





# Enhanced Partnerships Guidance

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# 1. Introduction

- 1.1 This document provides guidance on the key elements of the new Enhanced Partnership (EP) schemes which can be made by local transport authorities in England. It is intended for (a) authorities and operators wishing to establish a new partnership arrangement; and (b) for partnership agreements made under the legislation set out in the Bus Services Act 2017 (the 2017 Act) that subsequently need changing or revoking, in whole or in part.
- 1.2 An EP is an agreement between a local transport authority (LTA) and local bus operators to work together to improve local bus services. It includes a clear vision of the improvements that the EP is aiming for (known as an EP plan) and accompanying actions to achieve them (set out in one of more EP schemes). The local transport authority has formal responsibility for making the scheme, but at set points in the process they can only proceed with their proposals if they have the support of a defined proportion of local bus operators.
- 1.3 The 2017 Act allows individual partnerships to tailor their schemes to meet local needs. Therefore, we do not wish this document to fetter that flexibility by providing content on areas where it should be for local partnerships to determine their own policies and how these are to be pursued. Getting the balance right is crucial and we will monitor the use of this guidance and how individual partnerships are developed and implemented 'on the ground' to ensure that it provides the right level of guidance, is pitched in the right way and remains fit for purpose.
- 1.4 Please also bear in mind that the new EP legislation was inserted into the Transport Act 2000 (the 2000 Act) by the 2017 Act. So, for example, section 9 of the 2017 Act inserted sections 138A-138S into the 2000 Act. For ease of understanding, we provide both references to both Acts in this guidance.
- 1.5 This document includes two different types of guidance:
  - Informal guidance which seeks to explain how the new provisions introduced through the 2017 Act work in practice and offer some practical suggestions as to their application. This Informal guidance is shown in normal type font in this document. It has no formal legal status and there is no statutory requirement for a local authority to have regard to it. It may however reference requirements which are themselves set out in legislation (such as requirements to follow a particular process or to consult); and
  - Statutory guidance to which a local authority must have regard in exercising relevant functions. Statutory guidance is shown in underlined font in this document. It is issued under section 138R(1) of the 2000 Act (as inserted by the 2017 Act).



















































scheme but should now, in any case, be given the opportunity to object to a proposal before it is subject to wider consultation.

- 4.74 A notice that a plan and scheme have been prepared should be sent, in writing, to all operators of qualifying local services. What constitutes a qualifying local service is set out in regulations<sup>27</sup> and is explained in section 5 of this document. The decision as to whether or not a service is a qualifying local service is made on the basis of the service's status on the day before the notice is issued.
- 4.75 The notice should be sent to the address that is listed on the Public Service Vehicle operator's licence of each operator concerned. The authority may also choose also to give notice via their website or other sources, such as local newspapers.
- 4.76 The notice must:
- contain full details of the plan and scheme;
  - explain that operators of qualifying local services have a right to object to the plan (including what constitutes a qualifying local service);
  - set out what level of objections is required for the plan and scheme not to proceed to consultation. When plans and schemes are initially proposed this will always be the threshold set out in regulations<sup>28</sup>;
  - give a period of 28 days or more within which objections may be made; and
  - contain details of how an operator should make an objection, including a mail and email address to which objections should be sent.
- 4.77 We recommend that authorities invite operators to provide reasons for any objection which they make, in order to assist in the development of revised proposals if necessary. But there is no obligation on an operator to provide a justification for their objection.
- 4.78 Alongside issuing this notice, authorities may wish to use their powers to obtain information<sup>29</sup> from all operators of the registered distance of all their qualifying local services, in order to assist the authority in determining the total distance and so determine whether or not the relevant threshold for objections has been reached.
- 4.79 Further details on determining whether a scheme can proceed to the next stage following objections from operators is provided in section 5 of this guidance.

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<sup>27</sup> The Enhanced Partnership Plans and Schemes (Objections) Regulations 2017

<sup>28</sup> The Enhanced Partnership Plans and Schemes (Objections) Regulations 2017

<sup>29</sup> Section 10 of the 2017 Act, section 143B of the 2000 Act and the Franchising Schemes and Enhanced Partnership Plans and Schemes (Provision of Information) Regulations 2017.

# 5. Objection method

## Introduction

- 5.1 This section covers the operators' objection mechanism.
- 5.2 Following the notice that a plan and scheme have been prepared, it is for operators of qualifying services within the EP area to determine whether the next stage of the process can go ahead – in this case to a formal consultation exercise.
- 5.3 The legislation requires that any objection should be made within the deadline set by the authority – but this deadline cannot be less than 28 days after the date on which the notification was sent. Operators wishing to object to a plan or scheme are not required to give a justification for doing so. However, we would encourage - where possible - operators to raise any concerns that might lead to an objection with the authority before the objection process commences, so that early resolution can be sought.
- 5.4 Whilst this section is written with specific reference to objections being made prior to consultation on a plan and scheme the same principles apply at other points at which operators have the right to object to a plan and/or scheme. However, in some circumstances (as set out in paragraphs 4.62 and 4.63) different, locally determined criteria contained in a scheme may be used to determine whether sufficient objections have been received.

## Objection process

### Who can object?

- 5.5 Any operator of qualifying local bus services that operates within or into the geographical area of a plan or scheme on the day before the notice is issued by the authority is entitled to object to the consultation exercise on the plan or scheme. However, if the geographical area of the EP has more than one subsidiary<sup>30</sup> of a parent company - e.g. the Blackmore Group that has two bus companies, Blackmore Buses and Blackmore Red Rover Buses - those two (or more) subsidiaries are to be treated as a single operator under the objection mechanism. This is to prevent bus companies splitting into smaller subsidiaries in order to have more influence over the objection process.

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<sup>30</sup> The Enhanced Partnership Plans and Schemes (Objections) Regulations 2017 defines a 'subsidiary' as having the meaning given by section 1159 of the Companies Act 2006.

### What is a qualifying local service?

- 5.6 A service is a "qualifying local service" if it is a registered local bus services which has one or more stopping place within the geographical area of the EP plan or scheme concerned and it is not an excluded service.<sup>31</sup> An excluded service:-
- Is a service run under sections 89 to 91 of the Transport Act 1985 where the authority retains all the revenue from that service;
  - is a registered local service but is an excursion or tour<sup>32</sup>;
  - Is a service operated under Section 22 of the Transport Act 1985 (a community bus service). An EP does not apply to this type of registered service - although there is nothing to prevent the operator from voluntarily complying with some or all of the EP requirements that would otherwise apply to that service; or
  - The service has 10% or less of its overall distance (not just the distance within the EP plan or scheme) registered as a local bus service. (This might include interurban or other long distance scheduled services that are not generally used for local journeys within the EP area, but may use bus stops within it).
- 5.7 Whether or not a particular service is a qualifying local service is determined on its status on the day before the notice is issued. In practice this means that all local services that are operating on that date, or that will begin operating after that date, will need to comply with the requirements of the scheme.

### How do operators make an objection?

- 5.8 The notice of consultation must contain an address to which objections can be made. This should be a postal address or an email address. The notice must contain the date by which objections from operators must be received. This date cannot be less than 28 days from the date on which the notice is sent.

### What happens once objections are made?

- 5.9 The authority must assess objections using two criteria – if either is satisfied it is a legal requirement that the consultation exercise on the plan and scheme cannot go ahead (it is not a requirement that both criteria must be satisfied). These criteria are that:
- the combined registered distance of all the qualifying local services operated by objectors in the relevant EP area is at least 25% of the total registered distance of all local bus services operated by all the bus operators in that area and:
    - where there are four or more operators in the relevant EP plan or scheme area, at least three are objectors; or
    - where there are less than four operators in the relevant EP plan or scheme area, all are objectors
  - at least 50% of the total number of operators of qualifying local services within the relevant plan or scheme area have objected **and** the combined registered distance of qualifying local services operated by the objectors in the relevant area is at least 4% of the registered distance of all local bus services operated by all

<sup>31</sup> As set out in regulation 3 of the Enhanced Partnership Plans and Schemes (Objections) Regulations 2017.

<sup>32</sup> As defined in section 137(1) of the Transport Act 1985.

the bus operators in that area.

5.10 If a plan and scheme have different geographical areas then separate determinations of whether sufficient objections are made for each. Operators in scheme or plan areas where they do not operate local services cannot exercise objection rights in those areas.

The initial plan must be accompanied by one or more schemes, so neither the plan nor accompanying scheme(s) can proceed to consultation if:

- the plan does not receive sufficient objections but the accompanying scheme does; or
- The plan does not receive sufficient objection and if more than one accompanying scheme is proposed, they all receive sufficient objection. If some of the accompanying schemes do not receive sufficient objection, they can proceed to consultation with the plan;
- the accompanying scheme(s) do not receive sufficient objections, but the plan does.

### **How is registered distance calculated?**

5.11 As stated above, the regulations specify that it is 'registered distance' that should be used - this is the total distance that the vehicles need to cover in order to meet the description of the service as set out in the registration held by the traffic commissioner - not the distance actually operated 'on the road' (which will be less due to vehicle breakdowns etc.). Regulations contain powers enabling LTAs to require operators to provide this information for all their registered services that operate within or into the geographical area of the scheme. Alternatively, the LTA can calculate registered distance itself by using the registered particulars - LTAs also have powers to require operators to provide details (or copies of) the particulars for all the registered services operating within or into the EP area. Calculating registered distance on an individual bus route usually involves a simple calculation of route length x frequency (remembering to calculate both the outward and return journeys and any evening or weekend services). This calculation would of course need to be repeated for each service registered with the traffic commissioner operating within the geographical area of the EP scheme. Regulations also specify that where services are registered as 'frequent' (a bus every ten minutes or less) and do not therefore include a timetable, then a 10 minutes frequency should be assumed for the purposes of calculating registered distance.

### **Requirement to publish objections**

5.12 The authority itself must publish the names of operators making any objections within 14 days of the last day of the period during which objections can be made. The name for each operator must be the name as it appears on the local bus service registration.

### **What happens if the plan and scheme can't proceed to consultation?**

5.13 Hopefully, the authority will have gained a sufficient steer during the development of the plan and scheme to determine in advance whether individual operators are likely to object to the proposals – and negotiate changes that resolve their issues.

However, if sufficient objections are received that prevents the consultation process from going ahead, the authority will need to discuss the package of measures in the plan and scheme further with their operators to resolve the contentious issues – e.g. by amending them or removing them altogether – then open the revised package to objections once again. Whilst the authority should seek to resolve as many objections as possible, the legal requirement is that if there are not sufficient unresolved objection to meet either of the objection criteria then the consultation can go ahead.



# 6. Consultation process

## Carrying out the consultation

- 6.1 Assuming that the objection stage does not raise sufficient objections to meet either of the two criteria outlined above, the next stage is a formal consultation exercise. Consultation is an important element in the delivery process.
- 6.2 Transport Focus has produced guidance on carrying out consultation exercises – ‘Bus service reviews: consulting on changes to local services’ – that identifies key considerations when designing and delivering a consultation exercise and highlights recent best practice.
- 6.3 It is for the LTA to carry out the formal consultation exercise and when doing so they must, as a minimum, include a number of statutory consultees. These are:
- all operators of local bus services that would be affected by any of the proposals;
  - organisations that represent local passengers;
  - other local authorities that would be affected by the proposals;<sup>33</sup>
  - the Traffic Commissioners;
  - the chief officer of police for each area to which the plan relates;
  - Transport Focus;
  - the Competition and Markets Authority (CMA); and
  - such other persons as the authority thinks fit.
- 6.4 Although these are the bodies that must always be consulted, these minimum requirements should be seen as only part of a wider need for effective communication, publicity and consensus building. Where a scheme involves modification to infrastructure, the Authority should consider the appropriateness of also consulting:
- residents and occupiers of commercial premises in the immediate vicinity of proposed works;
  - existing bus passengers on affected services; and
  - existing road users on affected highways.
- 6.5 Where the scheme involves modification to services, consultation should also be conducted with:
- existing bus passengers on affected services; and

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<sup>33</sup> See section 138F(7), relevant local authorities for these purposes include, Local transport Authorities, district councils in England, National Park authorities, the Broads Authority, London transport authorities and councils in Scotland.

- relevant organisations which are not already involved in the EP process (for example, major local employers).
- 6.6 Responses to the consultation should be analysed thoroughly and changes made to the proposals where necessary. This should not be undertaken as part of the work of the partnership, not by the local authority in isolation. There is little point in conducting an extensive and comprehensive consultation exercise if, for example, passengers' views have not been properly taken into account or enough time and analysis of the responses has been undertaken. They are the group that bus services need to cater for, so their views ought to be paramount. The appropriate time needs to be devoted to analysing feedback from consultation and where necessary amending the proposals.

### Consulting on multiple schemes

- 6.7 The consultation process should take place for all schemes that relate to a plan. There is nothing to prevent a single consultation exercise covering a plan and several schemes at the same time – even if some of those schemes will not enter into force together. However, if a scheme is developed after the initial scheme(s) have been consulted on, a separate consultation exercise must be carried out on that subsequent scheme.

## 7. Making a plan and scheme<sup>34</sup>

### Modifications to EP proposals following consultation

- 7.1 Once the consultation exercise has completed and the responses have been properly analysed and any changes made, the local authority must decide whether to 'make' the plan and scheme ('make' being the legal term for finalising the content of both and then implementing the requirements of the scheme 'on the ground'). The local authority should discuss this with the operators so that agreement can be reached on what the final form of the plan and scheme should look like. Particularly bearing in mind that any changes to the plan and scheme as a result of the consultation exercise will trigger the operator objection mechanism as set out in paragraph 7.4 below.
- 7.2 This can be on the basis of the plan and scheme put to consultation, or a modified version of either that takes into account the responses to consultation. As stated previously, it is important that the partnership is open to changing the content of the plan and/or the scheme to reflect consultation responses, especially feedback from passengers or passenger groups.

### Notice of intention to 'make' a plan and scheme

- 7.3 Once that process has completed, the next stage is to inform all operators of qualifying local services of the intention to proceed. Again, this is because it is not a legal requirement that any particular operators should be obliged to participate in the preparation of a plan and scheme up to this point. Although all operators should have an opportunity to do so, there may be some that do not wish to engage with the process. However, despite this, all operators at this stage should be made aware of the full details of what the 'making' of a plan and scheme will mean for them, so that they can properly take part, if they wish, in the subsequent procedures set out below. These details can be contained in a letter or email (preferably both) to the affected operators, or by providing them with information about how full information can be accessed – e.g. via a dedicated website. This notice, as a minimum<sup>35</sup>, must:
  - Contain full details of the plan and scheme (or where to find it);
  - Whether it is the intention to modify the EP as a result of the consultation exercise and, if so, that this will trigger a further operator objection process;
  - State the period within which objections may be made (which must be at least 28 days from the date of the notice).

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<sup>34</sup> Section 138G of the 2000 Act/ section 9 of the 2017 Act.

<sup>35</sup> Section 138G(3) of the 2000 Act/ section 9 of the 2017 Act.

If it is the LTAs intention to modify the EP following consultation, the notice should also provide sufficient detail of how and why the EP is being modified so that operators can take an informed decision about whether they wish formally to object.

## Operator objections

- 7.4 An essential legal requirement after a consultation exercise on a plan and scheme and before either can be finalised or implemented is that operators of local bus services are legally entitled to object to a modified plan and scheme being 'made' (if the proposals remain unmodified after consultation then there is no need for a further operator objection process). Unless this process allows the plan and scheme to be made they cannot do so. An authority cannot unilaterally decide to implement a modified plan or scheme. It can only do so if any formal objections from operators do not satisfy either of the criteria listed in section 5 above.

### What happens after the objection period has elapsed?

- 7.5 Again, hopefully the authority will have gained a sufficient steer during the post-consultation negotiations on the package to determine in advance whether individual operators are likely to object – and, where necessary, negotiate changes to resolve them. However, if sufficient objections are received that prevents the consultation process from going ahead, the authority will need further to discuss the package of measures in the plan and scheme with their operators to resolve the contentious issues – then open the revised package to objections once again. However, as with objections made prior to consultation, whilst the authority should seek to resolve as many objections as possible, it does not require all objections to be resolved. The legal requirement again is that if there are not sufficient unresolved objections to meet either of the objection criteria, then the plan and scheme can be made.

## Making the plan and scheme – notice

- 7.6 Once the objection process has been completed and if there are not sufficient objections to prevent the plan and scheme being made, the authority can then make the plan and scheme. The date that the plan and scheme are made are for the authority to determine. However, the requirements in a scheme can only enter into force after the scheme is made – so that date must properly take into account the dates from which the requirements in the scheme will enter into force and the statutory 56 day notice period for changing registrations. If the authority intends to take over the local bus service registration system from the traffic commissioner (see section 6E(7) of the transport Act 1985 as inserted by section 12(3) of the 2017 Act), a transitional period will also need to be built into the date that the scheme is made or that individual provisions under it enter into force. **Further regulations and guidance will be provided in due course to enable LTAs to take over the registration function from the traffic commissioners.**

## Notice that a plan and scheme has been made

7.7 No later than 14 days after the date on which the plan and scheme was made, the authority must give notice that the plan and scheme have been made. This notice is to:

- Relevant stakeholders in the plan and scheme area.

It is important that the passengers who use services in the plan and scheme area are made aware that changes to their bus services are on the way, but it is for the LTA to determine what form this notice takes. It could include leaflet drops, posters, newspaper advertisements, web content, and information leaflets (e.g. handed out on the street, bus station or in local shopping centres etc.).

- To all operators that would be affected by the scheme.

It is very important that all operators whose local services would be affected by the scheme are made aware that they may be required to make changes to their local bus services. Although we would expect in most cases that all operators are already aware of what will happen, this cannot be guaranteed. Nor should such notice rely on general publicity as outlined above. The authority should write to each affected operator setting out in detail which requirements of the scheme will affect their services – using the address listed for operator licensing purposes. This notice should detail both area-wide requirements (such as compliance with a multi-operator ticketing scheme) and any requirements applying to individual services – e.g. route level requirements such as a frequency or timing restriction.

- The traffic commissioners

As the scheme will be enforced through the system of local bus service registrations, it is important that the traffic commissioner is given early notice of the making of a scheme – especially if the authority is obliged or has elected to take over the registration system. Of course, this is only a formal notification and we would expect authorities to have discussed these issues with the traffic commissioners much earlier on in the development of the proposals.

## Making more than one scheme

7.8 A plan and a number of schemes can be made at the same time and all can be included in a single notice – even if elements of the scheme or the scheme itself have later dates for the individual elements of them to be introduced – and provided that information is included in the notice. However, for any scheme that is made afterwards, these notice requirements apply separately to that scheme as well.

## Public information on the content of the plan and scheme(s)

7.9 Once a plan and scheme is made, it is important that bus operators, especially those considering entering the market or existing operators that are varying services, have easy access to comprehensive information about the requirements of an EP. This is especially the case for the EP schemes, which, of course, contain the specific requirements of the EP itself. This information should be readily available –

preferably on a website – and presented in a way that enables operators easily to understand what is required of them.

## 8. Postponing, varying and cancelling an Enhanced Partnership

### Postponement of an EP

- 8.1 Even after a plan and scheme are made it is possible for an authority to postpone any of the implementation dates specified in the scheme for any elements of the scheme<sup>36</sup>. The dates that can be postponed are:
- The date on which the scheme is to come into operation.
  - The date on which a particular requirement is to be imposed under the scheme.
  - The date on which any particular facilities are to be provided – such as new bus stops or other waiting facilities.
  - The date on which any particular measures are to be taken – such as reduction in the number of parking spaces or parking fees that are under the control of the authority are to be changed.
  - The date on which operators are required to comply with particular registration conditions – such as an area-wide or route requirement.
  - The date upon which any change as a result of a scheme variation or revocation comes into effect.
- 8.2 Before deciding to postpone any element of a scheme listed above, the authority must consult all operators of local bus services that would be affected by the postponement of the scheme in question.
- 8.3 If an authority, after consulting operators, decides to postpone the above elements of a scheme, the authority must give notice, including the reasons for postponement, not later than 14 days after the decision is made to those listed in section 7 of this document.

### Variation of an EP

- 8.4 Once a plan and scheme have been made there is nothing to prevent the partnership from varying it<sup>37</sup>. A variation can result from a number of reasons:

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<sup>36</sup> Section 138I of the 2000 Act/ section 9 of the 2017 Act

<sup>37</sup> Section 138K of the 2000 Act/ section 9 of the 2017 Act

- Another authority wishes to become part of the plan and scheme – this can be because, for example, the EP has been so successful in the original geographical area that another authority wishes to take part.
- A proposal to extend a ticketing scheme into a surrounding urban or rural area that is within another authority area. Indeed, when considering to vary an EP plan, an authority has a legal obligation to consider whether it is desirable to include another authority(s) within the revised plan. If a scheme is varied to include another authority, the new authority becomes an authority for the purpose of the scheme and also becomes legally obliged to deliver any of the facilities or measures in their area that are included in the revised scheme.
- Conversely, one of the requirements of a particular scheme may not be working as well as had been hoped and needs to be varied or even withdrawn entirely.
- Schemes must also be reviewed if the LTA believes a change in circumstances has potentially resulted in the scheme(s) no longer meeting the competition test under Schedule 10 of the 2000 Act.

8.5 The authority that wishes to vary a scheme cannot do so unless they are satisfied that the scheme, as varied, will contribute to the implementation of:

- The policies set out in the related EP plan or the revised EP plan if it is being varied at the same time as the EP scheme; and
- The authorities' local transport policies.

8.6 The authority must also be satisfied that the variations to the scheme will:

- Benefit passengers by improving the quality or attractiveness of bus services in the scheme area; or
- Reduce or limit traffic congestion, noise or air pollution.

### **Notice of intention to prepare a variation to a plan or scheme**

8.7 As with other stages of preparing and making a plan and scheme, the authority should give local bus operators and other stakeholders that have been involved in the preparation of a plan (if the plan is being varied) and the preparation and roll-out of a scheme (if a particular scheme is being varied) notice of their intention to vary it. It is important that those stakeholders are involved in the preparation of any variation and fully understand why the authority is proposing the variation. This may be, as stated above, because the authority wishes to include a neighbouring authority in a plan and scheme. Or it may be because the authority and local operators feel that changes need to be made to a scheme in the light of experience of how the original scheme proposals are working 'on the ground'. There is also nothing to prevent an operator or group of operators approaching an authority with a proposal for variation. There are no conditions on what can be varied. It is up to individual partnerships to decide. In the case of varying a scheme, there is no need to involve operators that will not be affected by the variation – but would need to include operators that are both directly affected (because it would change or impose new requirements) and those indirectly affected (because the variation has knock-on effects).



- 8.8 Once the early discussions have taken place and a draft variation to a plan and/or scheme have been prepared, the next stage is to make all operators of local bus services that would be affected by a variation to a plan and especially a scheme are aware of its existence. Again this is important because not all operators may have been able or wished to be involved in developing the proposals. But once those proposals have been developed at this stage all operators running services within or into the area subject to the variation should be made aware of the full details of what is being proposed so that they can properly take part, if they wish, in the subsequent procedures. These details can either be contained in a letter or email (preferably both) to the affected operators, or by providing them with information about how full information can be accessed – e.g. via a dedicated website.
- 8.9 This also applies to other stakeholders. If, for example, a passenger group has decided not to be involved in the development of a variation they should be made aware that a draft proposal has been tabled.

### Consultation

- 8.10 The next stage is that operators must be allowed to object to the draft variation to a plan and scheme proceeding to the next stage - a formal consultation exercise. The notice to operators that a variation to a plan and/or scheme has been prepared must also contain details of how individual operators can object to the proposals moving on to the consultation stage. Any objection should be made in writing and the authority should provide a mail and email address to where such objections should be sent – and acknowledge that an objection has been received. The legislation requires that any objection should be made within the deadline set by the authority – but this deadline cannot be less than 28 days after the date after which the notification was sent. Operators wishing to object to a variation are not required to give a justification for doing so. However, it is hoped that individual operators would raise any concerns that might lead to an objection with the authority before the objection process commences, so that a resolution can be sought.

### Operator objections

- 8.11 Any variation of a plan is subject to the statutory objection process. However, as explained in section 4 above, a scheme when it is originally made, may contain an alternative objection mechanism that is used when a scheme is varied or revoked. If this is the case, then that mechanism must be used for the purposes of operator objections. However, if no alternative mechanism has been included in the scheme, the statutory requirements will apply. Only the statutory objection mechanism can apply to the variation (or revocation) of a plan. Also note that where an EP scheme is being varied, only those operators that are currently required to comply with that scheme, or would be required to comply with the revised scheme as varied, have the right to object. Operators not currently affected by the scheme and who would also not be affected by the scheme as varied have no right to object.
- 8.12 If the statutory objection mechanism is to apply, the same procedures will apply as when voting takes place prior to the consultation stage and making of a plan and scheme. Any operator of qualifying local bus services that operates within or into the geographical area of a plan or scheme on the day before the notice under paragraph 8.7 above is entitled to object.

- 8.13 The same requirements that apply to notice, consultation and making of a scheme also apply at this stage when the variation to an existing scheme is being considered<sup>38</sup>. If following the operator objection process, the variation of the plan or scheme is to proceed, the authority must carry out a consultation exercise on the variation proposal. It is for the authority itself to determine how to undertake this exercise. However, all operators of local bus services in the area concerned must be formally notified as well as any other stakeholders, such as passenger groups that have been involved in the making of the original scheme. At this stage the Competition and Markets Authority must also be formally consulted.
- 8.14 Again, as with the procedures outlined previously, following consultation, if the authority decides to 'make' the variation, they must give notice to all operators of local bus services and allow operators to make objections. The objection mechanism used can either be a bespoke one that has been defined in a scheme (if only a scheme is being varied) or, in its absence, the statutory one. The variation of a plan must use the statutory voting mechanism.

### Decision to vary a plan or scheme

- 8.15 Again, as with other stages of the process, if an authority, after consulting operators, decides to make the variation, the authority must give notice, not later than 14 days after the decision is made to:
- Relevant stakeholders in the plan and scheme area.
  - To all operators that would be affected by the scheme.
  - The traffic commissioners.
- 8.16 The date(s) for variation of a plan – and particularly a scheme – will need to take into account the 56-day rule for registration variations – although the traffic commissioner or the LTA (if it is the registration authority) can decide to grant short notice variations if requested to do so by operators.

### Revocation of a plan or scheme

- 8.17 A plan cannot be revoked without also revoking all the schemes that are connected with it. And all the schemes cannot be revoked unless the connected plan is also revoked. However, a single scheme (if there is more than one) can be revoked without also revoking the other schemes or the plan.
- 8.18 The authority should give notice of their proposal to revoke a plan and scheme to all stakeholders that were involved in the previous stages of preparing or varying a plan or scheme. But as a minimum this must comprise:
- Operators of local services that provide local bus services in the plan or scheme area that would be subject to revocation;
  - The Competition and Markets Authority; and
  - Other persons the authority or authorities think fit.

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<sup>38</sup> Sections 138L and 138M of the 2000 Act/ section 9 of the 2017 Act

- 8.19 If after consultation, the authority still wishes to proceed with revocation, they must formally notify all the operators of local services of their intention to revoke a plan or scheme. This notice must, as a minimum, contain:
- The date on which the plan or scheme is to be revoked.
  - The authority's reasons for revocation.
  - Information on how the objection mechanism will be conducted - i.e. will it operate under the statutory powers or a bespoke mechanism (see section 8.22 below).
  - Specify which operators can object to the revocation and what the objection period is – although this must not be less than 28 days from the date on which the notice was sent. Eligible operators will be those that would otherwise be able to object to a variation.
- 8.20 Expanding on the third bullet above, the operator objection mechanism also applies to revocation. See paragraph 8.27 below.
- 8.21 It should be noted that revocation of a scheme should not be seen as an 'easy get out' for either LTAs or bus operators. It is very important that both the authority and the bus operators enter into an EP with their 'eyes open'. But it is also important that the authority and operators are not locked in to a scheme that is clearly failing. With this in mind, it would be sensible to agree, as part of developing the proposals before a scheme is made, how the scheme(s) is to be monitored, managed and what the triggers are for variation and revocation. This is an important point that should be fully considered and developed between the authority and the bus operators.
- 8.22 Under s.138E at section 9 of the 2017 Act - once a scheme is introduced, it may have different bespoke operator objection mechanism(s) or agreed triggers for certain things to happen - e.g. it is automatically revoked if, say, patronage targets aren't hit. This section of the Act gives full flexibility to tailor these bespoke arrangements. These would replace the statutory voting mechanism in Regulations.
- 8.23 Or an EP could include a series of metrics that could be used to assess the success (or otherwise) of individual elements of the scheme(s). These can be as flexible as they need to be. For example, it could have individual metrics for a ticketing scheme (say, take up of smart), for any frequency or timetabling requirements (say, based on the traffic commissioner's current targets), or the effectiveness of individual schemes as a whole (say, based on passenger growth). These can be as simple or complex as are needed – provided they are subject to an operator objection mechanism – and can, again, include things such as variation or revocation happening automatically.
- 8.24 Or simply, the EP could be time-limited and start again from scratch as the existing one becomes life-expired. The essential thing is that these issues are discussed and included, in advance, between the authority(s) and the bus operators and, if the authority wishes to proceed, are subject to the applicable operator objection mechanism – the statutory one when the scheme is made and any relevant bespoke one(s) when it is varied or revoked. As stated previously, any changes or revocation of the plan must use the statutory objection mechanism.
- 8.25 It is important to realise that an authority or individual operators cannot unilaterally back out of an EP – say, because there was a change in authority political leadership, or that an operator is not seeing the revenue growth that they envisaged, or because either side unilaterally decide that they no longer wish to continue to participate. The EP can only change or end in accordance with the requirements set

out in the 2017 Act and any rules laid down within it. That gives clarity to both the authority and the operators, both of which may be committing considerable resources to deliver their respective commitments.

- 8.26 The key overall point is that the scheme needs to set out mechanisms and triggers that would not require either side to compel the continuation of an EP that is failing. What those mechanisms and triggers are will vary from scheme to scheme and needs to be agreed by both sides – which is why the 2017 Act provides so much flexibility.

### **Operator objections**

- 8.27 As with a decision to vary a plan or scheme, local bus operators running local services on the day before a notice to revoke is issued may object to the revocation. For revocation of a scheme, the objection process can either be a bespoke one that is included within the scheme, or, in its absence, the statutory objection process (see sections 4 and 5 of this document). The revocation of a plan must always use the statutory process.

### **Notice period**

- 8.28 If, with agreement from the bus operators through the objection process, the authority decides to revoke a plan or scheme, they must, no later than 14 days after the revocation date, give notice of the revocation to:
- Relevant stakeholders in the plan and scheme area;
  - To all operators that would be affected by the scheme;
  - The traffic commissioners.

# 9. Enhanced partnership guidance – Competition issues

## Background

- 9.1 The development of a plan and scheme(s) are subject to the requirements of competition law. However, it is worth stating that given that bus partnerships in various forms have been in existence since the mid-1990s, there have not been any cases where partnerships have given rise to action being taken on competition grounds. However, this does not mean that authorities should be complacent. It is very important that the development of plans and especially schemes are not conducted in a way that that is unfair to particular operators. But a distinction needs to be drawn between what is 'unfair' in the development of a plan or scheme and what may simply be unpopular with individual operators.
- 9.2 An example of unfairness would be an authority dealing with a particular operator or group of operators differently to others that gives those particular operators an advantage. Although, as stated above, it is for each operator to decide their level of engagement, the authority should not make that decision for them. For example, if a small or medium sized operator (SMO) wishes to have the same engagement with the authority as a much larger one, they have a right to do so. Authorities should not engage differently with large operators because, for example, they feel that they can 'get things done' more quickly than SMOs.
- 9.3 However, this does not mean that the authority should shy away from content of plans and schemes that may not be popular or have the backing of all operators. A key difference between an EP and the practicalities of an Advanced Quality Partnership Scheme (formerly a Quality Partnership Scheme) is that the content of schemes and plans require only the majority of operators to agree – via the objection process. This does not mean that any 'blocking minority' should be ignored. If an individual operator or group of operators believes that the requirements of a plan or especially a scheme would have serious consequences for their business, they should take that up with the authority at an early stage. It should also be remembered that the authority will need to certify the scheme as compliant with competition law under the existing requirements at Part 1, Schedule 10 of the Transport Act 2000.

## Competition law generally

- 9.4 Competition law is designed not to protect individual businesses, but to promote and maintain competition between businesses. It is this rivalry that incentivises businesses to deliver what consumers want in terms of lower prices, better service standards and innovation.

- 9.5 Competition law as it applies to bus services stem from the Competition Act 1998 and are more specifically applied to buses under Schedule 10 of the Transport Act 2000. The CMA has also published an open letter to local transport authorities about local bus partnership arrangements made under the 2017 Act in relation to competition law [<https://www.gov.uk/government/publications/letter-from-the-cma-to-local-transport-authorities-on-bus-partnership-arrangements>].
- 9.6 Provision for the application of the competition tests where local authorities exercise their functions, including in relation to the making and varying of enhanced partnership schemes, are specifically provided for in Part 1, Schedule 10 of the Transport Act 2000. This guidance is focussed on the implications of those provisions.

## Role of the authority

- 9.7 All EP schemes exist within a deregulated bus market. It is not a franchised arrangement where the authority control all aspects of bus services, from routing of individual services through to ticketing – as stated previously, this is not ‘franchising-lite’. The effect of all EPs – especially EP schemes – is to impose a suite of restrictions, set out in the scheme, on the deregulated bus market in that scheme’s geographical area.
- 9.8 The role of the authority is to ensure, for plans and all schemes, that an appropriate balance is struck between:
- a. The EP plan and schemes delivering tangible improvements to passengers;
  - b. Imposing any necessary restrictions on the deregulated bus market.
- 9.9 This balance is important and it is a legal requirement in Part 1, Schedule 10 of the 2000 Act that before making or varying a plan or scheme that the authority undertake a formal assessment about whether, in their opinion, this balance has been achieved. This can be simply a document, produced by the LTA, that explains what restrictions are being placed on the deregulated market and why, in the opinion of the LTA, that those restrictions achieve the balance set out in paragraph 9.8 above.
- 9.10 The authority therefore has the major role in monitoring and shaping the local bus market on behalf of consumers in its area. It needs to understand the role of competition rules in this process, and act as the facilitator in delivering necessary co-operation without unnecessarily restricting the underlying potential for competition. For example, operators are well placed to flexibly adapt services to meet changes in passenger requirements. Actual or potential competition motivates operators to provide a high-quality service offering value for money. If this process is impeded, then there is a risk of detriment to passengers. So it is very important that the effect of a scheme on a SMO, or a prospective operator, is fully taken into account.
- 9.11 Some element of a scheme – particularly route requirements – may require two or more operators to co-operate with each other. For example, it may require them to co-ordinate timetables. Such co-operation requires a ‘qualifying agreement’ between the operators concerned. These agreements require the formal approval of the authority that any such agreement meets two tests:
- c. It must be in the interests of passengers using local services in the EP scheme or wider plan area; and



- d. It must not impose restrictions that are not indispensable to achieving the plan or scheme objectives.
- 9.12 Clearly, if the operators are co-ordinating timetables in order to meet a legal requirement imposed by an EP scheme, both of these tests should be met. As an EP scheme cannot prevent new operators from entering the market (provided they meet the required standards), there should not be any issues relating to LTAs or a group of operators (or both) seeking to 'stitch up' the market. Even where a scheme imposes a frequency restriction on a particular route, a new operator must be given access to that route, or all the existing registrations on that route must be cancelled and the entire route put out to competitive tender by the LTA (separate guidance and regulations will be forthcoming to explain this). However, if any LTA or operator is in doubt about compliance with competition issues in this area, they are free to discuss this informally with DfT first before contacting the CMA.
- 9.13 So it is clear that the overall role of the authority is to ensure that any restrictions introduced into what remains a deregulation market are appropriate. All plans and schemes should include a section in their documentation that deals with relevant competition issues and sets out:
- e. What elements of the scheme may give rise to competition issues and what those issues are;
  - f. How the authority has addressed or proposes to address those issues to ensure that restrictions are appropriate;
  - g. Detail any competition issues from individual operators that remain unresolved – e.g. because they were not sufficient to meet either of the operator objection criteria that would prevent a plan or scheme being made or varied.
- 9.14 In assessing what elements of the plan and scheme may give rise to competition issues, the authority may wish to consult the CMA's Competition Impact Assessment guidelines in order to identify how a policy may affect the suppliers and consumers in any given market.
- 9.15 In the context of an EP, concerns which may arise include any aspects which:
- permit the unnecessary exchange of sensitive information;
  - reduce incentives on operators to independently set their own fares;
  - which result in operators sticking to given routes and areas; and
  - which reduce the chance of any entry or expansion.
- 9.16 Other issues may also be relevant to the competition assessment. This is to maintain the benefits of competition - i.e. that operators are incentivised to maintain an efficient and effective service at reasonable fares so as not to lose custom to existing competitors now or potential competitors in the future.
- 9.17 Authorities should ensure that the EP scheme is reviewed if they believe that a change of circumstance means that their assessment of the competition impacts would be materially different. For example, if there was reason to believe competition would work better given the potential entry of a new and well-resourced competitor, or operators changing tactics to become more customer-responsive and innovative. Or, potentially, the benefits of the EP may not be as strong as originally anticipated.

## Reducing operators' risk of action on competition grounds

- 9.18 As commercial undertakings, bus operators are subject to normal competition law provisions to prevent practices that harm passengers' interests, such as colluding to raise prices or geographic market sharing. If evidence is found of such behaviour, the CMA has powers to, among other things, impose fines on operators of up to 10% of group turnover. However, legislative mechanisms are in place to ensure that competition law does not prevent consumers benefitting from improvements that can only be secured through closer partnership working between the authority and bus operators. The requirements of EP schemes are imposed by the authority as conditions to be met by local bus service for the service to be registered. This means that bus operators that are, for example, co-ordinating timetables, or accepting tickets, in order to comply with a EP scheme requirement are not breaching competition law and are therefore not at risk of CMA action or penalties. Any action taken by the CMA would be against the content of the scheme (or parent plan) itself – e.g. by requiring the authority to vary or cancel elements of a plan or scheme that it felt did not strike the appropriate balance outlined above.
- 9.19 However, this protection applies only to action by operators specifically to comply with the registration requirements set out in a scheme. Any other action by the operator that falls outside this compliance with a registration requirement is subject to all the requirements of competition law that would apply to bus services in a fully deregulated environment that is not subject to an EP plan or scheme.
- 9.20 From the above, it is clear that both authorities and operators need to remain aware that the requirements of competition law apply throughout the development and implementation of a plan and scheme. Both sides should therefore act fairly to all other parties and the authority has the responsibility to ensure that this happens in practice and should generally seek to resolve competition issues. The CMA can help where issues arise.

## Making a complaint to the CMA

- 9.21 The role of the CMA is to determine whether anti-competitive practices – which most partnership arrangements involve – are justified. And to take action if not. So, if, after the process outlined above, an individual operator(s) remains concerned with the effect of EP proposals on the viability of their business, *they should take this up with the CMA*. Operators should not shy away from complaining to the CMA for fear of upsetting the local authority – it is an important safeguard and will not, for example, 'tar' your reputation with the traffic commissioners. Nor does raising concerns with the CMA involve a complex administrative or legal process. A simple letter setting out the operator's detailed concerns, the resulting harm that you believe will occur to competition and/or consumers and how they relate to specific plan or scheme proposals is sufficient as a first step. However, any operator intending to make a complaint to the CMA should consider informing the authority beforehand (and seeking to resolve it with them) so that any subsequent inquiries by the CMA do not come 'out of the blue'. However, a complaint to the CMA does not necessarily mean that any action will be taken. It is for the CMA itself to decide what action (if any) is appropriate in response to any complaint.



- 9.22 Details of how contact the CMA can be found at: <https://www.gov.uk/guidance/tell-the-cma-about-a-competition-or-market-problem>

## Setting the price of a multi-operator travel card (MTC) under an enhanced partnership scheme

- 9.23 An EP can include a requirement that bus services operating within a geographical area specified in the scheme must accept a multi-operator ticket. The scheme can also specify the price the bus operators charge for a multi-operator travelcard.
- 9.24 This is not a mandate for the LTA to set the price. Any pricing included in a scheme must be subject to the operator objection mechanism. Nor can a scheme set the price of multi-operator individual tickets (i.e multi-operator tickets that the participating operators have agreed to themselves but which do not include all operators in the EP area) nor single operator tickets: operators must retain the ability to make decisions about pricing their own services.

### Governance

- 9.25 It is especially important where an EP scheme proposes to mandate a multi-operator travelcard and set its price that appropriate governance arrangements are put in place. Some of these arrangements are already mandated in the processes and arrangements for developing and maintaining EPs under the 2017 Act – and further explained elsewhere in this guidance. However, particular regard should be given to developing specific arrangements for the multi-operator travelcard scheme. Some key considerations are outlined below:

#### Have clear objectives

- 9.26 Clear objectives for the scheme is essential. These should be focused on providing good value and convenient multi-operator products to passengers.
- 9.27 Remember, such schemes may grow demand for bus services. This is also likely to act as one of the key factors that determine price.

#### Commercial viability

- 9.28 It is the operators that bear the commercial risk for a multi-operator travelcard scheme and so it must be set at a price that is commercially viable for them. The pricing of the scheme should not put individual operators out of business.

#### Information sharing

- 9.29 In agreeing the pricing and structure of multi-operator travelcards, the increased collection and sharing of data must not lead to anti-competitive information sharing

between individual operators. For example, existing public information can be shared, for example current fare levels, but not future fare intentions<sup>39</sup>.

## Pricing

- 9.30 It is important that the pricing strategy of the multi-operator travelcard is able to respond appropriately to changes in the bus market. As explained elsewhere, a scheme may include particular arrangements for varying or revoking the scheme or a part of the scheme. In this context it could be used to provide particular arrangements for changing the price of a multi-operator travelcard after the scheme has been introduced. This might require, for example, the price of a multi-operator travelcard to be changed by using a bespoke objection mechanism that does not require a consultation exercise. This would allow the price to vary as needed, whilst still allowing operators to object. This would also allow new operators that had entered the market after the price was set to participate in any setting of a revised price.
- 9.31 The size and structure of the ticket zones can also affect the price of the ticket. Tickets with very wide geographic coverage may lead to operator calls to increase the cost of that multi-operator travelcard over single-operator tickets covering a smaller geographic area. Individual schemes should therefore consider how the size and structure of zones will affect pricing. The mechanism to be used when determining the price of a multi-operator travelcard is for individual partnerships to determine and prices should be set in the least restrictive way possible. The multi-operator travelcard price should not be mechanistically linked to the fares of any of the participating operators. It is, however, acceptable to sense-check the proposed price against single-operator products in the market and take a view on whether the price suggested is competitive and reflective of the local conditions.
- 9.32 One potential mechanism was set out by the Competition Commission in their 2011 investigation into the local bus market<sup>40</sup>. Appendix 15 of that document sets out how the price of a multi-operator travelcard scheme would be built up according to the following framework:

$$\begin{aligned} \text{Multi-operator ticket fare} = & \\ & \text{average or median single fare} \\ & \text{x estimated ticket usage} \\ & \text{x discount for a multi-journey ticket.} \end{aligned}$$

- 9.33 The CMA believe using such a framework for pricing increases the transparency of how prices of multi-operator travelcards are set and of the relevant information used to determine these prices. This framework is not intended to be applied as a mechanistic formula, but to be used as a way of facilitating decisions about an appropriate level of pricing. Such decisions should be taken at a local level in accordance with the EP governance arrangements outlined elsewhere in this guidance.

<sup>39</sup> See para 4.9 of the block exemption guidance

<sup>40</sup> [http://webarchive.nationalarchives.gov.uk/+/http://www.competition-commission.org.uk/inquiries/ref2010/localbus/pdf/00\\_sections\\_1\\_15.pdf](http://webarchive.nationalarchives.gov.uk/+/http://www.competition-commission.org.uk/inquiries/ref2010/localbus/pdf/00_sections_1_15.pdf)

9.34 Annex B of the 2013 DfT guidance on multi-operator ticketing ('Building Better Bus Services: Multi-Operator Ticketing')<sup>41</sup> also provides detailed advice on how to apply this framework in practice.

## Summary of Schedule 10 procedures

### Part 1 test

9.35 Enhanced Partnerships and any multi-operator ticketing scheme that is a part of them, must be subject to the test in Part 1 of Schedule 10 to the Transport Act 2000. This test has three elements:

a) is there a significantly adverse effect on competition? If yes:

b) is the LTA's involvement with a view to securing one or more of the three purposes specified (known as 'bus improvement objectives'), either:

- to secure improvements in the quality of vehicles or facilities used to provide local services,
- to secure other improvements in local services of benefit to users of local services, or
- to reduce or limit traffic congestion, noise or air pollution; and

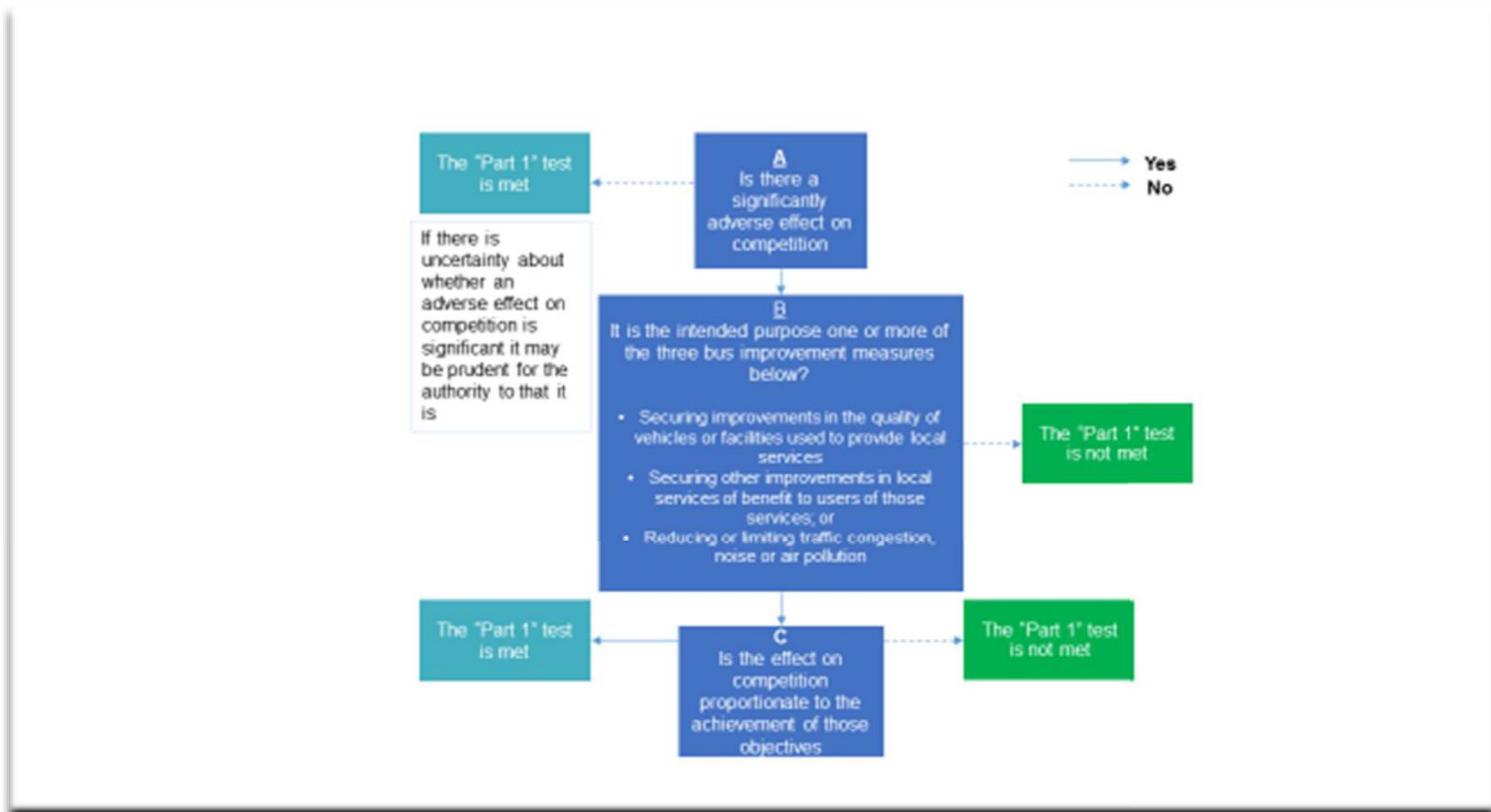
c) is the effect on competition proportionate or likely to be proportionate to the achievement of that purpose?

9.36 It is for the LTA(s) making the plans and scheme(s) to consider these issues and set out - in a document - why they believe the content of the EP schemes - meet those tests.

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<sup>41</sup> [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/141874/multi-operator-ticketing-guidance.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/141874/multi-operator-ticketing-guidance.pdf)

9.37 A flow chart setting out this process is below.



### Part 2 test

9.38 The Part 2 test is required where agreements or co-operation between operators 'has as its object or effect the prevention, restriction or distortion of competition in the area of the authority, or the combined area of the authorities'<sup>42</sup>.

9.39 In this context, if an EP imposes a route restriction that requires a degree of co-operation between operators, this arrangement should be covered by a 'qualifying agreement' made under Part 2 of Schedule 10 of the 2000 Act. This might be needed because, say, two or three operators on a route need to co-ordinate timetables, so that a headway or frequency restriction imposed by the EP on that route is complied with. Or it may be required if a new operator wishes to run services on the route that has a frequency restriction and the existing ones need to co-ordinate with the new operator to ensure all their services, taken together, comply with the route restriction.

9.40 Although such arrangements do 'prevent, restrict or distort competition' they are allowed if they are covered by a Qualifying Agreement between operators which are certified by the LTA. In order to certify a qualifying agreement, the LTA must apply two tests:

- a. the agreement must be in the interests of passengers using local services in the area of the local authority/ies concerned; and
- b. it must not impose on the undertakings concerned restrictions that are not indispensable to the attainment of the bus improvement objectives (in this case compliance with the relevant route requirement).

<sup>42</sup> Paragraph 18(3)(a), Part II of Schedule 10 to the Transport Act 2000.

9.41 If the proposed agreement between the operators, in the opinion of the local authority. Meet these tests then they can be covered by a qualifying agreement.