EXPLANATORY MEMORANDUM TO

THE FRANCHISING SCHEMES AND ENHANCED PARTNERSHIP SCHEMES (APPLICATION OF TUPE) (ENGLAND) REGULATIONS 2017

2017 No. 1092

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 Bus Services Act 2017 inserted new provisions into the Transport Act 2000 to provide certain local authorities with the powers to introduce bus franchising and enhanced partnership schemes. In both types of scheme there is the potential for contracts to be let to bus companies to provide local bus services, and for staff to be transferred from one operator to another. The new provisions make specific provision for the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE) to apply in these circumstances and for further details to be set out in Regulations. Those details are set out in these Regulations.

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 As these Regulations are subject to the negative resolution procedure and have not been prayed against, consideration as to whether there are other matters of interest to the House of Commons does not arise at this stage.

4. Legislative Context

4.1 The Bus Services Act 2017 amended the Transport Act 2000 to make provision for local authorities to make franchising schemes and enhanced partnership schemes in connection with the provision of local bus services.

4.2 In particular, new sections 123X and 138S of the Transport Act 2000 deal with situations where staff are transferred between bus operating companies as a result of local service contracts being awarded under a franchising scheme or a contract being awarded under an enhanced partnership scheme. Those sections provide that where it is relevant, transferring staff will have their existing employment rights protected by TUPE and provide for further details of how the arrangements will work in practice to be set out in Regulations. These Regulations set out the further details on the application of TUPE in these circumstances.

5. Extent and Territorial Application

5.1 The extent of these Regulations is England and Wales.

5.2 The territorial application of these Regulations is England.

6. European Convention on Human Rights

6.1 As these Regulations are subject to negative resolution procedure and do not amend primary legislation, no statement is required.

7. Policy background

What is being done and why

7.1 The Bus Services Act 2017 inserted new provisions into the Transport Act 2000 to provide certain local authorities with the powers to introduce bus franchising and enhanced partnership schemes. In both types of scheme there is the potential for contracts to be let to bus companies to provide local bus services, and for staff to be transferred from one operator to another.

7.2 Where a franchising scheme for local bus services is introduced, incumbent bus operators will be required to cease providing services in the area covered by the scheme. Local bus services will instead be put out to tender and provided under a local service contract between the authority and the operator winning the bid to run the franchised service.

7.3 An enhanced partnership scheme is a scheme under which a local authority (subject to notice and consultation requirements) specifies an area to which the scheme relates and introduces certain requirements as to the services to be provided. Route requirements can be agreed with operators which could, for example, place a limit on the frequency of services able to operate on a particular route. Should operators not be able to agree on how to provide services within this limit, the authority may be required to cancel registrations of local bus services and conduct a tendering exercise to award a contract or contracts for the services. However, the likelihood of this situation arising is low.

7.4 As it was not entirely clear whether TUPE would apply to either a franchising or enhanced partnership scenario, the new provisions clarify that TUPE will apply where employees transfer from one employer to another as a result of contracts awarded under a franchising or enhanced partnership scheme. This will ensure that the employment rights of employees are protected and that there is continuity of service. The new provisions include powers for Regulations to be made to supplement the TUPE provisions. These Regulations set out the detailed requirements that will apply to employee transfers and given their novel nature, will help provide a degree of consistency and certainty to local authorities, operators and employees.

7.5 These Regulations provide further details on:

- the process that should be followed when determining whether a person's employment is principally connected with the provision of particular services, and whether that person should therefore transfer under TUPE;
- the process that should be followed when determining which new operator employees should transfer to; and
- requiring operators of local services to provide the authority with certain information in relation to their employees.

Consolidation

7.6 The Bus Services Act 2017 amends Part 2 of the Transport Act 2000.

7.7 These Regulations do not amend any existing Regulations.

8. Consultation outcome

8.1 A six-week consultation exercise was held between 8th February and 21st March 2017 on the draft Regulations. The consultation sought views from a wide range of bodies, including the bus industry, local authorities, trade unions and passenger groups. This was supplemented by three half-day workshops to enable key stakeholders to ask questions about the Regulations before responding to the consultation.

8.2 Over 60% of those that responded agreed with the draft provisions for determining whether a person is 'principally connected' in order to be subject to a TUPE transfer to a new employer. Some respondents queried whether the consultation process should focus on individual roles or particular groups of employees that will be subject to TUPE, rather than the factors that will be taken into account in each individual case. Some respondents also felt that while the proposed consultation process included in the Regulations was useful, the provisions should provide more detail on the timescales involved to help ensure that local negotiations are concluded in a timely manner. The Department has considered these views and amended the Regulations to clarify that individual roles may be a factor in determining locally if the employee is 'principally connected'. The Department has also amended the Regulations to make it clear that local authorities can specify the timescales within which they are seeking agreement as part of the notice that they are required to publish.

8.3 70% of respondents agreed that both the employee's time spent assigned to the affected local services and their time in continuous employment were the appropriate factors for determining whether they are 'principally connected'. However, there was concern expressed about using time spent in continuous employment as a factor, as this could mean that staff employed shortly before franchising or an enhanced partnership contract are introduced would not transfer. The Department responded to this by removing the time spent in continuous employment to be taken into account as a determining factor when deciding if a member of staff is 'principally connected' where local agreement is not reached.

8.4 The Department consulted on the minimum proportion of a person's time that should be spent assigned to affected local services for them to be considered as 'principally connected'. The majority of respondents agreed that the minimum time should be 50%. The Department responded to this by amending Regulations to ensure that employees who spend at least 50% of their time assigned to the affected local services should be considered as 'principally connected'.

8.5 Over 70% of respondents agreed with the process for allocating transferring staff. Although the Department received few comments in relation to this consultation question, a number of respondents did argue that 'recognised trade unions' should be specifically named in the Regulations as parties to be consulted. The Department agreed that all employee representatives, including trade unions, should be consulted on the proposed allocation arrangements. The Regulations already provide for this by specifying 'employee representatives' as parties to be consulted. The Department therefore did not make any changes to the Regulations.

8.6 A detailed Government response on the outcome of the consultation is available from the Department for Transport's website at -

https://www.gov.uk/government/consultations/bus-services-bill-draft-regulations-and-guidance.

9. Guidance

9.1 There is no relevant guidance relating to TUPE in the context of franchising schemes and enhanced partnership schemes that is not included in this Memorandum.

10. Impact

10.1 The impact on business, charities or voluntary bodies of these Regulations in particular will be dependent on whether or not they operate bus services in an area where a franchising scheme is introduced, or on a route which is subject to registration restrictions as part of an Enhanced Partnership Scheme. The impacts will be in the form of providing information about employees to the authority, and administrative impacts in terms of engaging with the process to ensure the smooth transfer of staff.

10.2 The impact on the public sector will be in the form of the administrative process of consulting with operators to determine which employees should transfer under TUPE. We have not separately estimated these costs; they are bundled into an overall estimate of the costs to an authority of implementing franchising, estimated to be £2m-£4m in Passenger Transport Executive areas, and £1m-£2m in other areas. However, authorities are not required to introduce bus franchising or enhanced partnerships, and as such can consider these potential administrative burdens as part of their consideration of the costs and impacts of introducing such a scheme. The impact of the package of franchising and enhanced partnership scheme Regulations as a whole on the public sector is dependent on the level of take-up of the powers, and the specific models pursued in local areas.

10.3 These Regulations are part of a package of Regulations which enable authorities to set up franchising or enhanced partnership schemes for their local bus market. The overall impact on bus operators of franchising and enhanced partnership schemes will be dependent on the level of take-up of the powers, and the specific models pursued in local areas. Indicative analysis shows that the overall impacts on operators will be determined by a combination of factors, including changes in service quality and frequency, the level of on-road competition, and fare simplification.

10.4 The impact assessment prepared to accompany the Bus Services Act 2017 was updated to take account of any additional impacts of the package of franchising Regulations, and can be found at - https://www.gov.uk/government/publications/bus-services-bill-impact-assessments.

11. Regulating small business

11.1 These Regulations apply to activities that are undertaken by small businesses i.e. smaller bus operating companies. The impact on such small operators will be dependent on whether, or how, bus franchising or an enhanced partnership is implemented in the area in which they are operating.

11.2 A small and micro business assessment was conducted for the bus franchising and enhanced partnership policies as a whole and forms part of the impact assessment prepared to accompany the Bus Services Act 2017. It sets out the potential impacts of the policies more broadly, and the actions taken to attempt to mitigate the impacts on

small business. However, no specific action is proposed to minimise regulatory burdens on small businesses of these Regulations. This is because these Regulations do not directly impose burdens on business. The Regulations set out processes for authorities, employee representatives and bus operators to follow to both determine which members of staff are in scope to transfer, and attempt to minimise the potential impacts of a franchising or enhanced partnership scheme on employees and their employers.

11.3 As part of the consultation exercise Department for Transport officials met with a number of small bus companies and organisations representing bus companies to gather their views.

12. Monitoring & review

12.1 Jesse Norman, Parliamentary Under Secretary of State for Transport, has made the following statement under section 28(2)(b) of the Small Business, Enterprise and Employment Act 2015.

12.2 "Having had regard to the Statutory Review Guidance for Departments published under section 31(3) of the Small Business, Enterprise and Employment Act 2015, in my view, it is not appropriate to make provision for a review in the Franchising Schemes and Enhanced Partnership Schemes (Application of TUPE) (England) Regulations 2017. A review of these Regulations would be disproportionate, taking into account the economic impact of the Regulations on the activities of bus operators, and would be undesirable for the particular policy reasons set out below".

12.3 Franchising schemes and Enhanced Partnership schemes are tools available to a local transport authority ("LTA") to use to improve bus services in its area if it chooses to do so. Therefore the Department does not know how many such schemes will be created under the new provisions inserted by the Bus Services Act 2017; the adoption of Quality Partnership Schemes introduced under the 2000 Act was relatively small in number. Also before a franchising scheme or an enhanced partnership scheme can be made a LTA must, under section 123E and 138F of the Transport Act 2000 respectively, consult operators providing local services in the area relating to the scheme. In addition the LTA must set out full details of its plans for consulting on how well a franchising scheme is working once it is up and running and, in the case of enhanced partnerships, must decide whether and on what basis the partnership arrangements are to be reviewed. Such schemes are not time limited and may exist for many years or even decades. A provision for regular five yearly review of these Regulations underpinning such scheme would be resource intensive and time consuming for the Department, LTAs and operators as information and data would have to be gathered regularly from many different bodies throughout England and then assessed by Departmental policy experts and analysts, with reports setting out the conclusions of the review having to be produced.

12.4 Furthermore regularly reviewing these Regulations would adversely affect the achievement of the policy objective of securing LTAs' and operators' long term commitment to franchising schemes, or enhanced partnership schemes as the case may be, that are appropriate to their areas. For example LTAs may hesitate to enter into a long term financial commitment around infrastructure in a franchising scheme or an enhanced partnership scheme if they felt that every five years there was a high degree of uncertainty over the future of the scheme selected. For the same reason operators might be reluctant to enter into financial commitments around, for example,

new or improved vehicles. This might result in a franchising scheme or an enhanced partnership scheme not being adopted at all or either type of scheme being adopted with a much less ambitious scope and consequently a smaller benefit being realised for local bus services.

12.5 The outcome of the implementation of the relevant provisions of the Bus Services Act 2017, and associated secondary legislation, will be assessed as part of the post-legislative scrutiny of that Act. A provision for review has not been included in the Regulations. As these Regulations will only apply where a local authority has implemented a franchising scheme or been required to use the powers under an enhanced partnership scheme, a review of the effectiveness of the Regulations will be conducted once a number of such schemes have been introduced, or concerns are raised about the effectiveness of these Regulations by an authority that has implemented a scheme.

13. Contact

13.1 Paul Rhodes at the Department for Transport (Telephone: 07773 233713 or email: paul.rhodes@dft.gsi.gov.uk) can answer any queries regarding the instrument.