be determined by an organisation's constitutional documents or its wider social aims and objectives, implying that most organisations would fall into this exemption.
- 10.7 The Government's position remains that an operator's engagement in road passenger transport must be ancillary or complementary to another activity that is demonstrably their main occupation. The consultation said that "an organisation's constitutional documents may be clear enough to justify a decision that road passenger transport is not their main occupation". However, based on further legal advice the Department's position has changed. Whilst these documents can be a relevant consideration alongside other information, they are not on their own sufficient to determine an organisation's main occupation. Respondents requested further details on the types of evidence that can be submitted to support a claim and the guidance now provides this.
- 10.8 On the short-distance exemption the consultation sought views on whether, and how, this should be implemented. Views on implementing the exemption were mixed. Commercial bodies generally opposed its use on the basis that the same rules should apply regardless of the impact or distance of the service. In general community transport operators and local authorities supported its inclusion. Many felt that different distance thresholds were needed for rural and urban areas.
- 10.9 The Government has decided to give effect to this exemption for the benefit of 'not-for-profit' organisations. To address respondents concerns that the exemption might be of little use in rural areas, instead of prescribing a one size fits all 'short distance', the Government has adopted a more flexible approach.
- 10.10 Accordingly, these Regulations automatically recognise a specified distance as a 'short distance'. The exemption would be satisfied if the routes travelled by the operator's bus services generally do not exceed the specified distance. However, the specified distance is non-exhaustive, so that those operating in less densely populated areas will be able to make the case to a permit issuer of extenuating circumstance that, in view

of the nature of the area in which they operate, a 'short distance' is longer than the specified distance.

- 10.11 The consultation asked for views on what might be specified as a suitable 'short distance', saying that a radius of 15 to 20 miles was being considered. Respondents were asked to provide details of the proportion of their services that would fall within the exemption, if it were to apply to journeys within various radiuses from 5 to 20 miles. From the responses, it was clear that there is no obvious right answer, but that a short distance in rural areas could be a long distance in an urban context.
- 10.12 As these Regulations are not exhaustively defining a short distance the Department has decided that the specified distance will be ten miles.
- 10.13 To allow operators to choose an approach which best suits their operating practices, these Regulations automatically recognise as exempt any service that either:
- operates within a radius of ten miles measured from a central point nominated by the operator; or
 - does not exceed a distance of ten miles measured in a straight line from the first point at which passengers are able to embark to the last point at which passengers are able to disembark.
- 10.14 Full details of the Government's consultation, including a summary of responses and the Government's response, are available at:
<https://www.gov.uk/government/consultations/section-19-and-22-permits-how-to-apply-eu-regulation-10712009>.
- 10.15 As operator licensing and the permit system is a reserved matter in Great Britain, the Department has engaged with the Scottish and Welsh Governments throughout the process, to enable them to input their views and to keep them informed of progress.

11. Guidance

- 11.1 New guidance "EU Regulation 1071/2009: Guidance for section 19 and 22 permit users in Great Britain" has been produced and is available at:
<https://www.gov.uk/government/publications/section-19-and-22-permits-not-for-profit-passenger-transport>. The guidance was published alongside the Government response to the consultation.

12. Impact

- 12.1 The impact on business, charities or voluntary bodies is dependent on whether they fall under an exemption from the EU Regulation. Given that the preferred option will align domestic requirements with existing EU legal requirements that are already in force in Great Britain, any costs incurred by business or community bodies are effectively incurred as a result of current non-compliance with the EU Regulation. All those operating under permits will require familiarisation with these Regulations and associated guidance. Familiarisation costs per operator have been estimated to be small.
- 12.2 If an existing 'not-for-profit' permit holder determines that it does not meet one of the three exemptions from the EU Regulation, they will have to obtain a PSV operator's license in order to continue operating as they currently do; or change the type or method of their work. The PSV operator licensing regime is costlier, mainly because of the requirement to have a transport manager, but the exact costs will depend on the

number of vehicles run by the operator. The average annual costs of having to comply with the PSV operator regime range from £3,875 for a micro-operator (1 to 5 buses) to £484,141 for a very large community transport operator (with over 100 vehicles).

- 12.3 The impact on the public sector will be in terms of familiarisation costs with these Regulations and guidance in instances where a local authority is a permit issuer.
- 12.4 A full Impact Assessment is submitted with this memorandum and published alongside the Explanatory Memorandum on the legislation.gov.uk website.

13. Regulating small business

- 13.1 The legislation applies to activities that are undertaken by small businesses.
- 13.2 No specific action is proposed to minimise regulatory burdens on small businesses.
- 13.3 The basis for the final decision on what action to take to assist small businesses is that the policy is about compliance with a directly applicable EU Regulation which does not contain a specific exemption for small businesses. However, it is likely that a number of small businesses will fall within one of the three available exemptions.

14. Monitoring & review

- 14.1 The approach to monitoring of this legislation is through reviewing the impact of these Regulations through a qualitative analysis. This would most likely be done through a survey asking community transport operators, commercial operators, permit issuers, enforcement bodies and regulators whether they perceive that there is greater clarity on the types of operators exempt from the EU Regulation and whether ‘not-for-profit’ organisations are complying with the EU Regulation if they are not exempt.
- 14.2 A statutory review clause is included in these Regulations.

15. Contact

- 15.1 Akwasi Mensah and Catherine Perez at the Department for Transport email: buses@dft.gov.uk can be contacted with any queries regarding the instrument.
- 15.2 Catriona Henderson, Deputy Director Buses and Taxis Division at the Department for Transport can confirm that this Explanatory Memorandum meets the required standard.
- 15.3 Nusrat Ghani, Parliamentary Under Secretary of State at the Department for Transport can confirm that this Explanatory Memorandum meets the required standard.