EXPLANATORY MEMORANDUM TO

THE WELSH MINISTERS (TRANSFER OF FUNCTIONS) (RAILWAYS) ORDER 2018

2018 No. [XXXX]

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 purpose of the Order is to transfer certain functions of the Secretary of State relating to railways to the Welsh Ministers so far as those functions are exercisable in relation to Wales, and to provide for certain other functions of the Secretary of State relating to railways, so far as exercisable in relation to Wales, to be exercisable concurrently by the Secretary of State and the Welsh Ministers. The Order is concerned primarily with functions connected with the franchising of railway passenger services and with functions relating to the discontinuance of railway services and the closure of stations.

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 Disregarding minor or consequential changes, the territorial application of this instrument varies between provisions.

4. Legislative Context

4.1 The legislative framework for railways in Great Britain is largely set out in the Railways Act 1993 and Railways Act 2005. A key feature of that framework is that railway passenger services required to be provided by public authorities are provided through franchise agreements, unless those services are exempted from franchising by order. The Railways Act 1993 provides for the designation of services that are to be provided through franchise agreements. There are two designating authorities: the Scottish Ministers, in relation to Scotland-only services, and the Secretary of State in relation to all other services in Great Britain. The Railways Act 1993 also provides that there are two franchising authorities: the Scottish Ministers, in relation to a Scottish franchise agreement, and the Secretary of State in relation to any other franchise agreement for services in Great Britain.

4.2 The 1993 and 2005 Acts further detail a range of executive functions in relation to the procurement and enforcement of franchise agreements and consequential, ancillary and related matters to be exercised by the Scottish Ministers and Secretary of State as relevant franchising, funding and national authorities. Part 4 of the 2005 Act also confers functions on the Secretary of State and Scottish Ministers in relation to the discontinuance of services and the closure of stations and passenger networks.

4.3 The 2005 Act presently gives the Welsh Ministers the following principal functions:

- wide-ranging powers in relation to the provision of financial assistance to railway passenger service franchisees for the provision and development of Welsh services (services that start or end in Wales or otherwise make at least one scheduled call in Wales) and to other persons for Welsh purposes, including the provision and development of freight services and facilities where the services are to be or are provided wholly or partly in Wales (s.10 and s.11 Railways Act 2005);
- the right to be co-signatory to any new railway passenger service franchise agreement that includes Wales-only services (services which start and end in Wales and do not make any other scheduled calls outside Wales), as well as to be consulted by the Secretary of State before he enters into any new franchise agreement that includes Welsh services (s.10 Railways Act 2005); and
- powers to propose the discontinuance of certain railway passenger services and the closure of stations or networks used for passenger services, where the Welsh Ministers are the relevant funding authority (s.41 Railways Act 2005);

4.4 Under a Transfer Scheme made by the Secretary of State in October 2005, the Strategic Rail Authority's rights and liabilities in relation to the current Wales and Borders rail franchise agreement with Arriva Trains Wales, entered into in October 2003 and due to end on 14 October 2018, were transferred to the Secretary of State and National Assembly for Wales. The rights and liabilities of each Government in relation to this franchise agreement are set out in a 2006 Joint Parties Agreement. In addition to Wales-only services, the franchise includes regular services between Wales and Cheltenham, Birmingham, Manchester and Bidston, and between South and North Wales via Shrewsbury, as well as regular services on a limited number of routes that are entirely within England, for example Chester–Crewe and Crewe-Shrewsbury.

4.5 This Order makes amendments to the 1993 and 2005 Acts agreed between the UK and Welsh Governments to give effect to the full devolution of executive franchising functions in Wales. It is being supplemented by a series of agency agreements between the Secretary of State for Transport and the Welsh Ministers (pursuant to section 83(1) of the Government of Wales Act 2006) authorising the Welsh Ministers to exercise certain of the Secretary of State's franchising functions on his behalf so that the Welsh Ministers can procure and manage the next Wales and Borders rail franchise (from 14 October 2018) with similar geographic scope – ie including rail services to/from and within England.

5. Extent and Territorial Application

5.1 The extent of this instrument is England and Wales and Scotland as regards the amendments made by the Schedule, and the United Kingdom otherwise.

5.2 The territorial application of this instrument varies between provisions.

5.3 Taken as a whole, this instrument applies to England and Wales and Scotland (and it does not apply to Northern Ireland). However, individual provisions of this instrument differ between each other in their territorial application.

6. European Convention on Human Rights

6.1 Jo Johnson MP, Minister of State for Transport, has made the following statement regarding Human Rights:

"In my view the provisions of the Welsh Ministers (Transfer of Functions) (Railways) Order 2018 are compatible with the Convention rights."

7. Policy background

What is being done and why

7.1 The UK Government established the Silk Commission in 2011 to look at the future of the devolution settlement for Wales and recommend modifications to the present constitutional arrangements that would enable the UK Parliament and the National Assembly for Wales to better serve the people of Wales. In its second report in March 2014, *Empowerment and Responsibility: Legislative Powers to Strengthen Wales*, the Commission recommended that responsibility for the Wales and Borders rail franchise be fully devolved; but noted that, since the franchise operates into and within England, co-operation would be required for decisions affecting Wales and Borders services in England and that the franchise boundary might need to be redrawn[1].

7.2 In November 2014, the UK Government announced that agreement had been reached, in principle, to devolve executive franchising functions to the Welsh Ministers so that the Welsh Government could lead the procurement of the next Wales and Borders franchise, due to commence operations on 14 October 2018. This formed part of a wider agreement that included revised arrangements to enable the progression of two proposed rail electrification schemes in South Wales.

7.3 These commitments were restated in the UK Government's March 2015 Command Paper on further devolution to Wales, *Powers for a Purpose: Towards a lasting devolution settlement for Wales*, along with explanation that the two Governments were working together on the detailed arrangements for the next Wales and Borders franchise including how cross-border routes should be procured and managed, together with a commitment to review the need to strengthen its arrangements for engaging with the Welsh Government on the specification of other rail franchises procured by the Secretary of State that operate to and from Wales (currently West Coast, Cross Country and Great Western) [2].

7.4 The functions primarily connected with the franchising of railway passenger services and the discontinuance or closure of railway services and certain railway assets to be transferred by this Order to the Welsh Ministers broadly follow those transferred to Scottish Ministers by the Railways Act 2005. The principal differences – set out below - derive from the difference in scope of cross-border rail operations into England, and from the fact that responsibility for setting the strategic outputs and providing associated funding for the principal rail network operator, Network Rail, is not devolved in Wales, unlike in Scotland.

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[1]Paragraphs 7.3.4 – 7.3.9 in https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/310571/CDW-Wales_Report-final_Full_WEB_310114.pdf

[2] Paragraphs 2.5.6 – 2.5.10 in https://www.gov.uk/government/publications/powers-for-a-purpose-towards-a-lasting-devolution-settlement-for-wales

7.5 *Scope of railway passenger services for which the Welsh Ministers are the appropriate designating and franchising authority.* The Scottish Ministers may designate, in addition to Scotland-only services, cross-border services to/from England and Wales that they consider should be provided under the same franchise agreement, subject to consultation with the Secretary of State. Such services currently comprise Caledonian Sleeper services to/from London and Scotrail services to Carlisle via Kilmarnock (with some extended to/from Newcastle). This Order provides that the Welsh Ministers may designate, in addition to Wales-only services, only Welsh components of Welsh services (and that they may only designate Welsh components of Welsh services that they consider should be provided under the same franchise agreement as designated Wales-only services).

7.6 A Welsh component of a Welsh service is defined in this Order as a Welsh service (other than a Wales-only service) so far as it involves the carriage of passengers by railway in Wales (see paragraph 4.3 above for definitions of Welsh service and Wales-only service), but excluding certain parts of such a service, in particular the part between the last station wholly in Wales and the Welsh border when the service crosses from Wales into England and the part between the border and the first station wholly in Wales when the service crosses into Wales from England. The Welsh Ministers are the appropriate franchising authority for a Welsh franchise agreement (one that includes Wales-only services) to the extent that it covers Wales-only services or Welsh components of Welsh services.

7.7 The UK and Welsh Governments have agreed this more limited statutory scope in the light of the extensive nature of the cross-border services to/from England, and services within England, provided by the Wales and Borders franchise and the importance of each Government retaining appropriate accountability for rail operations on its territory. To ensure that these important cross-border links can continue and be developed further for the benefit of passengers, the Secretary of State is entering into agency agreements with the Welsh Ministers to enable them to exercise relevant powers under both Acts on his behalf so that the Welsh Ministers can procure, and manage a single franchise that also includes services that continue to/from, and operate within, England, subject to certain obligations in relation to the specification and management of the English part of the franchise. The latest such agreement is dated 28 September 2017 and enabled the Welsh Ministers to issue the final Invitation To Tender to shortlisted bidders for the new franchise. A copy is enclosed with this Memorandum [3]. A further such agreement is planned to be concluded in advance of the Welsh Ministers' award of the contract for the new franchise in Spring 2018.

7.8 The Governments also intend to conclude, within the same timescale:

- a Co-operation and Collaboration Agreement - setting out arrangements for partnership working in respect of both the management of the new Wales and Borders franchise, and the operation and procurement of passenger rail services operated by other relevant franchises. The agreed principles of this agreement are set out in Schedule 3 of the 28 September 2017 agreement;
- a Funding and Outputs Agreement – setting out relevant funding and outputs to be provided in relation to the new franchise; and

[3] Also published at https://www.gov.uk/government/publications/wales-and-borders-rail-franchise-2018-procurement

- an Operator of Last Resort Sub-contracting Agreement – setting out the terms under which the Welsh Ministers will, for the time being, subcontract to the Secretary of State the exercise of the duties as appropriate franchising authority under section 30 of the Railways Act 1993 transferred to them by this Order.

7.9 *Scope of the Welsh Ministers' powers as national authority in relation to modifications and closures of stations and passenger networks (networks used for the provision of passenger services), and confirmation of bye-laws*. The principal roles of the national authority on these matters are:

- to consider and, if appropriate, consult on proposals for closure made by operators and funders;
- if it is still of the opinion that a closure should proceed, to refer the matter to the Office of Rail and Road;
- should a closure not be ratified by the Office of Rail and Road, to secure the continued operation of the service or asset;
- to determine whether a closure is a minor modification to which the closure procedures do not apply; and
- to confirm bye-laws proposed by operators of railway assets.

7.10 The Order provides a more limited role for the Welsh Ministers than the Scottish Ministers as national authority in their territory on these matters, and excludes any such role in relation to proposals for closures of passenger networks or bye-laws proposed by operators of networks. This is because the principal funding for Network Rail's stations and network in Wales is provided by the Secretary of State.

7.11 *Scope of the Welsh Ministers' powers as appropriate franchising/national authority to transfer franchise assets and to make transfer schemes at the end of franchise agreements, and as appropriate national authority in relation to railway administration orders applying to protected railway companies.* The Order transfers powers to the Welsh Ministers to makes schemes to transfer franchise assets when a franchise comes to an end, but only in relation to a Welsh franchise agreement that only covers Wales-only services. This is because, in the case of a Welsh franchise agreement that includes - through the application of the Secretary of State's powers - other Welsh services and potentially other railway passenger services within England, it will not usually be possible to distinguish the franchisee's relevant activities and assets as between specific services within the franchise or between England and Wales, and s.58 of the Government of Wales Act 2006 in any event only permits the transfer of functions so far as they are exercisable in relation to Wales.

7.12 In the event of a 'protected railway company' (one that carries out activities as a licensed operator of railway assets) being likely to be unable to pay its debts, being the subject of a petition for winding up, or seeking to propose a resolution for voluntary winding up, the appropriate national authority may apply to the Court for a 'railway administration order'. The purpose of such an order is to enable part or all of the company's relevant activities as licensed operator of railway assets to be transferred to another company or companies as a going concern and to secure the continuation of those relevant activities pending that transfer. For the same reasons, the Order transfers the functions of the appropriate national authority to the Welsh Ministers in relation to protected railway companies only in respect of activities they

carry on as operator under a franchise agreement that is concerned exclusively with Wales-only services.

7.13 The next agency agreement will contain appropriate provision for co-operation between the Welsh Ministers and the Secretary of State on the exercise of these Secretary of State functions, given the inclusion in both the current and proposed next Wales and Borders franchise agreements of services other than Wales-only services.

7.14 *Amendment of references to 'National Assembly for Wales'*. The 1993 and 2005 Acts conferred various functions on the National Assembly for Wales which were subsequently transferred to the Welsh Ministers by paragraph 30 of Schedule 11 to the Government of Wales Act 2006. Those functions were transferred without textually amending the various references to the Assembly in the 1993 and 2005 Acts. To aid the clarity and accessibility of both those Acts in the light of amendments made by the Order transferring functions to the Welsh Ministers, the Order therefore also updates all the relevant references to the National Assembly for Wales, replacing them with references to the Welsh Ministers.

Consolidation

7.15 No consolidation of the Railways Acts 1993 or 2005 is planned.

8. Consultation outcome

8.1 The Silk Commission's recommendations on further devolution of powers were informed by wide-ranging consultation with the public, stakeholders and academics carried out by the Commission. This included an opinion poll which found that only 23% of respondents wanted rail transport in Wales to be controlled by the UK Government. A summary of the evidence can be found on page 67 of their second report.

8.2 The Wales Office, and Welsh Government officials, have been consulted during the drafting of this Order. The Office of Rail and Road and the Passengers' Council (now known as Transport Focus following an expansion of its functions) have been consulted on those provisions in this Order that affect their functions. Both organisations are content with the proposed provisions.

8.3 The Welsh Government has undertaken two public consultations on the priorities for the next Wales and Borders franchise. The first consultation ending in March 2016 received 190 responses. Amongst other matters commented on, many respondents emphasised the importance of maintaining direct cross-border services between Wales and the major urban centres in England, with most suggesting that the services should continue to be provided as part of the Wales and Borders franchise. The support for maintaining direct cross-border services as part of a Wales and Borders franchise is reflected in the policy background set out in section 7.

8.4 The second consultation ending in May 2017 received over 1300 responses. The consultation sought views on, amongst other matters, whether the Wales and Borders franchisee should continue to manage large stations (Chester, Shrewsbury and Hereford) and a number of small stations in England served by the franchise. There were more than 750 responses to these questions and in each case 75% or more of all respondents stated that the stations should continue to be managed by the Wales and Borders franchisee. Views amongst respondent local authorities and rail user groups based in England were, however, more evenly divided. A number of consultees

commented on other matters concerning the specification of the franchise within England and the arrangements for ensuring its accountability to local and regional stakeholders in England.

8.5 These responses have been taken into account in the terms of the September 2017 agency agreement referred to in paragraph 7.7 above and of the franchise procurement. In particular, in relation to stations in England, there will be no change to the number of English stations managed by the franchisee; however the new franchisee will be required to set up a dedicated Borders Business Unit to manage stations and services within England and act as a focal point for liaison with relevant local authorities, sub-national transport bodies and user groups. Reports on both of the Welsh Government's recent consultations can be found at consultations.gov.wales[4].

9. Guidance

9.1 Guidance is not necessary as this Order only affects a limited number of public bodies. The Department for Transport will continue to work constructively and collaboratively with the Welsh Government as it builds additional capability on rail franchising matters.

10. Impact

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

10.2 There is no overall impact on the public sector as this Order only concerns a transfer of existing functions from one public authority to another.

10.3 An Impact Assessment has not been prepared for this instrument.

11. Regulating small business

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

12. Monitoring & review

12.1 As the purpose of this Order is permanently to transfer certain functions of the Secretary of State for Transport to be exercisable by the Welsh Ministers either instead of or concurrently with the Secretary of State, no monitoring or review of the effects of this Order is required.

13. Contact

13.1 Elizabeth O'Donoghue at the Department for Transport (Tel: 07917 092917 or email: elizabeth.o'donoghue@dft.gsi.gov.uk) can provide further copies of, and answer any queries regarding, the instrument.

[4] https://consultations.gov.wales/sites/default/files/consultation_doc_files/160816-setting-direction-wales-border-rail-summary-responsesen.pdf and https://consultations.gov.wales/sites/default/files/consultation_doc_files/170718-summary_of_responses-en.pdf