

EXPLANATORY MEMORANDUM TO
THE TRANSPORT (SCOTLAND) ACT 2019 (CONSEQUENTIAL PROVISIONS
AND MODIFICATIONS) ORDER 2023

2023 No. [XXXX]

1. Introduction

- 1.1 This explanatory memorandum has been prepared by the Office of the Secretary of State for Scotland and is laid before Parliament by Command of His Majesty.

2. Purpose of the instrument

- 2.1 This Order makes provision in consequence of the Transport (Scotland) Act 2019¹ (“the 2019 Act”), which was brought forward to improve Scotland’s transport network. This instrument will ensure low emission zones (LEZ) can be enforced by Scottish local authorities, ensure the enforcement role of the Competition and Markets Authority (CMA) in relation to the competition test under section 37 of the Transport (Scotland) Act 2001² (the 2001 Act) extends to all the functions to which the test applies following the 2019 Act, and permit the Traffic Commissioner for Scotland to impose public service vehicle (PSV) operator licensing conditions in relation to new obligations for bus operators created by the 2019 Act. The Order imposes a new prohibition in respect of certain conduct relating to bus services (in place of the prohibition under section 2 of the Competition Act 1998³) and provides for the CMA to enforce the prohibition. The Order will also ensure that employment and pensions rights are protected when bus franchising comes into operation in an area of Scotland.

3. Matters of special interest to Parliament

Matters of special interest to the [Joint Committee on Statutory Instruments]

- 3.1 None.

4. Extent and Territorial Application

- 4.1 The territorial extent of this instrument (that is, the jurisdiction(s) which the instrument forms part of the law of) is the United Kingdom, except articles 32 to 35 which extend to Scotland only.
- 4.2 The territorial application of this instrument (that is, where the instrument produces a practical effect) is the United Kingdom, except articles 32 to 35 which apply in Scotland only.

5. European Convention on Human Rights

- 5.1 The Secretary of State for Scotland has made the following statement regarding Human Rights:

¹ 2019 asp 17. <https://www.legislation.gov.uk/asp/2019/17/contents/enacted>

² 2001 asp 2. <https://www.legislation.gov.uk/asp/2001/2/contents>

³ 1998 c. 41. <https://www.legislation.gov.uk/ukpga/1998/41/contents>

“In my view the provisions of the Transport (Scotland) Act 2019 (Consequential Provisions and Modifications) Order 2023 are compatible with the Convention rights.”

6. Legislative Context

- 6.1 This Order is made in exercise of the powers conferred by sections 104, 112(1), 113(2) to (5) and (7), and 114(1) of the Scotland Act 1998⁴ (“the 1998 Act”). Section 104 of the 1998 Act allows consequential modifications to be made where necessary or expedient in consequence of any provision made by or under an Act of the Scottish Parliament.
- 6.2 The 2019 Act was designed to make Scotland’s transport network more accessible, cleaner and smarter. This Order supports this by making provision in the areas of information sharing for enforcement of LEZs, making provision as regards the CMA’s enforcement of the competition test under section 37 of the 2001 Act, making provision regarding the application of competition law to certain conduct relating to bus services and making provision about the application of the Transfer of Undertakings (Protection of Employment) Regulations 2006⁵ and associated pensions rights to bus franchising. Amendments are also made to the Transport Act 1985⁶ (the “1985 Act”), to enable the traffic commissioner to apply PSV operator license conditions in certain circumstances.

7. Policy background

What is being done and why?

- 7.1 Section 104 of the 1998 Act enables provisions to be made that are necessary or expedient in consequence of any provision made by or under an Act of the Scottish Parliament. This Order makes provisions that are necessary and expedient in consequence of the provisions of the 2019 Act relating to LEZs, the operation of local bus services, and smart ticketing.
- 7.2 The Order makes provision to enable the Driver and Vehicle Licensing Agency (DVLA), and the Joint Air Quality Unit (a joint unit from the Department for Transport & Department for Environment, Food and Rural Affairs) to provide vehicle information to local authorities and the Scottish Ministers to enable the operation and enforcement of LEZs. These organisations hold a range of information relating to UK registered vehicles, including the make, model, engine type and tax classification. These details are required to determine whether a vehicle is compliant or non-compliant, in scope of a LEZ, or subject to an exemption. Vehicle keeper details, including the name and address of the registered keeper of a vehicle, are also required to issue penalty charge notices with respect to vehicles which are considered non-compliant though there are existing powers which enable DVLA to share that information.
- 7.3 In relation to smart ticketing, the 2001 Act made provision for local transport authorities (LTAs) to establish ticketing arrangements and ticketing schemes in relation to local bus services only. The 2019 Act will expand these ticketing arrangements and schemes to include connecting train and ferry services. The 2001

⁴ 1998 c. 46. <https://www.legislation.gov.uk/ukpga/1998/46/contents>

⁵ 2006 No. 246. <https://www.legislation.gov.uk/uksi/2006/246/contents/made>

⁶ 1985 c. 67. <https://www.legislation.gov.uk/ukpga/1985/67/contents>

Act provided for a ‘competition test’ in relation to the making and varying of ticketing schemes. The enforcement machinery for that test is provided for in the Transport (Scotland) Act 2001 (Conditions attached to PSV Operator’s Licence and Competition Test for Exercise of Bus Functions) Order 200⁷ (the 2001 Order). There is, in particular, provision for an application to be made by LTAs or bus operators to the Competition and Markets Authority (CMA) for them to decide whether the making or varying of a scheme meets the competition test. There are requirements for those who make such an application to inform other persons who are likely to be affected by it, and for the CMA to make arrangements to publish the application in a manner that it considers suitable to bring it to the attention of such persons (unless it considers publication is not required as it will be sufficient for it to obtain information from one or more particular persons). With the 2019 Act allowing ticketing schemes to include connecting rail and ferry services, these competition provisions of the 2001 Order, so far as they relate to ticketing, must be amended to reflect the potential expanded reach of those schemes. As such, the Order is required to make provision applying and updating the enforcement regime for the ‘competition test’ under section 37 of the 2001 Act, so that it applies to a Scottish LTA’s functions in establishing ‘ticketing schemes’, as extended by the 2019 Act to cover connecting ferry and rail services.

- 7.4 The 2019 Act brought in a range of new options for the delivery of local bus services in Scotland. Specifically, Bus Services Improvement Partnerships (BSIPs) and local services franchising were introduced. As with the extension of the competition test to apply to ticketing arrangements which include ferry and rail services, the 2019 Act also extends the competition test to BSIPs. Consequently, this order amends the CMA's enforcement role in respect of the competition test so that it can enforce the test in respect of BSIPs.
- 7.5 The Order also makes new provision in relation to certain types of agreements between bus operators called “qualifying agreements”. The Order provides a bespoke prohibition that will apply in place of the Chapter 1 prohibition contained in the Competition Act 1998. Certain offences in that 1998 Act will apply to non-compliance with the CMA’s investigatory role in relation to this bespoke prohibition. The Order does not create or amend the offences, rather the existing offences that operate in relation to the Chapter 1 prohibition will apply for the purposes of the bespoke competition test for bus. The CMA’s enforcement powers in relation to the new prohibition do not include the ability to impose financial penalties.
- 7.6 The Order also makes provision for LTAs to ensure that employees’ rights and pension benefits are protected should local bus services be franchised using the new franchising model in the 2019 Act, which replaces the Quality Contract model in the 2001 Act. Employee transfers to a new employer will be treated as a ‘relevant transfer’ for the purposes of the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE) when local services franchising is introduced.
- 7.7 The 2019 Act makes provision to impose obligations on bus operators in relation to BSIPs, bus services franchising and the provision of information in the event of the variation or cancellation of a local service’s registration. The Order amends the 1985 Act to provide new powers to the traffic commissioner to impose PSV licence conditions on operators who fail to discharge those obligations.

⁷ 2001 No. 2748 (S. 14). <https://www.legislation.gov.uk/uksi/2001/2748/made>

8. European Union Withdrawal and Future Relationship

8.1 This instrument does not relate to withdrawal from the European Union / trigger the statement requirements under the European Union (Withdrawal) Act 2018⁸.

9. Consolidation

9.1 Though the Order amends primary legislation, the modifications are minor and no consolidation is required.

10. Consultation outcome

10.1 As amendments in this Order are consequential, a formal consultation on the draft Order was not considered necessary.

10.2 A [public consultation](#) on the Scottish Government's proposals regarding the Regulations and Guidance for operation and delivery of LEZs was undertaken between 13th December 2019 and 24th February 2020.

10.3 A [public consultation](#) on the Scottish Government's proposals for the implementation of the bus provisions of the Transport (Scotland) 2019 Act was completed in October 2021. In addition, consultation took place between Scottish Government officials and officials in the UKG, specifically the Department for Transport, Department for Business, Energy and Industrial Strategy, Home Office and the Department for Work and Pensions, where agreement was reached between the Scottish Government and relevant UKG departments in relation to this Order.

11. Guidance

11.1 A full suite of guidance will be published in relation to the implementation of the various aspects of the Transport (Scotland) Act 2019 in due course. No separate guidance is necessary in relation to this Order.

12. Impact

12.1 A Justice Impact Test was completed for this section 104 Order considering the potential impact on the justice system within England and Wales with regard to the offences relating to BSIPs, ticketing and local franchising.

12.2 It is expected that there will be no significant impact as a result of this Order. There is an expected impact on businesses (bus operators) and local transport authorities, as well as an impact on bus users, at the stage of implementation of the bus services and ticketing provisions.

12.3 A partial [Business and Regulatory Impact Assessment](#) (BRIA) was completed at the time of the Bill's passage. Following this, a [final BRIA](#) was completed for the smart ticketing provisions of the 2019 Act. In preparing the latest consultation on the implementation of the bus provisions of the 2019 Act, which closed in October 2021, a suite of impact assessments were considered. These include a partial BRIA, Fairer Scotland Duty, Children and Young People Wellbeing Impact Assessment, Islands Communities Impact Assessment and an Equalities Impact Assessment. These can all be found on the [consultation's Transport Scotland page](#).

⁸ 2018 c. 16. <https://www.legislation.gov.uk/ukpga/2018/16/contents/enacted>

13. Regulating small business

13.1 The legislation does not apply to activities that are undertaken by small businesses.

14. Monitoring & review

14.1 The Order is consequential upon the 2019 Act. No formal monitoring or review is considered necessary.

14.2 The instrument does not include a statutory review clause and, in line with the requirements of the Small Business, Enterprise and Employment Act 2015⁹ the Secretary of State for Scotland has made the following statement: “There is no need for review or monitoring as the Order does not regulate businesses.”

15. Contact

15.1 Ryan McPheators-Dunn at the Office of the Secretary of State for Scotland (Telephone: 07514722887 or email: ryan.mcpheators-dunn@ukgovscotland.gov.uk) can be contacted with any queries regarding the instrument.

15.2 Rachel Irvine, Deputy Director for Constitutional Policy, at the Office of the Secretary of State for Scotland can confirm that this Explanatory Memorandum meets the required standard.

15.3 The Secretary of State for Scotland at the Office of the Secretary of State for Scotland can confirm that this Explanatory Memorandum meets the required standard.

⁹ 2015 c. 26. <https://www.legislation.gov.uk/ukpga/2015/26/contents/enacted>