

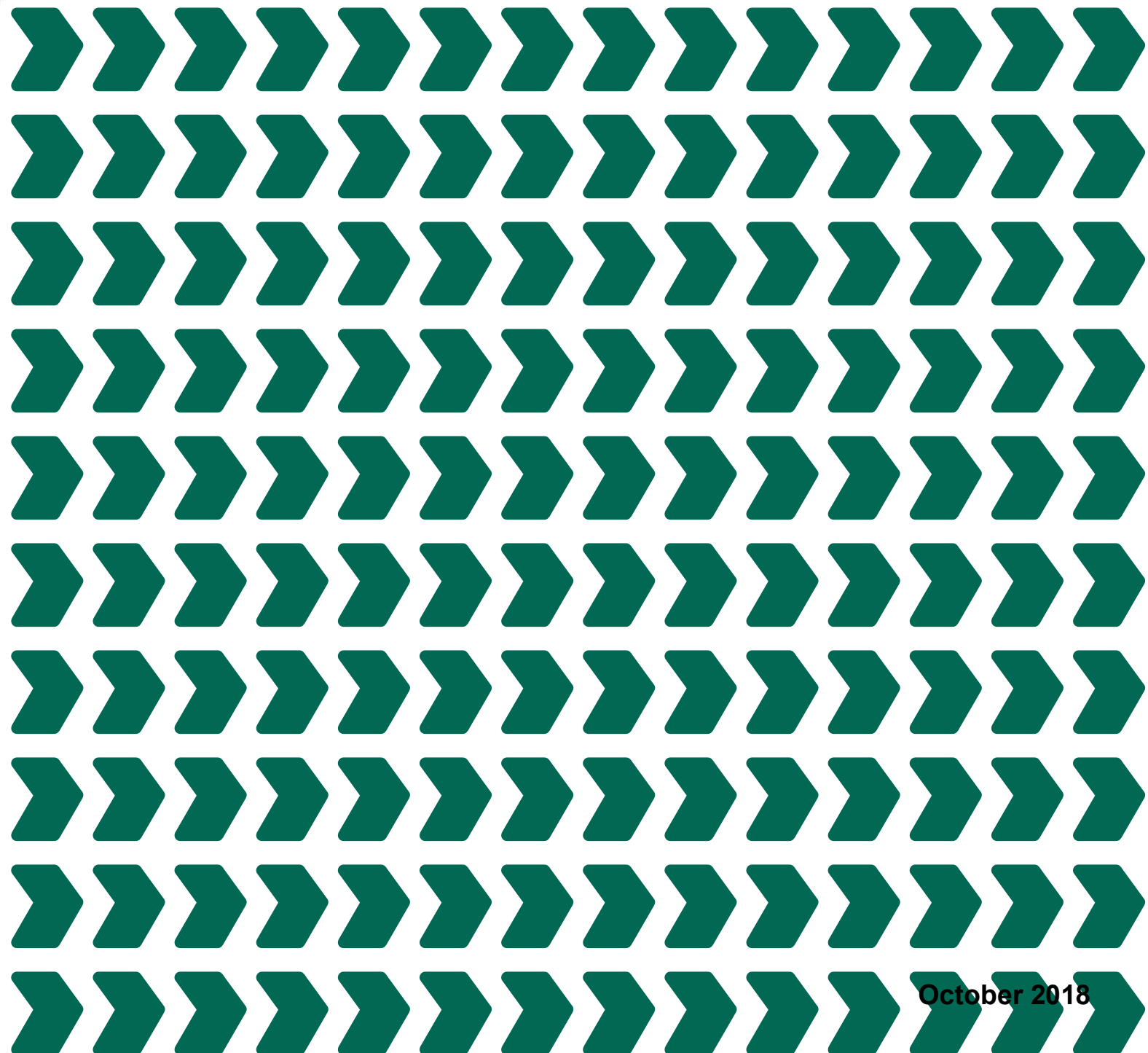


Department
for Transport

The Bus Services Act 2017

Registration of local bus services in an Enhanced Partnership Area

Response to Consultation



October 2018

The Department for Transport has actively considered the needs of blind and partially sighted people in accessing this document. The text will be made available in full on the Department's website. The text may be freely downloaded and translated by individuals or organisations for conversion into other accessible formats. If you have other needs in this regard please contact the Department.

Department for Transport
Great Minster House
33 Horseferry Road
London SW1P 4DR
Telephone 0300 330 3000
Website www.gov.uk/dft
General enquiries: <https://forms.dft.gov.uk>



© Crown copyright 2018

Copyright in the typographical arrangement rests with the Crown.

You may re-use this information (not including logos or third-party material) free of charge in any format or medium, under the terms of the Open Government Licence. To view this licence, visit <http://www.nationalarchives.gov.uk/doc/open-government-licence/version/3/> or write to the Information Policy Team, The National Archives, Kew, London TW9 4DU, or e-mail: psi@nationalarchives.gsi.gov.uk

Where we have identified any third-party copyright information you will need to obtain permission from the copyright holders concerned.

Contents

1. Introduction	4
2. Response to Consultation	5
Question 1	5
Question 2	5
1. Slot allocation contracts	6
2. Fees	6
3. Route requirements	6
4. Local authority acting as the registration authority	7
Question 3	7
Question 4	9
1. Transitional arrangements	9
2. Local authority acting as registration authority	10
3. Route requirements	10
4. Appeal process	11
3. List of those who responded to the consultation	12

1. Introduction

- 1.1 From 17 May to 28 June 2018, the Department ran a consultation on the regulations and guidance on the practical steps that local transport authorities (LTAs), bus operators and the traffic commissioner will need to go through in order to delegate the registration powers from the traffic commissioner to an LTA under an Enhanced Partnership (EP). It also set out special arrangements that must apply when a local bus operator cannot, or refuses, to meet those requirements.
- 1.2 The consultation also sought comments on the regulations and guidance covering appeals to the traffic commissioner where an LTA under an EP has declined a registration and where a franchising authority has declined a service permit application for a non-franchised service in their area.
- 1.3 The consultation document is available at:
<https://www.gov.uk/government/consultations/registration-of-local-services-in-enhanced-partnership-areas>
- 1.4 9 responses were received. In addition to a response from the Office of the Traffic Commissioners, the respondents comprised:
 - 5 from local authorities and representative organisations
 - 3 from bus operators and representative organisations
- 1.5 The response to the consultation is structured according to the questions asked, with a summary of responses given, followed by a statement setting out the Department's proposed next steps.

2. Response to Consultation

- 2.1 **Note:** Some of the responses raised minor detailed issues that will be addressed in guidance or by minor changes to the regulations. This section therefore only deals with the more substantive issues.
- 2.2 Also please bear in mind that the guidance will be updated as new issues arise that DfT believe warrant further or new coverage.

Question 1

The Registration Regulations only determine the information that the LTA should provide to the traffic commissioners. Should the Regulations also prescribe the information that the LTA should provide to operators when acting as the registration authority?

- 2.3 Three respondents supported the need for the regulations to specify the information that local authorities provide to operators and three did not - including the Confederation of Passenger Transport. Another felt that information provided to traffic commissioners should be available to operators that are in, or considering entering, the local market.

Government response

- 2.4 The registration system currently operated by the traffic commissioners is already regulated under long established legislation. We believe it is right that the regulations should regulate the exchange of information between the LTA and the traffic commissioners to ensure the same procedures will apply throughout England. These regulations reflect and build on those existing procedures and will minimise the administrative burdens on both LTAs and the traffic commissioners.
- 2.5 However, it would be very difficult to introduce regulations that appropriately dealt with the exchange of information between the LTA and bus operators. EP schemes are likely to vary greatly in size and complexity and arrangements that may be appropriate for one, may not be for another. **Therefore, we will provide further guidance on how LTAs should communicate and exchange information with operators when acting as the registration authority.** As an EP plan and scheme(s) will be public documents, local operators wishing to enter a market where an EP scheme is in place will be able to access them.

Question 2

Do you have any comments on the draft Registration Regulations?

1. Slot allocation contracts

- 2.6 It was suggested that the slot allocation contract provisions should allow for more than one contract. It was also questioned whether requiring contractual obligations for slot allocation contracts to be subject to consultation with representatives of bus passengers provided enough flexibility. It was also suggested the maximum period for a slot allocation contract should be increased from 5 to 10 years.
- 2.7 Another thought that not all of the contract evaluation criteria in Regulation 16 would necessarily apply to all types of contract - e.g. a requirement to evaluate 'connectivity' may not always be necessary.

Government response

- 2.8 We agree that slot allocation contracts should make provision for more than one contract and **will ensure the regulations allow this**. We do not believe that maximum period for a slot allocation contract should be more than 5 years. The EP mechanism is predicated on the continuation of a deregulated market and whilst slot allocation contracts are required in the short to medium term, we believe commercial operators should have an opportunity again to provide services commercially (within any frequency requirement set by the EP).
- 2.9 If any elements of the evaluation of contracts required by Regulation 16 are not relevant to particular contracts, then that particular evaluation does not need to be carried out. **We will make this clear in guidance**. We agree it is not appropriate for contractual obligations to be subject to consultation with bus passengers as they are unlikely to be in a position to comment on what can be complex technical documentation. **We will remove this requirement from the draft order**.
- 2.10 Another asked whether the figures in regulation 17 were net or gross. **We will make this clear in guidance**.

2. Fees

- 2.11 One respondent requested that the LTA, when acting as a registration authority, should be able to re-evaluate fees during the life of an EP scheme. The Office of the Traffic Commissioners also suggested that the traffic commissioners should also be allowed to set their own fees. A further response asked to use guidance to ensure that operators are informed if a fee is charged and how it was calculated.

Government response

- 2.12 The regulations allow the LTA to undertake such re-evaluation during the life of the scheme. **We will make this clear in guidance**. Traffic Commissioner fees are set under separate legislation and are out of the scope of this consultation. We will also put **further advice in guidance** on informing operators about calculation of fees.

3. Route requirements

- 2.13 It was suggested that an EP scheme should not be able to set maximum frequencies on individual routes, only minima. The ability to cancel services when a maximum level of service has been exceeded should also be deleted as traffic regulation conditions are sufficient. Currently, the traffic commissioner, when acting as a registration authority, can refuse a registration application if they believe the operator

will be unable to comply with an operation requirement. One response asked that provision should be made for the LTA, when acting as a registration authority, also to be able to refuse an application that includes a route requirement on similar grounds - e.g. if the LTA had concerns over the operator's expertise, technical or administrative ability.

Government response

- 2.14 The commercial market in an EP area remains deregulated, so it would not be appropriate to require commercial operators to operate minimum service levels on particular routes. The ability for the partnership to determine maximum frequencies to, for example, address congestion or air quality issues, is an important tool that should be available under an EP.
- 2.15 As the draft guidance says, the ability to cancel registrations that breach a frequency requirement implements an unavoidable requirement of EU legislation. The Bus Services Act 2017 prohibits the use of traffic regulation conditions (TRC) in the area of an EP scheme. However, we will **change the regulations to allow an LTA to refuse an application that includes a route requirement if they have doubts about the applicant's competence or ability to comply with it.** The operator will of course be able to appeal this decision.

4. Local authority acting as the registration authority

- 2.16 One respondent requested that the LTA, if acting as the registration authority, should have responsibility for registering cross-boundary services.
- 2.17 Two respondents suggested that the reference to vehicle type should be removed from the regulations as it does not form part of the current registration particulars.

Government response

- 2.18 The Bus Services Act 2017 only allows the LTA to take over the registration of local services that are wholly within the geographical area of an EP scheme. This cannot be changed by these regulations. Cross-boundary services remain registered with the traffic commissioner. This cannot be changed by these regulations. In response to two other questions, the regulations also require that where an EP scheme covers more than one LTA area, one of those authorities is to act as the 'lead authority' with the power to act as the registration authority in both areas. This is specifically to address problems for both the LTA and the traffic commissioners associated with having two registration authorities for the same EP scheme. **We will make this latter issue clearer in guidance.**
- 2.19 **We will also remove the reference to vehicle type from the regulations.**

Question 3

Do you have any comments on the draft Appeal Regulations?

- 2.20 One respondent expressed concern that the process of appeal in an EP area would further delay the procedures for dealing with a route restriction.

Government response

- 2.21 The ability for an operator to appeal the decision of the traffic commissioner is an important part of the existing registration process. We believe that a right of appeal should also exist when dealing with decisions by the registration authority in an EP area. The regulations are clear that if an appeal is made, the cancellation process is suspended until the appeal is heard and a decision published.
- 2.22 One respondent commented that there should be a provision that would allow a respondent to submit a reply to the appellant's reply.

Government response

- 2.23 The approach adopted is consistent with other appeal and tribunal processes. Prolonging this stage would make it more difficult to reach decisions quickly, and each party will have had two opportunities to respond to the original application by this point.
- 2.24 One respondent argued that the regulations should include a deadline for submitting written representations to the traffic commissioner before a hearing and that the commissioner should be able to restrict the submission of such representations where that deadline has been missed. Another respondent commented on the provisions requiring a response notice to be provided within a set deadline and suggested that any request for an extension of time should need to be submitted before the deadline expires. It was also suggested that all evidence should be submitted alongside the grounds on which an appellant relies.

Government response

- 2.25 While we recognise the importance of providing material in a timely manner, we believe that such deadlines are best considered as part of the Senior Traffic Commissioner's case management guidance. We would also want to avoid substantive evidence for or against an appeal being overlooked for purely procedural purposes as this could increase the chances of a further appeal, delaying a decision and increasing the workload of the Upper Tribunal.
- 2.26 It may be that the reason a respondent is unable to send a response within the set time period would also make them unable to notify the traffic commissioner that the response will be late. We believe that decisions about this are best left to the discretion of the traffic commissioner. The intended approach is consistent with other appeal and tribunal processes.
- 2.27 Three respondents questioned what would happen to services in the event of a decision about an appeal being further appealed to the Upper Tribunal, and wanted this to be set out in regulations.

Government response

- 2.28 The Government believes that this should ultimately be at the discretion of the traffic commissioner as the decision maker in each case, and the usual conventions should apply. These are set out in the Senior Traffic Commissioner's practice directions and guidance. This means that an operator would apply to the traffic commissioner for the decision to be stayed until the appeal hearing has taken place (i.e. the decision is put on hold to allow the appeal hearing to take place first). If the traffic commissioner refuses to grant a stay, the operator may be able to apply to the Upper Tribunal direct for a stay.
- 2.29 One respondent commented that there were no provisions for the traffic commissioners to make a costs order in respect of parties who have been found to

be frivolous, vexatious, improper or unreasonable in their conduct at an appeal hearing.

Government response

- 2.30 There are no powers in the primary legislation to allow the traffic commissioners to make a cost order for these hearings. However, such powers have been rarely used where they are available. There are other powers available to the traffic commissioner to act against a vexatious party before a matter reaches a stage where such action could be considered appropriate.

Question 4

Do you have any comments on the draft guidance?

1. Transitional arrangements

- 2.31 The point was made that providing the traffic commissioner with a list of all the existing registrations that will be required to meet the requirements of a scheme is potentially onerous on the LTA.
- 2.32 Another respondent suggested that the guidance should set out a more complete process for managing the transition to an EP to ensure that services are not disrupted. Another also requested further guidance on how to manage the transition from an EP scheme back to a fully deregulated market.
- 2.33 Another respondent said it would aid understanding of the guidance if the three Acts covered by the guidance were consolidated into one. This is out of the scope of this consultation and would in any case require further primary legislation.

Government response

- 2.34 Given that the traffic commissioners will need to deal with EPs that are potentially in a number of areas, and maintain the registrations that apply to deregulated areas, we believe it is unreasonable to pass this burden on to them. During the development of an EP, the LTA should have obtained an intimate knowledge of the bus services that operate in their area and the operators that run them. LTAs also have powers under the Franchising Schemes and Enhanced Partnership Plans and Schemes (Provision of Information) Regulations 2017 to request registration information from individual operators. Therefore, we do not believe that it is unreasonable for the LTA to comply with this requirement.
- 2.35 It would be very difficult to set out a complete process that could take into account how the transition should best work for every potential scenario. The partnership elements of the 2017 Act are predicated on the basis of all parties working in close co-operation to ensure that the transition to the new partnership arrangements should happen smoothly and without adverse effects on passengers. At a detailed level, that must be a matter for the members of the partnership.
- 2.36 We shall provide **further advice in guidance** on how to manage the transition from an EP scheme back to a fully deregulated environment.

2. Local authority acting as registration authority

- 2.37 One respondent asked the guidance to provide further advice on how the LTA should conduct itself to ensure that it acted reasonably and what evidence should be passed on to the traffic commissioner for wider action - e.g. enforcement under the operator's licence. It was also suggested that the LTA when acting as the registration authority should be able to register cross-boundary services, as a 'two-tier' system could be problematic, especially if there are neighbouring EP schemes.
- 2.38 Another requested more guidance on how registrations would apply to cross-boundary services and in the case of more than one registration authority.
- 2.39 Further guidance was also requested on the ability of the LTA to amend the registration fee during the course of an EP.

Government response

- 2.40 It would be difficult to provide advice on what would be appropriate conduct, as this will depend on the issue at hand. The guidance already explains that the operator should be made aware of any shortcomings and where appropriate have the opportunity to put things right. These are basic principles and LTAs can decide how to apply these procedures in individual cases, taking advice from, where necessary, their own legal advisors. We believe this is sufficient - and that further clarification at this stage might prove counter-productive. However, **we will keep the issue under review and provide further guidance if and when specific issues emerge. We will also make clear in guidance that if the local authority believes wider action should be taken by the traffic commissioner, they should contact the Office of the Traffic Commissioner as soon as possible to discuss how best to proceed.**
- 2.41 The 2017 Act does not permit the LTA to take over the registration of cross-boundary services. This cannot be changed by these regulations. If LTAs believe that the registration of cross-boundary services may be problematic where there are adjoining EP schemes, they have the option of merging schemes into one. The regulations then require one of the LTAs to take on the registration function for both LTA areas, 'the lead authority'. When considering the size and number of EP schemes, especially those that may be close together, the LTA(s) should consider how the requirements of the scheme are enforced and whether separate schemes should be merged to simplify things for operators and the LTAs involved. **We will make this clear in guidance.**

3. Route requirements

- 2.42 Some respondents questioned the need for services to be cancelled and replaced by one(s) contracted to the LTA, the process involved and whether the registration authority should have discretion to refuse applications if it considers them spurious or vexatious. Another that further guidance should be provided on the responsibilities and processes regarding the specification and tendering of a bus service that extends outside the EP area. A further question was asked about whether an agreement between operators would require a qualifying agreement under Schedule 10 of the Transport Act 2000.

Government response

- 2.43 EU Regulation 1370/2007 requires that if an operator is prevented from entering a bus market because of a route restriction imposed as part of an EP scheme, this

creates an 'exclusive right' for the existing operators and requires the service provision to be put out to tender. As this is an unavoidable legal requirement, the regulations contain a necessary mechanism to ensure it is complied with. As the guidance says, this scenario *is* avoidable if all the operators (both existing and potential) voluntarily co-operate with each other to ensure overall service levels stay within the requirements of the route restriction. The practical difficulties associated with not doing so and the potential loss of a profitable commercial route(s) provide a direct incentive to ensure that this part of the regulations are not triggered. However, the draft regulations cannot be used to compel operators to behave in a particular way.

- 2.44 Currently, the traffic commissioner has no discretion to refuse a properly completed application to register or vary a local bus service. In an EP area, the bus market remains deregulated and the registration authority must accept a properly completed application that complies with the requirements of the EP scheme. If the conduct of a bus operator is considered by the LTA to be vexatious, this should be reported to the traffic commissioner who can consider action against the operator's licence on grounds of repute.
- 2.45 We will provide some **further guidance** on the tendering of cross-boundary services, but LTAs already have responsibility for tendering local bus services and how to proceed will depend heavily on the circumstances of the case and necessary discussions with the operator - particularly as tendering the EP portion of the route may render the deregulated element difficult to operate or commercially unviable. **We will also clarify the Schedule 10 point in guidance.**

4. Appeal process

- 2.46 One respondent expressed concern that that the guidance did not include advice on how or when an appeal would be disposed with by the traffic commissioner and that not complying with the appeals procedure was not necessarily grounds for striking out the appeal.

Government response

- 2.47 As with the existing appeals mechanism, it is for the traffic commissioner to determine how to conduct appeal hearings and how individual appeals are dealt with. The senior traffic commissioner has powers under the Local Transport Act 2008 to issue directions and guidance that cover, among other things, appeal procedures. It would be inappropriate for these issues to be covered in DfT Guidance.

3. List of those who responded to the consultation

- Association of Local Bus Company Managers (ALBUM)
- Association of Transport Co-ordinating Officers (ATCO)
- Confederation of Passenger Transport (CPT)
- Derby City Council
- FirstGroup
- Hertfordshire County Council
- Office of the Traffic Commissioners
- Transport for Greater Manchester
- Transport for West Midlands