

Our Ref: [REDACTED]  
Your Ref:

18 March 2021

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

Dear [REDACTED]

## **LEGAL DIMENSIONS OF THE NATIONAL BUS STRATEGY**

We welcome the scale of ambition in the National Bus Strategy and the ongoing dialogue we have had, and hope to have, on its development.

I am writing to you now in relation to the legal dimensions of how the proposals in the Strategy might unfold. This letter is on the basis of advice that we commissioned from DLA Piper.

Whilst we appreciate that the publication of the National Bus Strategy (the Strategy) has set a wider context to the proposed approach to delivery of recovery arrangements, we also note that the detail of the transition from the current CBSSG support continues to develop and whilst information on how this will develop is set out in an Appendix to the Strategy, there is still need for the detailed legal framework for this to be set out. In the context of these developing arrangements, we thought it would be helpful to set out concerns and proposals from a legal perspective in respect of the discussions to date and the information in the Appendix to the Strategy, hopefully to assist in ensuring that the final arrangements work effectively to manage the transition from the current CBSSG arrangements to the proposals set out in the Strategy.

We have set out both proposals and concerns regarding the legal framework being used to deliver the proposed arrangements, and also practical considerations that stem from the existing legal frameworks. We have sought to do this in the context of the latest proposals as set out in the Appendix to the Strategy. Specifically:

- better enabling local authorities to make use of direct awards will both allow them to appropriately stabilise the market as it recovers, and potentially support transition into enhanced partnerships or franchising in the timescales proposed;
- simplification of delivery of the delivery routes for the Bus Strategy will be beneficial, to allow both operators and local authorities to focus on delivery of

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represents Greater Manchester, London, Liverpool City Region, Tyne and Wear, Sheffield City Region, West Midlands, West Yorkshire, Nottingham City Council, Strathclyde Partnership for Transport, Translink, Transport for Wales, Tees Valley and West of England Combined Authorities are associate members of the group.

the BSIPs rather than legal structures, and therefore we have suggested a mix of legal measures that would aid recovery, including repeating a number of suggestions that we made last year;

- competition and subsidy control issues will be relevant to ambitious partnerships, and clear guidance would be beneficial to ensuring that the EPS that are produced are not “lowest common denominator” schemes, but maximise the benefits of the funding provided;
- the strategy is clear that authorities should deliver through either EPS or franchising. In doing this, we would expect authorities to make use of existing structures, in particular where they complement the use of an EPS. Ensuring that authorities can deliver in a context where significant legal frameworks will need to be put in place, will require care to ensure that it does not prejudice smaller operators and/or authorities that already have effective governance;

The detail of these issues is set out below. At this stage we have not sought to comment on all of the detail set out in the Strategy, only where this impacts on the shorter-term recovery from the impacts of COVID-19. This letter is therefore sent in the context of the publication of the Strategy but does not seek to comment in detail on the longer-term delivery proposals in the Strategy, save where it will be of immediate concern.

## **1. Use of Direct awards**

It is clear from the Strategy that during 2021-2022 there is an expectation that LTAs and operators will work together to maximise the number of services provided, supporting them and re-growing the customer base, and preventing scaling back of services to just profitable routes, and that this will need to be done in the context of working towards agreement of Bus Service Improvement Plans, negotiation of Enhanced Partnerships and implementation of franchising scheme. To achieve this it is important that there is not instability in the network as passengers start to return. We also note that you expect the majority of funding in this period to be used to support services.

In this context, as we have previously discussed, we would welcome any proposals to provide a time limited exception from the requirements of sections 89 – 92 Transport Act 1985 in respect of the need to competitively procure local service contracts to the extent that this is required to support services for this interim period where operators are still recovering from the effects of COVID-19 (“Exception”). In particular it may be necessary to procure specific services from certain operators both pre- and post- introduction of Bus Service Improvement Plans to ensure that the right network is provided during transition to a longer-term EPS or franchising scheme. Such an approach would reflect the proposals that we made last summer, and we believe that as a short term approach to allowing local transport authorities to manage the appropriate provision of services across their areas it will remain important to allow them to be able to use direct award of local service contracts to support operators’ continued provision of necessary services without unnecessarily disrupting the market, and also to, where necessary, make focussed decisions on which services to support.

We appreciate, however, that care will need to be taken that this does not have unforeseen consequences on the market. This applies both in introducing and removing the Exception, as the end of such an Exception could also lead to a new “cliff edge” when it expires. We would therefore suggest that:

- a) implementation of the regulations required to allow for this Exception should proceed as a matter of urgency. This would be made pursuant to section 91(1)

Transport Act 1985. Effective direct award powers are a necessary tool for supporting recovery from COVID-19, providing local authorities and operators with a cleaner procurement route for any direct award contracts that may be required even prior to introduction of any other recovery mechanisms. We would be happy to work with you on these regulations to ensure that the detail worked effectively with existing de minimis exceptions and allowed for a practical transition back to “business as usual” following the recovery period.

- b) In this respect, care needs to be taken that the period for which this Exception would apply is long enough not only to allow for transition to such direct award agreements, but also allow a balanced transition out of those agreements into the proposed longer term delivery models that would follow, including EPS and franchising. The provisions of section 91(1) allow regulations to exclude certain services from section 89(1) of the Transport Act 1985, the description of such services which “may be framed by reference to .... any other relevant circumstances”. In this case we believe that the circumstances should cover a sufficiently wide scope of post-COVID recovery to maximise its effectiveness. Having a relatively short period over which a greater number of direct awards are allowed would not take account of the fact that if services have not fully recovered then replacement of services with secured local service contracts may take time, and where a local authority is proceeding with an EPS may need to align with transition into the standards required by that EPS and therefore a reasonable transition period should be allowed to allow for services to return to commercial operation and/or to be retendered. Setting end conditions for the exception aligned with the wider approach to recovery will therefore be important, to ensure that a smooth transition to franchising (if implemented by any authority) or an enhanced partnership could be affected, and to give operators of commercial services sufficient confidence to be able to agree longer term partnerships with their local transport authorities. Another way to achieve this would be to set specific conditions for the terms of the contracts, rather than limiting the time period of the exception, for example by limiting the circumstances that contracts could be directly awarded, and expressly including exceptions that included transition into franchising schemes and provisions consistent with the terms of a proposed EPS.
- c) Ideally such an Exception should either be completely separate from current de minimis contracts, so that these services do not affect existing de minimis contracts or should amend the current provisions to increase the limit on direct awards in such a way that does not undermine the effect of contracts let under the current regulations. The current wording of regulation 3A(3) of the Service Subsidy Agreements (Tendering) (England) Regulations 2002 (De Minimis Regulations) which allows for procurement of de minimis contracts where they and “all other service subsidy agreements made by the authority otherwise than by acceptance of a tender invited pursuant to section 89(1) of the Act” do not exceed 25% of the forecast expenditure for that year would currently mean that services let under a new exception would still eat into the de minimis cap and therefore be capped at 25% in total. The exception should therefore either work by amending this threshold to be higher than 25% for the specified period, or should expressly carve-out contracts let under this exception from the application of the existing regulation 3A(3) of the De Minimis Regulations.
- d) As part of your proposed revisions to guidance, local transport authorities should be given guidance as to the wider applicable procurement and subsidy

control provisions that apply to their letting such contracts on a direct award basis to ensure a consistent approach to compliance with procurement rules (which will both provide legal clarity for local transport authorities and also provide operators with a consistent approach, giving them confidence that they are not prejudiced by such processes compared to their competitors). In particular ensuring that local authorities understand the interface between the Transport Act 1985, Regulation 1370/2007 and the applicable procurement regulations is important to ensure that the correct procurement routes are used, and that issues such as over-compensation are properly and consistently managed where contracts are directly awarded. Whilst these issues are always relevant, the potential scale of required direct awards and the level of scrutiny that will apply as the impact of COVID lessens makes it important that the correct rules are followed to ensure that legal risk is minimised. These issues may also be important as operators move into the framework of enhanced partnership schemes on a wider basis, as the ability to ensure that any non-commercial services are let on a basis which is consistent with that framework may merit focussed use of direct awards, but it is important that this is done within the correct legal framework. We note your intention to ensure that there are more comprehensive “socially necessary” services, including extending services to be “whole day” services, an area where direct award is often currently used for de minimis services to ensure consistency and value for money, and therefore ensuring that the new guidance proposed for such services covers the legal use of direct awards will be an important step.

More generally time limited direct awards agreements will be an effective way to support delivery of required services which would not otherwise be provided as a result of the impact of COVID-19 and can (subject to provision of the exception above, and ensuring that they fit correctly within applicable procurement regulations) be implemented quickly, providing significant control over how services are provided. Provided that those services are ones which would not otherwise be provided, or provided to the relevant standard, this would fall within the existing powers of local transport authorities (for example under section 9A Transport Act 1968 or section 63 Transport Act 1985). In particular this approach would allow for effective use of recovery funding by local transport authorities allowing continued focused funding to be provided to operators where they continue to provide services which are not commercial due to the continuing impact of COVID, but with the ability to then competitively tender those services at a later date if they do not return to commercial operation. This route therefore provides a clear legal route for the proposed use of recovery funding to support required services, as set out in the Strategy. Whilst we welcome the proposals to expand the use of EPS, where the funding provided relates to provision of specific services, it would not be legally possible for local transport authorities to rely solely upon the use of partnership structures for providing that funding to operators, as it is clear from section 88 Transport Act 1985 that such funding should still be subject to a competition, unless excepted under section 91, and therefore ensuring that direct awards can be made where appropriate will form an essential part of the toolkit to deliver more ambitious partnerships.

## **2. Delivery structures**

Given the timescales proposed for delivery of the Bus Strategy’s key elements, and the need to do this whilst managing recovery from COVID, we think it important that, so far as possible delivery of both EPS and franchising are de-risked, to allow parties to focus on the quality of delivery. Whilst the Strategy makes it clear that there will be discretion to continue funding local transport authorities where they are not responsible for any delay in

implementing a proposed EPS, it would still be beneficial to streamline that process, to ensure that all authorities have the best chance of implementation of effective partnerships prior to the summer of 2022. Potential routes to provide for more focussed introduction of either scheme would include:

- 2.1 Providing for direct award powers (discussed in section 1 above) to allow for a managed transition into franchising, de-risking the process for both local transport authorities and existing bus operators. This is potentially an ideal time to transition services onto a franchise basis, whilst many operators are subject to significant state support with services being delivered on a basis agreed with their local transport authority, and therefore being operated on a basis more closely aligned with franchised operation.
- 2.2 The use of short-term direct award powers may also be helpful in de-risking the introduction of more ambitious EPS, if this allows for some of the transition to higher standards to be managed through contract. The general direct award powers that we have requested above would work for these purposes, as such awards would remain within the existing de-regulated industry structure.
- 2.3 Reviewing the objection thresholds for enhanced partnership schemes, so that they are not used to unreasonably stop authorities and groups of operators progressing EPS. In particular, if different operators are progressing back to commercial operation at different speeds there seems a risk that operators could seek to use these mechanisms for commercial advantage by blocking schemes. This is a particular risk where the number of bus operators is such that limited numbers could effectively object to the scheme, and the tight timescales mean that operator opposition to proposals risk not only delay of implementation of BSIPs, but potential material loss of funding. Ensuring that the objection thresholds are set at levels which allow for valid objection, but do not allow for small groups of (in particular larger) operators to block an otherwise effective EPS may be beneficial to implementation in the timescales proposed. In particular an operator making objections after changes are made to an EPS following a consultation process could significantly delay implementation. If thresholds cannot be amended, it would be helpful for guidance to make clear how discretion will be exercised by DfT to allow continued funding in these circumstances, so that this cannot be used as a threat by operators to gain unreasonable concessions.
- 2.4 Providing for more flexibility in the change mechanism for an EPS (this could alternatively be provided by providing more clarity as to the extent that change can be incorporated into an EPS) to allow partnerships of operators to more effectively develop an initial EPS once made, without significant time and effort expended on consultation would be helpful. We appreciate that such a change mechanism can be built into the terms of an EPS, but this will, itself, require material negotiation, within tight timescales.
- 2.5 Providing clarification to the process for introducing franchise schemes to allow such schemes to progress more rapidly. This might include the following:
  - Updating the statutory guidance on the content of an assessment to make the requirements clearer and more streamlined. Whilst the specific requirements of the assessment are detailed in sub-sections 123B(2) to (4) Transport Act 2000, sub-sections (5) and (6) allow for statutory

guidance to supplement this. The majority of the detailed requirements for an assessment can therefore be changed without any legislative change by changing the statutory guidance. Changing the guidance will not affect the need for local transport authorities to mitigate risk associated with the impact of a scheme on an operator but may allow authorities to consider whether other approaches to their assessment are appropriate. This may particularly be the case where the complexity of a local bus market is lower, and therefore a more simplified assessment could properly be carried out. Updating the guidance may also allow more account to be taken of the wider benefits that may be driven by franchising schemes for delivering public transport post-COVID-19. Clearly any revisions to guidance will need to also recognise those schemes which are already in development.

- The process for obtaining information under section 143A of the Transport Act 2000 (in respect of franchising schemes) and section 143B (in respect of EPS) could be streamlined. Experience has shown that whilst these information provisions provide an ability to request relevant information from operators that will inform the proper development of either an EPS or franchising scheme, and whilst the powers are relatively extensive, it is possible for operators to delay provision of such information (and therefore the development of a scheme based upon it). This situation could be improved by:
  - providing more specific (and time limited) enforcement rights within the legislation to avoid delay by operators in providing information.
  - providing a more comprehensive list of information in regulations i.e. amending the Franchise Schemes and Enhanced Partnership Plans and Schemes (Provision of Information) Regulations 2017

2.6 When we wrote to you last summer, we proposed that there may be benefit to allowing for some limited controls over service registrations whilst the bus market was destabilised by COVID-19. We proposed that including veto rights for LTAs within the process of registration of local services under section 6 Transport Act 1985 in circumstances where that registration would, in the reasonable opinion of the authority, have an adverse effect on the ability of the authority to meet the public transport requirements of its area in an economic, efficient and effective manner, may be a useful tool to avoid unnecessary market disruption as the effects of COVID-19 were reduced. There would be merit in such proposals now, to support the transition to an EPS, and avoid the risk of speculative registrations by existing operators or new entrants disrupting the transition to an EPS. As we noted at the time such an amendment would probably require primary legislation to amend section 6 Transport Act 1985, and therefore if this is not practical as a solution as a minimum we would suggest amendment of the current requirements relating to service registrations under the Public Service Vehicle (Registration of Local Services) Regulation 1986. As regulations made under section 6 Transport Act 1985, these could either be amended or supplemented by further regulations dealing with the current situation, and in particular:

2.6.1 Require materially extended notice periods for registration (or variation) of services where the local transport authority is concerned about the adverse effect of such services on meeting the public transport requirements of the area – this would act as an active discouragement on operators to register services which could be perceived in this way, and would therefore support

effective transition to an EPS, without disruptive competition as services became more commercial.

2.6.2 Allow for the requirement of provision of additional information to the traffic commissioner and the local transport authority prior to registration, to ensure that a local transport authority can fully understand the nature and intent of the service before agreeing to its registration and ensure that this is consistent with the wider BSIP.

2.6.3 Such an approach would mean that whilst there was no veto right, and operators could seek to register new services to compete in the open market, they would be restricted from doing this if it was going to have a wider adverse impact on the public transport market and in particular run contrary to the BSIP.

2.7 The Strategy is clear that it will review whether it remains correct that local authorities cannot set up new bus companies (albeit that they can buy an existing bus or coach company). We agree that this is an area that is ripe for review and welcome the recognition that many of the best performing bus companies are municipal companies. As we noted last summer currently even the establishment of an operator of last resort company would not be possible under the current restrictions in section 22 Bus Services Act 2017. We believe that the current proposals which will move the majority of services across the country to being either delivered through an EPS or franchising to make it more important that local authorities can establish bus companies of their own, as this will provide a useful further ability to maintain competition in both markets subject to an EPS and franchise markets. Allowing for the formation of such companies to support BSIPs would be a sensible measure, and we believe that existing statutory measures already provide existing operators protections against such companies having an unfair advantage or distorting effect on the market.

### **3. Funding within existing structures**

We understand that the funding to support recovery will be provided through local transport authorities and then utilised consistent with their BSIPs. We agree that this is the appropriate route, as it will ensure that funding is provided consistent with and in accordance with each local authority's statutory functions and will also ensure that it will be easier to transition from recovery to the new status quo, whatever regulatory structure that takes.

In order to allow for effective legal structures to be put in place, it is important that as much certainty as possible can be provided on funding streams for as long as possible, as this will allow more certainty to be included in contracts between operators and local transport authorities, allow for firmer commitments and outputs to be expressed through partnership scheme structures, and allow for more certainty of delivery of franchising schemes. We believe that this is the intention as set out in the Strategy, but it is important that this is reflected in the more detailed COVID-19 recovery measures to be implemented in accordance with the Appendix, to provide the best baseline for partnership discussions with operators. Where funding is provided for shorter periods, or there is a greater risk of funding being withdrawn, partnership or franchising schemes or other contracts between local government and operators may necessarily be more limited in scope, and it may be difficult to get any party to agree to more ambitious longer term structures, as will be required to implement more ambitious EPS, as it will be harder for local transport authorities to enter into the agreements necessary to support such measures or to make enhanced partnership schemes which are predicated on longer term investment, and it will

be more difficult for operators to commit to make longer term investment, where the public sector funding sources are not clear or limited to shorter time periods.

Given the potential for distortion of competition and subsidy control issues at boundaries between local transport authorities, in particular where different scheme or funding levels are in place either side of the boundary, it may be helpful to provide authorities with greater guidance around how such requirements, in particular in respect of competition issues might apply. This will be particularly important where some of the more ambitious parts of the Strategy in respect of fare rationalisation are to be implemented, given the potential competition implications. It is therefore key to ensure that each authority understands the impacts of their proposed schemes and works closely with neighbouring authorities to understand if there are any specific requirements that should apply, cross-boundary to mitigate these risks, and in particular if there are any specific cross-boundary competition issues that would affect this. We would note that the use of EPS is already subject to a competition test under the Transport Act 2000, and therefore there is an existing legal requirement in implementing the detail of such arrangements to ensure that the competition impacts are proportionate to the passenger benefits that will be delivered. However, the Strategy expects ambitious application of EPS to maximise passenger benefits, which in some cases may lead to material restrictions on competition, and therefore clear structured guidance will be important to give both operators and local transport authorities confidence to negotiate the terms of an EPS and also understand what risks may be created at the boundary between areas, and how these will be mitigated. We assume that this will be reflected in the revised guidance proposed by the Strategy, as managing these issues will be important to implementing ambitious EPS and it is important that authorities have this guidance as soon as possible to inform their initial engagement with operators. Whilst these issues may be less of an issue in franchised areas once the scheme has been implemented, they will still be relevant where benefits are being delivered in transition to franchising and therefore guidance should ideally cover this.

#### **4. Routes for recovery**

The Strategy makes it clear that operators and local authorities must proceed either to implementation of an enhanced partnership or into franchising in order to have continued funding beyond June this year. In both cases, the funding will need to take into account the timescales that both of these routes take, and therefore we welcome the fact that you acknowledge that there may be reasons outside parties' control which means that an EPS may not be reached by April 2022 and acknowledge that the timescale for introduction of franchising may be longer. We would suggest that it is important that you continue to fund local transport authorities and operators who are working towards ambitious partnerships or delivering franchising, even if this takes longer to avoid discouraging the formation of higher quality partnerships or ambitious franchising schemes which might otherwise deliver better value for money and better meet the ambitions of the Strategy.

In particular:

- Requiring local authorities to “commit” to either enhanced partnerships (EPS) or franchising schemes before they have gone through the relevant statutory processes, will create legal challenge risk of pre-determination by the local transport authority that is making such a decision. This would be highly counter-productive. Commitments to progressing either of these models therefore needs to be capable of being given on a qualified basis, otherwise legal challenge risk will be increased. We presume that this is clear prior to the commitments that you are expecting to be made by June 2021 i.e. that any



commitment is clearly subject to the statutory processes that are to be followed by the LTA, and worded in a manner which could not lead the decision to be challenged.

- It is clear from the Strategy that only use of an EPS as a partnership structure will be supported with the necessary funding. We wonder whether in providing guidance to authorities on how you expect EPS to be implemented that consideration is given to how those structures would work in conjunction with an EPS, to avoid the need for wholesale replacement where there are existing structures that deliver benefits at a local level. In particular, where operators and authorities have existing effective functioning partnership arrangements with strong governance but utilising voluntary partnership arrangements or advanced quality partnership schemes, we would assume that you expect them to draw on these structures in agreeing the terms of an EPS, and that where the structures complement and simplify the form of EPS required to deliver the BSIP that you would not expect those existing structures to be lost. It is important that guidance on this is provided at an early stage, to ensure that operators and local transport authorities have the right context for engagement on their plans. We believe that this is also important because in a number of cases voluntary partnership arrangements will allow specific operators to commit to delivery of greater benefits where they have binding commitments from an authority than may be possible if there is a need to rely upon the regulatory (rather than contractual) approach allowed by an EPS. Similarly, where there are existing, and long functioning AQPS, it would seem unnecessary to replace these elements of partnership with an EPS. Could you confirm that in these circumstances you would be comfortable with local transport authorities building on their existing structures, and using an EPS only for those additional requirements required to maximise the benefits of the BSIP, or if not, what approach you do expect? Taking this approach will mean that local transport authorities and operators can focus on agreeing what they are going to deliver, and how they will most effectively do that, rather than having to determine how to force those outputs into being delivered purely through an EPS, or through the use of franchising.

Whichever route is followed there needs to be clarity on the processes to be followed; timescales to be met; and the way in which any failures to meet specific milestones will be dealt with, so that once into the process both local authorities and operators have confidence that they will not find themselves suddenly unable to access funding that they expected to receive to support recovery. It would be helpful for further guidance beyond the Strategy to set out clearly the timescales, including mapping this against the minimum statutory timescales that may need to be adopted by LTAs and operators, to ensure that those timescales can be met. Once processes are agreed it is important that all parties have confidence that provided the agreed processes are, and can be, followed, that funding will be provided, and that there is certainty of funding to back the proposed delivery route.

Simplifying delivery routes will be important to ensuring that this is achievable on a country wide basis. The need to resource and succeed in partnership negotiations is likely to be difficult both for operators and local transport authorities, in particular with the wider operational strain caused by COVID-19. Simplifying the process will maximise their ability to negotiate such arrangements without needing excessive resource, whilst maximising the benefits that can be achieved.

The above points are based upon our previous engagement with you and an initial review of the Strategy. We would be very happy to engage in more detail on those proposals to support you implementing legally deliverable structures that can be effectively implemented by all of our members in a manner consistent with and supportive of their wider transport strategies and consistent with the Strategy.

Yours sincerely,

[Redacted signature]

[Redacted name]