

Our Ref: [REDACTED]  
Your Ref: [REDACTED]

28 October 2022

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

Dear [REDACTED]

## **DRAFT FRANCHISE GUIDANCE**

We have significant concerns as to whether the new draft guidance will support the implementation of franchising by our members, and we believe that there is a material risk that it could make the implementation of franchising more difficult. We have not sought to comment on every detail and all of the wording of the drafting, as we believe there is likely to be more merit in you considering the drafting as a whole in light of our comments. We also believe that a full and formal consultation would be appropriate for a document with such significant implications.

Unlike EPs, franchising is the only guaranteed way of ensuring that bus services and fares are fully integrated (and more widely are able to play their full part in wider integrated public transport networks). The guidance should therefore be informed by the need to streamline and simplify the process and avoid introducing additional risks, costs and delays – particularly for speculative legal challenges seeking to exploit potential loopholes.

We have grouped the issues into broad themes:

### **Internal consistency and drafting**

Whilst we have in the past raised comments about the current guidance, it is generally closely aligned with the relevant parts of the Bus Services Act 2017 as incorporated into the Transport Act 2000, and generally uses terminology consistent with that legislation and within the guidance itself. The current drafting does not always do this, which creates a material risk of ambiguity or confusion as to intent.

This is a particular concern where drafting is statutory guidance which a franchising authority is required to have regard to, as if this is unworkable then it potentially undermines the ability to cleanly implement a scheme, however good the case, and increases challenge risk for the authority significantly.

Examples of this include:

- Paragraph 5.7 as currently drafted does not match the relevant wording of section 123H e.g. the second bullet point talks about “the scope of the franchise local bus services intended to be provided under contract to the LTA”, whereas section 123H(2)(c) requires a scheme to cover “the local services intended to be provided under local service contracts”. Whilst it would be helpful if section 123H(2)(c) to include the word scope, as this would provide clarity that each service did not necessarily need to be detailed in the scheme, that is not currently the wording of the legislation. At the moment this creates ambiguity – if the intention is to be helpful in clarifying how this provision is intended to work, this should be clearer. If the intention is that the wording simply reflects the requirements of the legislation, then such ambiguity should be avoided.
- References to the comparator being an EP model are, in the short term, sensible, as this is likely to be the “next best” comparator for any authority now implementing franchising. However, consistent terminology should be used (currently references include “best possible EP model” (paragraph 7.3); “best EP alternative” (paragraph 5.6); “best EP option” (paragraph 8.3). These are presumably all references to the “best EP” option. This is defined as “the implementation of an existing or planned EP for the same geographical area”, which does not mention how it is “best possible”. We would also note that whilst, with the NBS, EPs are likely to be the best possible other option, as they are the only other option likely to be funded, a government change in strategy would potentially make this wrong (see the next section).
- Paragraph 11.2, third bullet point states that the scheme needed to state “the date when initial franchising contracts are intended to be signed ....” Strictly speaking the legislation says “first to be entered into” which is not necessarily the same thing (they could be signed, but with dating deferred, for example, so that they were not formally entered into). Whilst this is a relatively minor point, it does mean that the guidance is not aligned with the statute.
- The final bullet point of 11.2 states, as statutory guidance that “The authority should also include in the scheme all existing and funded bus priority measures (including but not limited to bus lanes) that it provides or intended to provide, including for future measures their expected operational dates.”. The legislation does not say this – it talks about “additional facilities that they consider appropriate to provide” – many existing bus lanes will clearly not be additional facilities, as they will already be used by operators. It is unclear whether this, statutory guidance is intentionally widening the scope of these provisions, and if so, why, or whether this is an error.
- Paragraph 9.2 purports to quote section 123B(3), but limb (b)(ii) has been modified to read: “b. other policies affecting local services such as commitments and development of a franchising or EP proposal that those authorities are considering or have adopted.” This is not currently what this limb says – it states “(ii) other policies affecting local services that those authorities have adopted and published.” This is not quite the same thing, and therefore the guidance could lead to an authority not complying with the legal framework

These are just a few examples of areas where there are inconsistencies either internally or with the legislation. We appreciate that this was a draft document that you shared, but equally we are sure you understand that such inconsistencies, both internally and with the legislation will increase the risk of challenge for authorities seeking to proceed on this basis, as it may be difficult both to comply with the legislation and the guidance at the same time, and decisions may be confused as a result.

### **Potential for guidance dating quickly**

The guidance has changed materially from the current franchising guidance to reflect the impact of the BSIP process, which means that authorities should have EPs in place. We agree that given the impact of the National Bus Strategy this is likely to be the case for authorities now choosing to franchise, who are likely to already have EPs in place, which will be aligned with their BSIPs.

However a BSIP is not a statutory document, and therefore whilst at the moment this guidance may well be helpful, we have concerns with the statutory element of the guidance in particular referring to BSIPs and more generally binding authorities to carry out assessments in a way that is specifically focussed on the BSIP, as to the extent there is any future government bus policy change that does not require BSIPs or requires consideration of other factors, the statutory guidance will potentially conflict with the wider considerations that the guidance correctly recognises local transport authorities will need to take into account in making their decisions.

This would mean that if such changes do occur, for example if DfT ever did not require production of a BSIP as a policy requirement, it may then become impossible for authorities to proceed with franchising assessments effectively until the guidance has been further revised. We think this would be unhelpful and unnecessary. For example:

- paragraph 9.4 and 9.5 are very helpful in terms of explaining some of the issues which should be considered in an assessment in respect of BSIP objectives, but the use of “in particular” could be taken to mean that this should be prioritised over other policies, and will also be meaningless if policy ever changes so that BSIPs are not a required policy document.
- Similarly, paragraph 23.2 references “local services and/or BSIP outcomes in the areas to which the scheme relates are likely to be better if the scheme did not apply.” The underlined text is not included in section 123N(2)(a) so this misrepresents the statutory test for revocation and therefore the guidance implies a test which does not exist in the legislation.

We would therefore suggest that BSIP specific drafting should be included in an annex as helpful guidance and examples of how the general guidance would apply in respect of BSIPs, but should not be included in the main body (save as examples) and should not be statutory guidance.

### **Ignores previous input from UTG and members**

On areas where we and/or our members have previously asked for improved guidance or legislation (including our asks of the Transport Bill which we provided to the DfT recently and attached as an annex to this letter.

For example:

- Guidance on varying a franchising scheme could be clearer about the expected process to be carried out under section 123M, as the drafting of this section is fairly ambiguous (as it tries to shortcut the process required by referencing the process for franchising schemes). It would be helpful if the statutory guidance set out more guidance on how the process in section 123M will apply in practice, and the level of detail required.
- Guidance on transition could be clearer on the fact that implementation of an extended transition period will also disapply the usual short notice provisions that operators may rely upon for legitimate operational change, including where this is requested by local transport authorities. Guidance to ensure that such measures are therefore built into the transition notice where appropriate would also be helpful, as the transition notice can only be implemented once.

### **Risks undermining primary intent to provide workable route to franchising**

For the reasons noted above, there is a risk that by trying to ensure that the franchising process is fully aligned with the BSIP process, that additional requirements are imported. Whilst many of these may well be sensible in the light of many approaches to franchising, in particular in the context of an authority who has just made an EP, by making them prescriptive you will add extra time and risk to the process of carrying out an assessment. Authorities will both need to consider what they need to do to meet the statutory guidance, and what they need to do to meet the legislation. As the two are not wholly fully aligned this will take extra time, with risk of challenge if either is not followed.

As another example, Annex D to the Guidance helpfully notes the ability to promote, and provides examples of, smaller franchising schemes than those which have been considered to date. This is a helpful in making the clear the range of potential routes that might make use of franchising schemes, in some cases as part of a mixed economy of partnership structures and franchises, and some thought has clearly been given to this (and indeed we could see the benefit of this guidance being more detailed to ensure that local transport authorities fully understand the opportunities that may be available in this respect). However, for these “micro-franchises” to be viable it will also be important that franchising can be introduced with a stream-lined process, otherwise the cost of assessment will itself make them unviable. Some of the examples above of extensive guidance as to the content required within an assessment, in particular where it is imposed as a statutory requirement may themselves therefore lead to these smaller franchises not being viable from a cost perspective, not because they are a good policy intervention, but because the guidance has required a disproportionately overly robust assessment to be carried out. As noted above, this could potentially be fixed by moving the BSIP specific requirements into an annex and removing the statutory nature of requirements relating to the content of the assessment.

For the reasons noted above we would therefore urge you to consider this drafting carefully and consider:

- Reducing the extent that guidance is statutory, in particular where it links to current non-statutory processes, such as the BSIP (including moving BSIP examples into an annex).

Consider previous feedback from our members on matters such as variations and transition to ensure that the guidance is picking up practical issues that have previously been raised.

- Remove ambiguity and lack of clarity wherever possible. In particular ensure that the guidance is properly aligned with the statutory frameworks to avoid inconsistency or confusion.
- The importance of not importing more risks, delay, costs to the franchising process - including the scope for speculative legal challenges.

Let me know if it would be helpful to discuss further including with our legal advisers.

Yours sincerely,

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