
DRAFT STATUTORY INSTRUMENTS

2023 No.

The Transport (Scotland) Act 2019 (Consequential Provisions and Modifications) Order 2023

PART 4

Bus Services: Local Services Franchises

Interpretation

23.—(1) In this Part—

“affected local services” means local services which, during the period of operation of the franchising framework⁽¹⁾, the relevant operator would be required by virtue of section 13B(1) (b) or (3) of the 2001 Act⁽²⁾ (effects of franchising framework) to cease providing,

“personal data” has the same meaning as in section 3(2) of the Data Protection Act 2018⁽³⁾ (terms relating to the processing of personal data),

“principally connected” has the meaning determined under article 25,

“relevant employee” means an employee whose employment with a relevant operator is principally connected with the provision of affected local services,

“relevant information” has the meaning given in article 26,

“relevant operator” means an operator of affected local services,

“TUPE” means the Transfer of Undertakings (Protection of Employment) Regulations 2006⁽⁴⁾,

“transferring employee” means an employee of a relevant operator whose contract of employment becomes, under the operation of this Part, a contract of employment with a new operator,

“working time”, in relation to an employee, means any period during which an employee is working at the disposal of the employee’s employer and is carrying out the activities or duties assigned by the employer, but does not include any period during which the employee is undertaking any work experience or training for employment provided in accordance with a training course or programme.

(2) The following expressions have the meaning given in TUPE⁽⁵⁾—

(a) “assigned”,

(b) “appropriate representatives”, and

(1) See section 13A, with section 82(1), of the Transport (Scotland) Act 2001 ([asp 2](#)) for the meaning of “franchising framework”. Section 13A was inserted by the Transport (Scotland) Act 2019 ([asp 17](#)), section 38. Section 82(1) was relevantly amended by the Transport (Scotland) Act 2019, the schedule, paragraph 3(9)(a)(i).

(2) [2001 asp 2](#). Section 13B was inserted by the Transport (Scotland) Act 2019 ([asp 17](#)), section 38.

(3) [2018 c. 12](#). Section 3 has been amended for purposes which are not relevant to this Order.

(4) [S.I. 2006/246](#).

(5) See regulation 2(1) of [S.I. 2006/246](#) for the meanings of “assigned” and “employee”. See regulation 13(3) of [S.I. 2006/246](#) for the definition of “appropriate representatives”.

(c) “employee”.

(3) Where two or more local transport authorities have acted jointly to make a franchising framework, a reference to a local transport authority is to be read as a reference to the authorities acting jointly.

Application of TUPE

24.—(1) Paragraph (3) applies to a situation in which—

- (a) at the time when a franchising framework comes into operation, affected local services cease to be provided by a relevant operator in the area to which the relevant franchising framework relates, and
- (b) at the same time, a person begins to provide local services in that area under a franchise agreement⁽⁶⁾.

(2) Paragraph (3) also applies to a situation in which—

- (a) affected local services cease to be provided by a relevant operator before the coming into operation of the franchising framework, and
- (b) at the same time as those local services cease to be provided, a person begins to provide local services under an agreement with the local transport authority entered into by reason of the cessation of the local services referred to in sub-paragraph (a).

(3) Any situation to which this paragraph applies is to be treated as a relevant transfer for the purposes of TUPE (whether or not TUPE would otherwise apply).

(4) For the purposes of TUPE, the organised grouping of employees⁽⁷⁾ that is subject to the relevant transfer consists of those employees of the relevant operator whose employment is principally connected with the provision of the affected local services referred to in paragraph (1) (a) or (2)(a).

Determination of “principally connected” employment

25.—(1) For the purposes of article 24(4) the determination as to whether a person’s employment is “principally connected” with the provision of affected local services is to be made by agreement between the parties or, where there is no agreement, in accordance with paragraph (5).

(2) After a local transport authority make a franchising framework they must issue a consultation notice to—

- (a) operators of affected local services, and
- (b) appropriate representatives of employees employed on those affected local services.

(3) Any notice issued for the purposes of paragraph (2) must set out—

- (a) the proposed criteria for determining if a person’s employment is principally connected with affected local services, which may include particular individual roles,
- (b) the consultation process and the agreement sought,
- (c) the periods over which the consultation process will take place,
- (d) the parties to be issued with a consultation notice, and
- (e) what constitutes agreement between the parties.

(4) If there is agreement between the parties for the purposes of paragraph (1), the local transport authority must notify the parties and publish the details of the agreement.

⁽⁶⁾ See section 13A of the Transport (Scotland) Act 2001 for the meaning of “franchise agreement”. Section 13A was inserted by the Transport (Scotland) Act 2019, section 38.

⁽⁷⁾ See [S.I. 2006/246](#), regulation 2(1) for the meaning of “organised grouping of employees” within TUPE.

(5) If there is no agreement for the purposes of paragraph (1), a person’s employment is treated as “principally connected” with the provision of affected local services if that person spends, on average, at least half of their working time—

- (a) assigned to the provision of affected local services, or
- (b) assigned to activities connected wholly or mainly to the provision of affected local services.

(6) In this article, “the parties” means—

- (a) the local transport authority that have made a franchising framework,
- (b) the operators of affected local services, and
- (c) appropriate representatives of employees working on those affected local services.

Meaning of “relevant information”

26.—(1) For the purposes of articles 27 and 28, “relevant information” means—

- (a) relevant employee information, and
- (b) information about the identity of appropriate representatives of relevant employees.

(2) For the purposes of paragraph (1)(a) “relevant employee information”, in relation to a relevant employee, means—

- (a) such of the particulars of employment that an employer is obliged to give to an employee by virtue of section 1 of the Employment Rights Act 1996⁽⁸⁾ (statement of initial employment particulars),
- (b) such information about any collective agreements, as defined in section 178(1) of the Trade Union and Labour Relations (Consolidation) Act 1992⁽⁹⁾ (collective agreements and collective bargaining), in respect of a relevant employee,
- (c) such information describing the affected local services with which a relevant employee’s employment is principally connected, including the proportion of a relevant employee’s working time assigned to those affected local services, and
- (d) such other information,

as the local transport authority making a request under article 27 consider necessary in order to enable any person considering entering into a franchise agreement, or any other agreement for the provision of local services in the circumstances described in article 24(2), to calculate the costs and liabilities likely to arise from the application of TUPE to such an agreement.

Request for relevant information

27.—(1) At any time after a local transport authority have made a franchising framework the authority may issue a request to a relevant operator for such relevant information as may be specified by the authority.

(2) A request made under paragraph (1)—

- (a) must specify the date by which the relevant operator is to respond to the request, which must be not less than 21 days from the date on which the request is issued,
- (b) must contain sufficient information about the franchising framework to enable a relevant operator to determine which of their employees would be relevant employees for the purposes of that request,

⁽⁸⁾ 1996 c. 18. Section 1 was amended by S.I. 2018/1378 and S.I. 2019/731.

⁽⁹⁾ 1992 c. 52.

- (c) must only request such relevant information as the local transport authority consider necessary in order to carry out their functions in relation to the application of TUPE in connection with the franchising framework, and
 - (d) must not include a request for personal data, except to the extent that such a request is for information about the identity of appropriate representatives.
- (3) If a relevant operator in receipt of a request for relevant information made under paragraph (1) is of the opinion that the requirement specified in paragraph (2)(b) has not been satisfied, the relevant operator must—
- (a) within 14 days from the date on which the request is received, give notice in writing to the local transport authority of that opinion, and
 - (b) describe the information which, in the opinion of the relevant operator, is required in order to satisfy the requirement in paragraph (2)(b).
- (4) If the local transport authority receive notice in accordance with paragraph (3)(a) the authority must—
- (a) supply to the relevant operator such information as seems to the local transport authority to be necessary, taking into account the description of information supplied in accordance with paragraph (3)(b), in order to enable the relevant operator to respond to the request made under paragraph (1), and
 - (b) specify a revised date by which the relevant operator is to respond to the request made by virtue of paragraph (1), which must be not less than 21 days from the date on which the information described in sub-paragraph (a) is received by the relevant operator.
- (5) If a request has been made under paragraph (1) and the local transport authority no longer require relevant information they must notify the relevant operator.
- (6) A request does not have effect to the extent that—
- (a) complying with the request would involve the disclosure of information which would contravene the data protection legislation or any other enactment relating to the disclosure of information, or give rise to the commission of an offence (but the duty or power is to be taken into account in determining whether the disclosure or use would contravene that legislation), or
 - (b) the person to whom the request applies would be entitled to refuse to comply with the request in or for the purposes of proceedings in a court in England and Wales, Northern Ireland or, as the case may be, Scotland.

Obligation on relevant operator in receipt of request for relevant information

28.—(1) Subject to paragraphs (2) and (3), a relevant operator must respond to a request for relevant information made in accordance with article 27 within the period which applies by virtue of article 27(2)(a) or (4)(b).

(2) Paragraph (3) applies where a local transport authority make a request for relevant information under article 27 and either—

- (a) the operator does not have any or all of the information requested, and is unable to obtain the information at a reasonable cost, or
- (b) the operator is unable, by virtue of the prohibition contained in paragraph (7)(b), to respond to the request.

(3) Where this paragraph applies—

- (a) the operator must, within 14 days from the date on which the request is received, give notice in writing to the local transport authority that the operator is unable to respond to the

request, explaining why it is not possible to provide any or all of the relevant information requested, and

- (b) the obligation imposed by virtue of paragraph (1) does not apply to the operator in respect of any of the relevant information in relation to which the operator has given notice under sub-paragraph (a).

(4) If, having received notice under paragraph (3)(a), the local transport authority issue a revised request for relevant information—

- (a) this article applies to the revised request as if it had been a request made under article 27, and
- (b) the revised request must specify the date by which the relevant operator is to respond to the revised request, which—
 - (i) must be not less than 21 days from the date on which the revised request is received by the operator, or
 - (ii) must be, in a case where either of the circumstances described in paragraph (2) applied to the request made under article 27, but the operator failed to inform the authority of that fact within the period specified in paragraph (3)(a), not less than 21 days from the date on which the period specified in paragraph (3)(a) expired.

(5) If a request is made under article 27, the relevant operator must continue to provide revised relevant information about the identity of the appropriate representatives to the local transport authority if that information changes after the response is provided in accordance with paragraph (1).

(6) If paragraph (5) applies, the obligation on the operator to provide revised relevant information continues until that operator receives notice that it is no longer required for the purposes of article 27.

(7) In responding to a request for relevant information made under article 27 a relevant operator—

- (a) must take such steps as are reasonable in the circumstances to ensure that the information provided is complete and accurate, and
- (b) must not disclose personal data, except to the extent necessary in order to satisfy a request for information about the identity of appropriate representatives.

Allocation arrangements

29.—(1) After making a franchising framework the local transport authority must consult—

- (a) relevant operators, and
- (b) appropriate representatives of relevant employees,

about the proposed allocation arrangements.

(2) The allocation arrangements must—

- (a) identify organised groupings of relevant employees, or classes of relevant employees within such organised groupings, and
- (b) identify for each organised grouping of relevant employees or, as the case may be, class of relevant employees within such organised groupings, the franchise agreement to which each organised grouping or class of relevant employees is to be assigned.

(3) After the end of the consultation required under paragraph (1), the local transport authority must publish details about the allocation arrangements made in accordance with this article and notify—

- (a) relevant operators, and
- (b) appropriate representatives of relevant employees.

(4) For the purposes of this article a class of relevant employees is to be defined with reference to one or more of—

- (a) the identity of the relevant operators by whom relevant employees are employed,
- (b) the organised grouping to which the relevant employees belong,
- (c) any identifiable sub-groups to which the relevant employees belong, in a case where the organised grouping is divided into sub-groups by the relevant operator for the purpose of organising the responsibilities of relevant employees, and
- (d) the characteristics of the work undertaken by relevant employees when working for a relevant employer, including in particular—
 - (i) the nature of the duties undertaken, and
 - (ii) the times and the places at which those duties are normally undertaken.

Revised allocation arrangements

30.—(1) This article applies in the circumstances set out in paragraph (2) if, at any time before the date on which a franchising framework comes into operation, an application is made to the traffic commissioner⁽¹⁰⁾ for the cancellation or variation of a registration under section 6 of the 1985 Act⁽¹¹⁾ (registration of local services) with respect to services which are affected local services.

(2) The circumstances referred to in paragraph (1) are that—

- (a) the effect of the application is that affected local services would cease to be provided before the coming into operation of the franchising framework, and
- (b) the local transport authority who made the franchising framework propose to enter into an agreement with a person, by reason of the cessation of those services, to provide replacement local services in the period between their cessation and the coming into operation of that franchising framework.

(3) As soon as reasonably practicable after the local transport authority have received a copy of the application described in paragraph (1), the authority must consult—

- (a) relevant operators, and
- (b) appropriate representatives of relevant employees,

about the revised allocation arrangements which the authority propose to make in respect of an organised grouping of relevant employees, or classes of relevant employees within such an organised grouping, affected by the circumstances described in paragraph (2).

(4) The local transport authority must finalise and publish the revised allocation arrangements before entering into an agreement for the provision of replacement local services in circumstances described in paragraph (2).

(5) For the purposes of this article “revised allocation arrangements” means allocation arrangements described in article 29 revised to take account of any application made under paragraph (1) in circumstances described in paragraph (2).

Pensions

31. Any situation which, by virtue of article 24, is to be treated as a relevant transfer for the purposes of TUPE is also to be treated as a relevant transfer within the meaning of TUPE for the purposes of—

⁽¹⁰⁾ See section 48 of the Transport (Scotland) Act 2001 (asp 2) for the meaning of “the traffic commissioner”. There are amendments to section 48 which are not relevant to this definition.

⁽¹¹⁾ 1985 c. 67. Section 6 was relevantly amended by the Transport (Scotland) Act 2001 (asp 2), sections 45 and 46 and Schedule 2, paragraph 4(2).

- (a) sections 257 and 258 of the Pensions Act 2004⁽¹²⁾ (pension protection on transfer of employment), and
- (b) any regulations made under section 258 of that Act.

Duty to secure pension protection

32.—(1) Paragraph (2) applies to a local transport authority which have made a franchising framework and which—

- (a) enter into a franchise agreement with a person under the franchising framework, or
- (b) enter into, in the circumstances described in article 24(2), any other agreement with a person for the provision of local services in the area to which the framework relates.

(2) The local transport authority must ensure that any agreement mentioned in paragraph (1) is made, in the event of there being any transferring employees, on terms—

- (a) that require the person to secure pension protection for every transferring employee,
- (b) that, where there are transferring employees, require the person—
 - (i) to procure a pensions statement which satisfies the requirements specified in article 35, and
 - (ii) to provide every transferring employee with a copy of any part of the statement which relates to that employee, and
- (c) that, so far as relating to—
 - (i) the requirement to secure pension protection described in sub-paragraph (a), and
 - (ii) the requirement to procure and provide the statement described in sub-paragraph (b),are enforceable against the person by every transferring employee.

Meaning of pension protection

33. For the purposes of article 32(2)(a) pension protection is secured for a transferring employee if, after the change in employer, the transferring employee has rights to acquire a pension which—

- (a) are the same as the rights the transferring employee had as an employee of the relevant operator, or
- (b) count, under article 34, as being broadly comparable to, or better than, those rights.

Broadly comparable

34.—(1) For the purposes of article 33(b), the rights to acquire pension benefits count as being broadly comparable to, or better than, the rights which the transferring employee had as an employee of the relevant operator—

- (a) if the rights satisfy the condition specified in paragraph (2), or
- (b) if, in the situation described in paragraph (3), the rights satisfy all of the alternative conditions specified in paragraph (4).

(2) The condition is satisfied if the rights to acquire pension benefits that the transferring employee would have as an employee of the new operator mean that the employee would suffer no material detriment overall in terms of the employee's future accrual of pension benefits.

⁽¹²⁾ 2004 c. 35. Section 257 was amended by the Pensions Act 2007 (c.22), Schedule 7, Part 6, and S.I. 2006/246. Section 258 was amended by the Pensions Act 2014 (c. 19), Schedule 13, paragraph 73.

(3) The situation is that there are exceptional circumstances which mean that it would not be reasonably practicable for the new operator to grant rights to the transferring employee which satisfy the condition specified in paragraph (2).

(4) The alternative conditions are satisfied if—

- (a) the rights to acquire pension benefits granted to the transferring employee include arrangements to pay compensation to the transferring employee, and
- (b) the arrangements to pay compensation described in sub-paragraph (a) are such that the compensation is sufficient to offset the material detriment which would otherwise be suffered by the transferring employee.

Pensions statement

35.—(1) The pensions statement procured by a person entering into an agreement under a requirement specified in accordance with article 32(2)(b)(i), must be obtained in writing from a Fellow of the Institute and Faculty of Actuaries.

(2) The pensions statement must certify—

- (a) that, to the extent that the principles can be applied, the person making the statement has formed the opinion contained in the statement having had regard to the guidance for assessing broad comparability between two sets of pension scheme benefits set out in Annex A to HM Treasury’s note ‘Fair Deal for staff pensions: staff transfer from central government’ dated October 2013⁽¹³⁾, and
- (b) that, in the opinion of the person making the statement, the new operator’s pension scheme offers relevant employees rights to acquire pension benefits which meet the requirements of article 33 on the date the statement was made.

⁽¹³⁾ The note is available from the www.gov.uk website (Fair Deal for staff pensions: staff transfer from central government (publishing.service.gov.uk) at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/262490/PU1571_Fair_Deal_for_staf_pensions.pdf).