

Our Ref: [REDACTED]
Your Ref:

12 July 2021

[REDACTED]

Department for Transport
Great Minster House
33 Horseferry Road
LONDON
SW1P 4DR

Dear [REDACTED]

LEGAL ASPECTS OF THE NATIONAL BUS STRATEGY

Thank you for your letter of 10 May responding to our letter of 18 March. I note that since that letter was received you have issued guidance on Bus Service Improvement Plans and Enhanced Partnerships and that we should shortly expect to see revised guidance on Franchising.

We welcome the importance that you place on making it easier for both LTAs and operators to focus on what we want to achieve, and de-risking delivery. In considering your letter, and responding, we have sought to focus on those points where, in light of your responses, we continue to believe there is benefit in ensuring that the legislative regime supports practical delivery. In that light, we note your points that any legislation (primary or secondary) would take time to deliver given pressures on Parliamentary time, and the need for consultation. We also note the need to be clear as to why any legislative proposal is required and could not be better delivered through guidance. In responding, we have therefore sought to explain where relevant why guidance may not be sufficient, and also the justification for any legislative measures.

Use of direct awards (outside of a franchising scheme)

You have asked for a view on potential contract values and scale, and we also note your comment regarding the interaction between domestic and regulation 1370/2007 as retained in UK law. We think it is worth clarifying the suggested position on this:

- This is not an area that can easily be dealt with through revisions to guidance. Quite correctly, the default legal position is that such contracts should be awarded competitively and this in any case applies under the Transport Act 1985, even where the current retained European legislation (both regulation 1370/2007 and the Utilities Contract Regulations/Public Contract Regulations) do not apply to require

competitive procurement due to contracts being below threshold. Local transport authorities already make use of the de minimis provisions under the Service Subsidy Agreements (Tendering) (England) Regulations 2002 (SI 2002/2090) to directly award contracts where necessary, but, in the case of our members, these are typically limited to 25% of the overall secured service budget (pursuant to regulation 3A). As there is a clear statutory regime that would be breached without additional regulations, guidance alone is therefore not appropriate.

- The transition from the current context for bus provision (which as you are aware remains impacted by COVID-19) to the future need to implement the national bus strategy creates an additional risk if funding is reduced in a way which means that services which were previously marginally profitable prior to COVID-19 became no longer profitable. In reality this may not lead to full withdrawal of services (which would then allow for a clean competitive procurement of a replacement service), but instead withdrawal of services leaves only a commercial core at the most profitable periods of the day. This behaviour is common (and understandable) for operators in a commercial environment, and extension of services beyond their commercial hours has been a common use of de minimis contracting precisely for these reasons. In order to maximise the benefits of the national bus strategy and to avoid the discussion in respect of the BSIP focussing on short term service impacts, it seems important to us that the approach to implementation of BSIPs and transition into new enhanced partnerships or franchising schemes can focus on those long term aims, rather than the short-term transition. Allowing greater use of de minimis style direct award contracts for this transitional period therefore seems likely to allow an effective transition and allow all parties to be able to focus on long-term outcomes, rather than short-term management of transitional issues. Where government funding is used to support services for this transitional period, the selective use of direct award powers beyond that possible under current de minimis powers will enable those services to be let in a way which retains market stability through this transition. Otherwise, it will be necessary to competitively procure those services, which may actually discourage incumbent operators from committing to strong enhanced partnerships, if they believe it will lead to their pre-COVID-19 services being competitively procured. We note that the new EP guidance provides specific examples where de minimis powers may be utilised to achieve subsidy support – for example extending service hours or increased frequencies (see paragraphs 8.17 – 8.20 of the guidance), and whilst tenders may be appropriate for some of these service extensions (especially where fares can be otherwise rationalised to remove the disbenefits of different operators running the same service) in some cases this will be impractical and use of de minimis powers may be the only effective way to deliver the BSIP cost effectively, and it will be important that powers are then available to do this. This is particularly important, as we are aware that many of our members, and other local transport authorities, already make use of a large proportion of the allowance allowed for direct award under de minimis rules, and therefore there is a risk that without an extension to these powers local transport authorities will have to balance their existing and transitional needs for direct awards, which could also impact the stability of local bus markets, and also the ability to implement some of the proposals in BSIPs.
- We would not propose that the individual value of contracts falls outside the constraints that already apply to the letting of subsidised bus service contracts. For example, the limit that apply to such direct awards under article 5 of regulation 1370/2007 would apply, with individual contract values capped at £875,000 (or

£1,750,000 where awarded to SMEs with 23 or fewer buses). Where the UCR or PCR applies to a contract (i.e. where the contract is not a services concession) then more stringent rules apply to direct award, further limiting the value of such contracts to below threshold. However, in reality we believe that in most cases the individual contract values will be materially lower than this, both due to the availability of funding, and also because, in many cases we would expect that these contracts will be used where the long-term expectation is that the services will become commercial, both due to the return of passengers post-COVID and also due to the improvements that could be achieved through the implementation of EPs (or franchising where these contracts are supporting transition to franchising). However, this also makes it difficult to assess the total value of contracts that may be required, as this will depend upon individual bus markets, the response of the market post COVID-19, and the specific ambitions of each individual BSIP. As a result, we believe that the additional exception that is proposed should not be limited by total value (unlike the position for existing de minimis contracts), as this may simply create a new “cliff-edge” of contract value, but instead should be focussed on the purpose and term of the award, with the contract term of individual direct awards being shorter than are allowed by de minimis to ensure that the requirement for a direct award is reviewed regularly, and conditions linked to the implementation of the BSIP. As existing procurement rules will still apply, these will further ensure that use of direct award powers are limited to those which are actually necessary. As previously mentioned, it will be necessary to ensure that any such exception interacts correctly with the existing de minimis exceptions to avoid unforeseen consequences. As the proposed exceptions would therefore not impact the underlying procurement rules and would only require a time limited exception from the application of section s89 Transport Act 1985, these would be passed under the provisions allowing for regulations pursuant to section 91 and 92 Transport Act 1985.

- We also note that in our dialogue around future funding of bus services that the intention of DfT is to return to the proposition that we have put throughout the pandemic, which is for more comprehensive devolution of funding. The timeframe for which being April 2022 in line with the implementation of BSIPs and transformation funding from that point. This option may be difficult to take forward (as it has been in the past) If we remain in a Catch 22 / ‘indecision is the decision’ around powers and decision making. As in DfT will not look at the powers that are needed to devolve until we make the decision to devolve. But then we cannot make the decision to devolve because the powers aren’t there to devolve.

If you were to proceed with this approach, we would be happy to engage in more detail to help work through the practical issues that may arise from implementation. However, given the real benefit that this could provide to authorities negotiating the terms of BSIPs and following EPs, it is important that this is progressed quickly.

We understand that you are having separate discussions with our members who have already triggered the franchising process around use of direct award powers both to assist the transition into, and award of contracts within, a franchising scheme.

EP Objection Rights

We note your comments regarding the need for secondary legislation being required to amend the objection threshold for EPs and understand that there is a need for a

compelling case in order to change these thresholds. We also note your comment that if an objection is raised there is a funding risk to both parties if the mechanism is used. We further note that this specific comment has been reflected by the express statement in the guidance that "to object without giving reasons would run against the requirement in the BSIP to co-operate with the EP process to receive discretionary funding, including CBSSG."

However, even if the intention of this is to ensure that there is sufficient pressure on any operator to object only if they believe it is truly justified, due to the negative funding risk that they would be running, the reality still appears to be that this would mean that there is a funding risk to all parties if the mechanism is used, as the sufficient number test set out in regulation 11 of the Enhanced Partnership Plans and Schemes (Objections) Regulations 2019 means that objections can be raised by a minority of operators, but the impact of those objections would be to then mean that a proposed EP could not proceed for any of the operators or the LTA. It is not clear from the revised guidance whether those parties who do co-operate can still benefit from the potential uplifted funding benefits from delivering a BSIP if an EP is not implemented due to objections by a minority. It is precisely for these reasons that we believe it would be worthwhile reviewing these thresholds, as the requirements of the National Bus Strategy change the commercial dynamics of any discussion regarding EPs. Previously, there was not a negative funding implication of failing to deliver EPs, and therefore where operators chose to object to a scheme, this meant that the improvements to the EP would not be implemented but did not directly have negative implications on any of the participants – the status quo would instead be retained. The introduction of the NBS and the potential loss of existing funding to all operators as a result of an EP not being agreed changes these dynamics and could have an adverse impact on negotiation of the terms of an EP with operators, as failure to get agreement from any sub-group of the operators could have negative implications on all operators and the LTA, rather than simply maintaining the status quo. This changes the dynamics of the required statutory engagement and whilst we understand your expectation that the risk of loss of funding will incentivise operators to co-operate where reasonable this may be dependent upon the specific dynamics of individual bus markets. Given the differing nature of bus markets, it is difficult to quickly establish what may be an appropriate threshold, however, we think it would be worth considering:

- a) Is the 25% threshold in regulation 11(4)(b) still appropriate? This would mean even where there was agreement with 75% of the market, a potentially small minority of operators (including one operator with sufficient market size to exceed the 25% threshold) could block introduction of an EP implementing the NBS.
- b) Is the 4% threshold in regulation 11(5)(b) appropriate, as this means that even where 96% of the market agrees with the proposal, a small minority (by volume) of operators could successfully object. Alternatively, potentially the 50% threshold could be raised, so that there needs to be a clearer majority of operators opposed to the scheme before it proceeds.

The intention is not that this should stop operators from raising valid objections, but that those objections should only gain traction where a significant proportion of the bus market is opposed to them. This is a particular concern where there are certain operators who move more quickly to a position where they do not require significant CBSSG support, as in those instances there may actually be a competitive benefit in seeking to delay implementation of an EP, where this will harm their competitors. We assume that this is not the intent of the currently proposed approach.

We note that you would “look carefully at individual cases before advising Ministers about funding withdrawal.” Whilst this gives some comfort that a sensible approach will be taken to funding withdrawal, the exercise of discretion at such a stage does not change the negotiation dynamics described above – this discretion may mean that there are not adverse financial consequences of failing to reach agreement, but this will only be known at a late stage. Therefore, if it is not possible to relax the objection rights to provide this balance, it would be helpful to have clearer guidance as to how the SoS intends to exercise such discretion where an EP is not implemented to give greater confidence that a failure to reach agreement on the terms of an EPS will not necessarily lead to such a funding loss.

EP Change Mechanics: we welcome the suggestion that the EP template will include proposals around change. We note that this template has not been provided with the update of the EP guidance, but that the guidance already makes helpful reference to the potential for incorporating bespoke change mechanisms within an EP.
Clarification of process for introducing franchising schemes: we welcome the suggestion that this will be clarified in the revised guidance.

Veto rights in the registration regime: whilst we note your point regarding primary legislation being required to make amendments to section 6 Transport Act 1985, we had noted specifically in the letter that as a result, we were only proposing that amendments were made to requirements for service registrations under the Public Service Vehicle (Registration of Local Services) Regulations 1986. These are regulations made under (amongst other sections) section 6(9) Transport Act 1985 and can be amended by statutory instrument pursuant to the same regulation (as they have been on a number of occasions). We continue to see a benefit for effecting transition between the current situation and widescale EPs of introducing such restrictions. Whilst we note your point that EPs provide LTAs with greater control over the registration regime, this will be the case once an EP is in effect, and therefore does not assist with the transition period. We would therefore be grateful if you could properly consider this proposition for the reasons set out in our original letter as for such amendments to be beneficial they would need to be considered in the next few months so that they were in place during the period of finalisation of BSIPs.

Municipal bus companies: we look forward to the call for evidence on this subject.

Funding certainty: whilst your response does not expressly cover this, we would re-emphasise the benefit in providing greater funding certainty for authorities as to how funding will be allocated as part of the current process. The level of funding availability and how it will be allocated to different proposals will potentially drive the “art of the possible” in discussions in BSIPs, and whilst it is understood that there will be some need to manage the immediate deliverables under BSIPs dependent upon funding availability, the greater certainty that can be provided, the more focussed discussions can be between local transport authorities and operators in respect of investments, and hopefully the more benefits that can be realised. The revised guidance recognises this in describing at paragraph 3.17 that you would expect new DfT funding to be included in an EP either initially, or by varying the scheme at a later date. Whilst this is helpful, gaining an early understanding of this will ensure that it can be taken into account in those initial EP discussions, which will allow the initial EP to be based upon available funding, and allow operators to agree to a more ambitious EP that reflects the greater investment. On a similar note, the fact that the SoS will disapply the April 2022 deadline in individual cases or on an exceptional basis is welcomed, but it will be important that both LTAs and

operators understand when this may be the case, so that it drives the correct behaviours from all parties.

Wider competition issues: we note your points regarding the encouragement of engagement on significant cross-border services. We would note that even without such encouragement where there are such services this is effectively a statutory requirement for LTAs due to the statutory obligation to consider such joint working under section 138A(14) of the Transport Act 2000. We note your point that where competition concerns are raised that advice should be sought on specific scenarios with the CMA, and that you will support this, which is welcomed. We also welcome the additional guidance which is provided in the revised EP guidance on how competition law would apply to some of the elements of the BSIP. Including engagement with the CMA. This is helpful, however it raises a potential concern that the ambitious objectives of the NBS will be more likely to raise competition concerns, and whilst these concerns will often be manageable and then capable of being raised with the CMA by each individual local transport authority, the need to negotiate a large number of enhanced partnerships in parallel across England later this year could potentially give rise to a large number of such queries (and indeed the more ambitious the aims of operators and local authorities, potentially the greater need to engage with the CMA to gain assurance that such proposals are manageable within current competition law). This therefore raises a number of capacity concerns. Operators will necessarily be concerned to ensure that any BSIP and EP proposals do not give rise to concerns for their business. LTAs are likely to want to explore the constraints of competition law on their ambitions and therefore this could lead to extensive negotiations, where aspirations are ambitious. The CMA will then potentially have to deal with a large number of similar queries, exploring the constraints of competition law on proposals, within a small window of time during the autumn, prior to consultation on any EP. If the CMA do not have the capacity to deal with such queries quickly this could harm the ability of authorities to proceed with more ambitious plans. Therefore, whilst we can understand the desire to avoid speculative guidance, we could see the benefit in finding ways to provide further practical guidance on application of competition law as EPs develop, to avoid repeated raising of similar issues.

Delivery timescales: it is welcome that the guidance must be clear that the commitment to EPs and/or franchising will be subject to the statutory process. Whilst it is also good that you recognise the need for flexibility in the deadline, we would reiterate the benefit in setting out the timescales required to be followed in implementing for the April 2022 deadline, to provide local transport authorities with clear guidance as to the recommended timescales for key parts of the EP process. In one place. This is particularly important given the need for many LTAs to consult upon EPs within a similar timeframe, making it important that there is sufficient time for responses from operators and other consultees (and for those responses to be taken into account) within the statutory timescales for implementation. It is important that such guidelines are set out early to ensure that LTAs can take this into account in their programme of engagement with operators over the summer and early autumn, to ensure that consultation can be meaningful and be properly completed prior to scheme implementation next spring.

Simplification of the franchising process: we understand that you are in discussion on this with our members who have already triggered the franchising process.

Thank you again for taking the time to consider the points made. We look forward to continuing engagement with you to support effective implementation of the National Bus Strategy.

Yours sincerely,

[REDACTED]

[REDACTED]