



Department
for Transport

Final summary of responses: consultation on section 19 and 22 permits for road passenger transport in Great Britain

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Summary report

Introduction

- 1.1 The purpose of this summary report is to present the full findings from the Government's consultation on the use of section 19 and section 22 permits for road passenger transport in Great Britain. The Government has also published a response to the consultation and revised guidance about the operation of EU Regulation 1071/2009 for community transport operators using permits under the Transport Act 1985.
- 1.2 The Department for Transport received almost 500 written responses to the consultation which closed on 4 May 2018, and over 550 people attended the workshops that the Department ran during the consultation period. The number of responses received, their length and complexity were unusual for consultations of this nature and the consultation analysis has been a more complex task than anticipated.
- 1.3 This final summary covers all the responses together with the feedback received from the workshops. The findings of this final summary do not materially differ from the findings of the interim summary of responses. The interim summary was published in July 2018 and covered a sample of around 100 written responses. The Department considered the responses to the consultation carefully, spent time looking at each and every one and incorporated them into its detailed policy considerations.

What was the consultation for?

- 1.4 The consultation sought views on how to align domestic law on section 19 and 22 permits with EU legal obligations on road passenger transport operators.
- 1.5 EU Regulation 1071/2009 ("the Regulation") establishes common rules governing those seeking to pursue the occupation of road transport operator, and sets out the requirements that operators of road transport services must comply with. In Great Britain, operators require a Public Service Vehicle (PSV) operator licence to show compliance with the Regulation. The Transport Act 1985 enables permits to be issued under sections 19 and 22 of the Act to enable qualifying not-for-profit organisations to run passenger transport services without a PSV operator licence.
- 1.6 The permits system was designed to recognise the value of not-for-profit organisations that provide services of social/charitable benefit where their profit-making counterparts would not, often in relation to isolated or vulnerable people. The UK is unique among European Countries in the range and scope of such services provided, and it is widely acknowledged that the overall term 'Community Transport' can disguise what are often social or therapeutic care services.
- 1.7 However, concerns had been raised by private bus operators and others that some organisations operating under the permit system may be offering commercial services while benefitting from not-for-profit status. This brought to the fore the conflict as to whether "not-for-profit" equates to "non-commercial".
- 1.8 The consultation set out Government proposals to address these concerns. These focused on updating existing guidance as to the interpretation of the exemptions from the Regulation to illustrate when the exemptions might apply, and on scope to amend existing domestic legislation to provide greater legal certainty.
- 1.9 The overall intention is to give greater clarity, so that those in the community transport sector motivated by compassion and philanthropy, rather than profit, can continue providing services that are invaluable to many elderly, isolated and disabled people.

Legal exemptions from the Regulation

1.10 The Regulation sets out exemptions, for road passenger transport operators which:

- "...are engaged in road passenger transport services exclusively for non-commercial purposes"; or
- "...have a main occupation other than that of road passenger transport operator"; or
- "...are engaged exclusively in national transport operations having only a minor impact on the transport market because of ...the short distances involved".

1.11 Under EU law, the first two exemptions have direct effect in the UK, whereas Member States have the ability to decide whether or not to apply the third exemption. The Government is giving effect to the third exemption.

1.12 The draft regulations included in the consultation presented one way in which this third exemption could be implemented.

Findings

- 1.13 The consultation questions, included in the document and discussed at the workshops, primarily focussed on the exemptions. Some relevant context questions for section 19 and 22 permit holders were also included in the consultation document. The purpose of the context questions was to gather information to feed into the Department's final impact assessment and the responses to these questions are not covered in this summary response.
- 1.14 The main questions covered:
- how the proposed guidance for the "non-commercial" and "main occupation" exemptions could be improved or clarified;
 - whether there were further examples of "non-commercial" activity which should be included; and
 - how the "minor impact because of short distance" exemption might be used in practice.
- 1.15 Consultation responses were received from a wide range of individuals and institutions, including permit holders, local authorities, commercial bodies, and bodies representing these different groups. The majority were from permit holders. Many of the responses provided examples or testimonials of the importance of the services that their community transport services provide to local people, particularly emphasizing the social value that they deliver, to highlight the impact on those people if the service was lost. The majority of the responses asked for further clarity on the proposed text of the guidance and many community transport operators and local authorities suggested the inclusion of real world or good practice examples of how to evaluate certain types of service such as dial-a-ride.
- 1.16 Responses often commented on potential wider implications of the proposals in terms of driver training and driver licensing, and expressed disappointment that the consultation did not cover these issues. Some noted that the impact assessment did.
- 1.17 Some respondents suggested that a review of who can issue permits may be appropriate.
- Exemption for "undertakings engaged in road passenger transport services exclusively for non-commercial purposes..."**
- 1.18 The Department's proposed interpretation of "non-commercial" included cases where either:
- the service is free of charge;
 - any charge for the service is substantially less than cost;
 - any charge for service equals (or exceeds) cost and there is no competition from commercial operators;
 - occasional services organised on a voluntary basis with an unpaid driver; and
 - incidental services where the transport is incidental to the provision of other services.
- 1.19 The majority of community transport operators and local authorities were concerned about the impact of the interpretation on either the services that they provide or the services that they procured. Most local authorities and some community transport operators provided detailed comments on where the guidance could be improved.

Most individuals or commercial bodies felt that there should be a level playing field, with only a few providing detailed comments on the interpretations.

- 1.20 Many people, including the Community Transport Association (CTA) and the Association of Transport Co-ordinating Officers (ATCO), disagreed with the Department's position that "non-commercial" does not necessarily equate to not-for-profit, and did not feel the case had been made to support the Department's change of view.
- 1.21 Respondents, including Mobility Matters, disagreed with the Department's focus on the need for all the services that a permit holder operates to be "non-commercial". They thought that the exemption in the Regulation does not refer to individual services, but in their view, to the undertaking as a whole being engaged "exclusively for non-commercial purposes". By focusing purely on individual services and whether a charge is made, many commented that it precluded any consideration of the activities, status and purpose of the charitable organisations.
- 1.22 Some respondents from the community transport sector said the guidance should be consistent with, and should provide examples relating to, areas of domestic charity and tax law. Many, including the CTA and Mobility Matters, wanted the guidance to focus on the "purpose" of the organisation as set out in its constitution, given the reference to "purposes" in the wording of this exemption in the Regulation.
- 1.23 Many community transport operators took the view that, as "commercial" meant having the intention to make profit, "non-commercial" meant having the intention not to make a profit. Local authorities argued that as the Transport Act 1985 prevents permit holders from making a profit, they would fall, or should be deemed to fall, under the "non-commercial" exemption in the Regulation. In general, there remained confusion and disagreement about the terms "not-for-profit" and "non-commercial" and it was clear that greater clarity was wanted.
- 1.24 Many local authorities and community transport operators commented that the draft text for the guidance which prevents the "non-commercial" exemption applying if an operator also raises income through occasional private hire of vehicles would be a major issue for many community transport operators. This activity was often done to subsidise other services. Some noted that removing the ability to do this would result in many community transport operators reverting to a greater dependence on grants and donations, significantly affecting their continued viability. Some thought it should be possible for private hire to be carried out by permit holders as the overall purpose of the organisation was not to generate a profit.
- 1.25 Others, particularly representatives of the commercial sector, were of the view that every organisation operating vehicles capable of carrying more than 8 passengers should be subject to the same rules, with some referring to an existing judgement in relation to the "non-commercial" carriage of goods to support their view. A number of respondents said that charging passengers for a service is "commercial", regardless of not-for-profit status. Some suggested that permit holders should be restricted to running a small maximum number of vehicles.

The service is free of charge

- 1.26 Some respondents, including Mobility Matters, stated that permits are only needed in respect of hire and reward; so if the service was free of charge it would not be hire and reward. The CTA sought clarity on whether the reference to grants included Bus Service Operators Grant and Bus Support Grant. Clarity was also requested as to how concessionary travel reimbursement should be treated. ATCO commented that

voluntary donations and unconditional grants were undefined and thought these needed to be clarified to avoid ambiguity over what would fall under these terms.

Any charge for service is substantially less than cost

- 1.27 Local authorities and community transport operators thought that further clarification was needed in respect of this category, particularly around the definition of cost, and what can and cannot be included (e.g. should it be direct or indirect costs or marginal costs, does it include overheads, depreciation and volunteer time). There were differing views on whether a value of volunteer time should be included within the cost model, with community transport operators arguing in favour of this and the commercial sector arguing against it.
- 1.28 Many, including the CTA and Mobility Matters, also pointed out that charities are encouraged to charge for services on a full cost recovery basis. Some even quoted the Charity Commission guidance which says that charities should expect and negotiate for full cost recovery in any case where a public authority is purchasing a service from them. Clarity was requested on whether following the full cost recovery guidance would make operators "commercial".
- 1.29 A number of respondents, including the CTA, also stated that the exemption would preclude a local authority from grant funding a community transport group unless the grant was only 89% of the cost, as the charge to the local authority had to be less than 10% of cost. It was likely that the community transport operator would find it difficult to secure the remaining funds. The point was also made that any operating model where a loss is being made is generally unsustainable.
- 1.30 Some, such as ATCO, wanted clarification on how the 10% figure was arrived at. Other comments were that 10% less than cost was too low and that a commercial operator could incur such a loss on a commercial route. The Confederation of Passenger Transport (CPT) suggested 25% less than cost would be more appropriate.

Any charge for the service equals (or exceeds) cost and there is no competition from commercial operators

- 1.31 A concern raised by many, including the CTA, was that the requirement for the community transport operator to provide appropriate evidence that no commercial operators planned to bid for the local authority contract was unfair and gave commercial operators a competitive advantage by effectively giving them a veto. Some community transport operators and local authorities wanted clarification on what absence of competition meant and whether "commercial operator" included taxi and private hire operators. Some, including ATCO, commented that by its very nature competition can come and go, and so asked what would happen if the circumstances changed during a contract, and how long a determination of no competition would last.
- 1.32 Many commented that it did not make sense for the purpose of a community transport operator to be deemed "commercial" or "non-commercial" depending on whether a third-party bids. ATCO raised concerns that agreements between community transport operators and commercial operators as to who was going to bid for a contract could be deemed collusion by local authority procurement officers. Some local authorities argued that subsidised routes should be considered "non-commercial", because being subsidised was evidence that they could not be operated for a profit at cost. Some suggested that contracts under a certain value, awarded under the de minimis rules, should be considered "non-commercial".

- 1.33 There were concerns from a number of groups, including Mobility Matters, ATCO and local authorities that vexatious bids could significantly increase costs for local authorities by limiting competition/competitors. There were comments about local authority procurement and suggestions that contracts with capped bids or wider social value criteria could be used to prevent inflated vexatious bids. One local authority suggested that a community transport operator's tender could be accepted if it was significantly below the lowest commercial tender and/or no tender would otherwise be awarded. Some suggested including quality measures in tenders to attract the appropriate levels of service for passengers' needs.
- 1.34 A number of respondents, including Mobility Matters and the CPT, commented that the guidance needed to recognise that it is not just local authorities that award contracts to community transport operators, and so it should refer to the bodies offering a contract. Others asked whether self-assessment or self-determination would be used to define substantially less than cost.

Occasional services organised on a voluntary basis

- 1.35 Respondents thought that further detail was needed on what would fall under this exemption. In particular, organisations such as the CTA and Mobility Matters sought clarity about the meaning of phrases such as 'occasional services', 'not regular in nature' and 'organised on a voluntary basis'. Clarity was requested on the difference between 'occasional' and 'occasional private hire'. Some questioned the relevance of unpaid drivers to determining/satisfying this exemption.

Incidental services where carriage is incidental to the provision of other services

- 1.36 Operators sought further clarity on how "incidental" should be defined.

Exemption for undertakings engaged in road passenger transport services ...which have a main occupation other than that of ... transport operator

- 1.37 The Department proposed that a not-for-profit organisation's main occupation could be established by:
- an organisation's constitutional documents;
 - looking at their day-to-day activities; and
 - where the case is not clear, it should be considered on its own merits.
- 1.38 Around half of community transport operators and local authority respondents thought that community transport operators should not be defined as road transport operators due to their wider social aims and objectives. Community transport operators also thought that the exemption had the perverse effect of stopping specialist transport charities and giving their work to non-transport specialists. Private individuals and commercial bodies' views were mixed, from wanting a level playing field and a tighter description to address large organisations which might have a significant, but not main, part of their occupation as road transport operator, to those wanting educational establishments to be included in the exemption.
- 1.39 Many respondents, including the CTA, thought that main occupation should be determined by reference to the community transport operator's constitutional documents. The CTA and Mobility Matters among others also thought that community transport operators should be defined by their charitable aims or as social care providers rather than as road transport operators. A number of individuals simply stated that community transport operators should not be defined as road transport operators.

- 1.40 Many local authorities and ATCO wanted the guidance specifically to address the issue of local authorities' in-house fleets which they thought would fall into this exemption. However, it was noted that organisations which chose to be separate or independent from their local council would not fall under the exemption and so this would create unfairness in the system. Some respondents wanted clarity on the status of schools and academies with respect to this exemption.
- 1.41 Respondents, including the CTA and ATCO, expressed concern that the exemption could create a two-tier system. For example, permit holders which specialise in providing transport may provide services for another charitable organisation; in this context, as their main occupation is transport, the specialist permit holder would not be exempt, but the charity procuring the transport service would be exempt. This would increase the costs of specialist transport charities. If as a result of these additional costs, services were taken back in house by non-transport specialists there could be a loss of focus on the passenger needs and maintenance of the vehicles, as this would just be a small part of the main activity of the organisation. Clarity was sought on whether specialist community transport operators can merge with other charitable organisations that meet the criterion for this exemption.
- 1.42 Community transport operators and local authorities wanted the guidance to be clear that if an organisation met this exemption they did not also need to meet the "non-commercial" exemption.
- 1.43 Some local authorities sought assurances that a consistent and fair approach to this exemption would be taken across the country. More detail was requested on what evidence should be considered. There were suggestions by local authorities and a commercial respondent that the factors taken into account could be similar to those used when determining applications for a restricted PSV operator's licence. One local authority suggested that the exemption be measured by the main occupation of the driver rather than the community transport organisation. Others asked what action would be taken with respect to permits issued incorrectly.

Exemption for undertakings engaged exclusively in national transport operations having only a minor impact on the transport market because of ... the short distances involved

- 1.44 Domestic legislation did not provide for this exemption. The consultation sought views on how this exemption might work in practice.
- 1.45 Most community transport operators commented on the fact that there should be different distance thresholds for rural and urban areas and gave examples of the distance of services that they run. Local authorities also thought there needed to be different thresholds for rural and urban areas and often gave more detailed comments about how the exemption might work in practice. Individuals and commercial bodies generally opposed the use of this exemption and said the same rules should apply regardless of the impact or distance of the service.
- 1.46 Many, including the CTA, thought that most community transport organisations are of a size and scale that has little impact on the national, or indeed, local transport market, and supported the Department's intention to introduce this exemption. Others, including Mobility Matters, expressed concern about how it would work in practice, with the CPT arguing that it was not only unworkable in practice but also wrong in principle. There were also comments that as the exemption did not distinguish between "commercial" and "non-commercial" undertakings, there may be unintended consequences of applying it, with commercial operators also taking advantage of it.

- 1.47 A number of community transport operators offered thoughts on the meaning of "minor impact", with others seeking more clarity on the meaning of this phrase. Some thought that community transport services had a minor impact because no commercial operator wanted to run door-to-door services or due to the specialist nature of the work, equipment used, and training required. Others said users were often unable to use public transport so there would be no impact. The implication was that community transport does not attract passengers away from other forms of transport. Some said there would be a minor impact due to the small number of community transport vehicles operated. There was a suggestion that minor impact could be measured with a threshold based on a percentage share of contracts or passengers, or be based on mileage and market share.
- 1.48 Respondents highlighted the differences between urban and rural operations. Many, such as the CTA and ATCO, thought that whilst the exemption might be useful in urban areas, this was unlikely to be the case in rural areas, as what is deemed to be a short distance in a rural area is often different to that in an urban area. Some, including ATCO, thought distance was not the best way of excluding minor impacts and could lead to an artificial service boundary being created. Some supported the idea of specifying a geographical area or administrative boundary, or suggested variations on this theme. For example, local authorities could agree with the community transport operator a suitable operating zone that could be defined on a map, and those services within that zone would be exempted.
- 1.49 A range of approaches to measure the distance were suggested, including:
- traveling as the crow flies or total route distance, rather than the use of a radius from an operating centre as set out in the consultation;
 - some local authorities and community transport operators questioned whether dead mileage would be included in any distance calculation;
 - some wanted a definition of operating centres or suggested that distance should be measured from a specified central point rather than operating centres, or that several operating centres could be used;
 - another suggested that the exemption should only be applied where passengers are carried at separate fares with passenger journey length capped.
- 1.50 Many, including Mobility Matters, wanted the guidance to define what the "transport market" was, whether this included other modes of transport, whether it was the national market, and whether it included every market for a particular service or the overall market for transporting vulnerable passengers. Some, including the CPT, argued that each market should be considered on its own merits.

Next steps

- 1.51 Alongside the final summary of responses, the Department has published the Government response to the consultation on the use of section 19 and section 22 permits for road passenger transport in Great Britain. It summarises the key issues raised during the consultation and the Government's position on each of the exemptions.
- 1.52 The Government has also issued guidance for community transport operators and permit issuers on the interpretation of the "main occupation" and "short distance" exemptions from the Regulation. The guidance reflects the position set out in the Government response and will be kept up to date and revised, if necessary, as the new interpretations are used.
- 1.53 In December 2018, solicitors acting on behalf of the Bus and Coach Association applied to the High Court for permission to judicially review the Department's approach to the "non-commercial" exemption. The Government will therefore not make any further statements about what the "non-commercial" exemption means and so the guidance does not include any advice on this. The definitive view of what the "non-commercial" exemption means will be a matter for the High Court. The Department will then amend the guidance to bring it in line with the Court's decision.
- 1.54 While the Department awaits the Court's judgement, it would in general be premature for any local authority to end or withhold community transport contracts. The Department will continue to provide advice to any local authority who wishes to discuss their policy in respect of letting contracts to community transport organisations.
- 1.55 The Department will continue to work with local authorities, the Office of the Traffic Commissioner, the Driver and Vehicle Standards Agency, and organisations such as the CTA and Mobility Matters to monitor sector impacts.