



**DECISIONS OF THE TRAFFIC COMMISSIONER  
FOR WALES**

**Decisions made at a public inquiry for operator licensing issues and a  
conjoined hearing held in public for permit issues.**

**DANSA Ltd – PG1085594**

**&**

**Transport Manager – Susan Evans**

**Decisions made in respect of applications to renew permits by DANSA Ltd**

- 1. The eighteen permits issued under section 19 of the Transport Act 1985 are revoked.**
- 2. The fourteen permits issued under section 22 of the Transport Act 1985 are revoked.**
- 3. The revocation of the section 22 and section 19 permits takes place at 23:59 hours on 31<sup>st</sup> December 2019, however I will extend this date if there is an application for a variation of the PSV operator's licence, with suitable applications for additional authorisation. Additionally, if I am absent or unavailable for any reason, I am content for the Senior Traffic Commissioner to amend revocation dates.**

**Decisions made in respect of the PSV operator's licence held by DANSA Ltd,  
PG1085594**

- 4. An adverse finding is made under section 17 (3) (e) of the Public Passenger Vehicles Act 1981, as amended. There has been a material change in that the operator is the holder of a PSV operator licence – and additionally- is also the holder of section 19 and 22 permits, which is not allowed.**

**5. The good repute of the operator is tarnished in view of it not complying with the law, however for reason set out below, it is not at this stage lost.**

**6. The professional competence of the operator is tarnished for the reason set out below, albeit it is at this stage not lost.**

**7. The operator continues to meet the required level of financial standing for a PSV operator's licence for its current authorisation.**

**8. A formal warning is given in respect of the operator's licence. For the avoidance of doubt, if the use of permits continues then there should be an expectation that there will be an additional hearing with view to a potential finding of loss of repute and revocation of the operator's licence.**

**Decisions made in respect of Transport Manager, Susan Evans**

**9. At this stage I do not make formal finding as to loss of repute as a transport manager, albeit this is only for reasons as set out below. Susan Evans is warned that compliance with the law takes precedence against expedience and public policy. Additionally, Susan Evans is advised to attend a specialist two day transport manager refresher course.**

**Background**

10. DANSA Ltd is a company limited by guarantee, albeit it is not a registered charity. On 19 January 2009 it was granted a PSV operator's licence with authority for four vehicles, there are no services registered on the PSV operator's licence. The nominated transport manager is Susan Evans.

11. DANSA Ltd also holds eighteen permits issued under section 19 of the Transport Act 1985, eight were due to expire on 20 November 2018, the remaining ten are due to expire on 5 May 2020.

12. DANSA Ltd also holds fourteen permits issued under section 22 of the Transport Act 1985, six were due to expire on 9 January 2019 with eight expiring on 30 July 2020. There are 28 registered services using section 22 permits.

13. Renewal applications for permits raised issues as to whether the organisation met the criteria for operating under section 19 and section 22 permits. Further concerns were raised as a result of fixed penalties being issued by the police.

14. Guidance issued by DfT indicates that an entity cannot hold both permits issued under sections 19 and 22 of the Transport Act 1985 and at the same time hold a PSV operator's licence issued by a traffic commissioner. This has been accepted by the operator. Ongoing correspondence with DANSA Ltd led to the convening of the hearing to consider the permits and a conjoined public inquiry to consider the operator's licence.

15. The trigger for the hearing was the issue of fixed penalties by a police officer in respect of a number of issues including operating without an operator's licence.

### **Format of hearing**

16. Although the Transport Act 1985 provides for a traffic commissioner to convene a hearing in respect of section 19 and 22 permits, there is no specific provision as to how that hearing should be conducted. In the interests of transparency these proceedings were publicised in Ns & Ps in the same way that PSV operator licence hearings are published, this enabled both the press and the general public to attend as happened in this case. No objection or query was raised to my convening the hearing in the same way as that for a public inquiry. Indeed in this case the hearing also included a public inquiry in respect of the operator's licence.

### **Attendance at the hearing held on 15 April 2019– aside from the press and members of the public**

17. In attendance were:

- Alun Thomas, director of DANSA Ltd
- Dean Cawsey, director of DANSA Ltd
- Susan Evans, who is nominated transport manager for the operator's licence, effectively she is also the chief officer for DANSA Ltd
- Leanne Jones, Business Development Manager for DANSA Ltd
- Rhys Davies, Counsel representing DANSA Ltd
- Darren Davies, solicitor of Hutchinson Thomas solicitors, instructing Counsel
- Gemma Lelliott, Community Transport Association (CTA)
- Christine Boston, director, CTA Wales

18. At the conclusion of the hearing on 15 April 2019 I was asked if I would allow further evidence and representations to be provided, this I agreed. I also indicated that if specifically sought, I would allow further oral evidence, in other words if necessary, I would allow an adjournment. Whilst additional evidence and representations were provided, there was no request for another hearing.

### **Delay**

19. There is an expectation that traffic commissioners will publish a written decision within 28 days of the hearing or on final receipt of information, including transcripts. The paragraph above refers to a request on behalf of DANSA Ltd that it have time to provide additional evidence, this I agreed. Importantly I acceded to a later request for yet further time to collate and send additional evidence and representations.

### **Applicable law in respect of permits issued under sections 19 and 22 of the Transport Act 1985 (referred to as section 19 or section 22 permits)**

20. I am only one of many bodies that can issue permits. All 22 local authorities in Wales can issue them, as can well over 60 organisations designated with such authority by the DfT. One of these designated bodies is the Community Transport Association (CTA) which issued the section 19 permits in this case.

21. Section 20(5) of the Transport Act 1985 sets out that (subject to a subsection that does not apply in this case):

... *a permit may be varied or revoked -*

*(a) by the traffic commissioner or body who granted it; and*

*(b) in the case of a permit granted by a body designated under section 19(7) of this Act, after consultation with that body, by the traffic commissioner for any traffic area in which any vehicle has been used under the permit.*

22. At the commencement of the hearing I set out my general understanding in relation to the applicable law in relation to both section 19 and 22 permits, this was agreed by Counsel representing DANSA Ltd.

23. TCs make up but a fraction of the total number of issuing bodies and cannot make general policy in respect of the decision-making process. TCs have put in place administrative processes in an endeavour to ensure that permit cases referred to TCs are dealt with consistently and in as efficient a manner as possible, pending action following the recent consultation (now closed) on legal changes and pending resolution of any legal challenge. As creatures of statute, traffic commissioners (TCs) can only apply the law as made, subject to any interpretation by the higher courts. I am aware that there is ongoing litigation, which might result in the High Court providing a binding statement on the law

24. It is important to apply the appropriate tests in the correct order. The first test applied to an application for a section 19 or section 22 permit – or review thereof - must be whether any exemption under EC Regulation 1071/2009 applies. This is directly applicable to European legislation and accordingly domestic legislation must be read in a way which gives effect to it. Accordingly, EC Regulation 1071/2009 takes precedence over domestic provisions. In this particular case, the EU regulation very much post-dates the domestic legislation.

25. Only once an applicant has satisfied an issuing body that they meet an exemption contained within Regulation 1071/2009 do they fall to be considered under the criteria for section 19 of the Transport Act 1985, which allows them to operate vehicles under a permit and are therefore exempt from PSV operator licensing by virtue of section 18 of the Transport Act 1985. In other words, although it may appear that an entity meets the criteria for a section 19 or 22 permit, this cannot be the case unless it **first** meets the requirements of EC Regulation 1071/2009.

26. The criteria for section 19 and 22 permits are different, most notable are the requirements that the vehicle is not being used for the carriage of members of the general public nor with a view to profit nor incidentally to an activity which is itself carried on with a view to profit. “Without a view to profit” is a significantly different test to that for commercial. An applicant can provide evidence to the issuing body of the costing involved in the provision of the service, including salary costs, and an issuing body can make a determination on whether the intention is to make a profit. It is important to be clear that it is the intention that is important not the actual outcome, i.e. the failure to make a profit is not evidence that the intention to do so was not there. It may be permissible to make a surplus provided that this is reinvested in the operation or other charitable work. Each case must turn on the evidence provided.

27. At the time of the hearing the UK had not legislated to give effect to any derogation relating to a minor impact on the transport market because of the short distances involved. In any event any changes will not come into force until October this year. It remains the position that an applicant who seeks to rely on one of the exemptions to Regulation EC 1071/2009 has the legal burden to satisfy an issuing body that it falls within scope of the exemption, namely:

- road passenger transport services exclusively for non-commercial purposes, or
- which have a main occupation other than that of road passenger transport operator.

28. There is no definition of non-commercial in the legislation although I am aware that the term is subject to ongoing judicial review proceedings, TCs are not and should not be parties to the litigation.

29. It was made clear on behalf of DANSA Ltd that it relied on the exemption in EC 1071/2009 referring to road transport services exclusively for non-commercial purposes.

30. It is also clear that where there is an existing permit, the issuing body (or traffic commissioner) which is considering removal of the permit has the legal onus to satisfy itself that there is sufficient evidence that the permit holder no longer qualifies. In other words the onus shifts where there are existing permits.

31. In the absence of a clear definition an issuer of a permit has to consider the arguments and evidence that services were operated non-commercially. Evidence of tendering processes and lack of general interest from PSV licensed operators may assist in the deliberations. I remind myself of the above paragraph in relation to the issue of onus of proof. There are arguments that permit operators have a lower cost base than licensed PSV operators; just because a price quoted by a PSV operator was deemed excessive does not on its own account provide conclusive proof that the service is being operated non-commercially.

32. Although it was not explicitly said, it was implied that DANSA Ltd wanted an approval to continue using section 19 and section 22 permits, furthermore if it did have this approval it would surrender the PSV operator's licence in recognition that the two licensing regimes are mutually exclusive.

### **Evidence**

33. I refer below to evidence given at the hearing. I have referred to selected parts of that evidence in this decision although it is fully recorded in the transcript. I have had the benefit of hearing from witnesses in person. In making findings of fact I have considered oral and written representations.

34. For the avoidance of doubt in this specific case I have no problem in accepting the accuracy of all the evidence given to me. Indeed, I was impressed at the honesty, transparency and openness of all those before me.

35. One of the issues raised in the public inquiry brief related to financial standing for the operator's licence. Evidence was provided of this in advance of the hearing, accordingly I indicated that there was no need to address me on this issue

36. **PC Philip David** emailed my office in June 2018 following his issuing fixed penalties to a driver who was driving on behalf of DANSA Ltd. he pointed out that the organisation both had an operator's licence with authority for four vehicles, and additionally, a number of section 19 permits. It was suggested by the police officer in his email that he had been told that DANSA Ltd had one contract after a reverse auction process, where it had bid against five other contractors. On 8 March 2018 the police saw two minibuses displaying section 19 permits which were apparently carrying out the contract. The drivers told the police officer that they were paid £8.50 per hour and were currently running a route using the section 19 permit.

37. Later PC David attended the offices of DANSA Ltd and issued two fixed penalties of £300 each for using a vehicle without an operator's licence. He referred to numerous letters and emails involving South Welsh Police, Dean Cawsey of DANSA Ltd, Christina Rees MP for Neath and Christine Bolton, director of the CTA in Wales. It was established that DANSA Ltd felt that it had taken advice from DfT and it was on this basis that they were running the contract. PC David explained that the South Wales Police had obtained advice from counsel, which confirmed that the view of the South Wales Police was correct in law.

38. The bundle of paperwork received on behalf of DANSA Ltd included correspondence from various sources following the issue of the fixed penalties, above. A civil servant within the Welsh Government wrote to me, it is clear that he perceived the issue of the fixed penalties to be a mistake and he thought that DANSA Ltd was lawfully utilising its permits. My brief for the hearing also included correspondence from numerous individuals and organisations, referring to the issue of fixed penalties and pointing to the essential and invaluable work undertaken by DANSA Ltd within the local community, I do not list all of the local authorities, AMs in the Welsh Assembly, MPs and others, no disrespect is intended. It is abundantly clear from the paperwork produced that DANSA Ltd is regarded very highly.

39. It is clear that many felt that the fixed penalties were incorrectly issued, however they were not disputed formally, this would have resulted in a court hearing which could have tested the legality or otherwise of the issue of the fixed penalties. Lack of payment of the fixed penalties resulted in commencement of enforcement action, eventually a minister within the Ministry of Justice wrote to a local MP to confirm that fine enforcement had been withdrawn, effectively the fines were written off. There were references to the importance of fines being only enforced by the courts when there was merit to do so, with an indication that this did not apply in this case.

#### **Evidence from Dean Cawsey**

40. During oral evidence before me, Dean Cawsey indicated that he believed that the police officer had referred to five other organisations tendering as he had contacted a local authority officer. Dean Cawsey suggested to me that some operators tender for contracts as a matter of routine because an individual might have a job description requiring them to do this, without any expectation of succeeding. Whilst he had no evidence to support this, he commented that the contracts in this case were very short distances, some under five miles in remote areas where none of the other contractors were based.

41. Dean Cawsey explained that it was currently vice-chair of DANSA Ltd and that since joining the organisation he had also become an elected member of Neath Port Talbot Council. He was also able to confirm salaries and wages paid to various employees, this included:

- Susan Evans, transport manager and chief officer was paid xxxxxxxx a year
- the deputy coordinator was paid xxxxxxxx a year
- Leanne Jones, business development manager was paid xxxxxx a year
- an administrative officer was paid xxxxxx a year
- drivers were now (at date of hearing) paid xxxxxx per hour
- escorts were paid at the minimum wage

42. It was later clarified that the salary for the business development manager was a full-time rate, however she worked 20 hours a week and so she received a pro rata sum.

43. Dean Cawsey also confirmed that Susan Evans was effectively the chief officer and controlled DANSA Ltd's café as well as transport. He went on to explain that many staff had worked for the organisation in excess of a decade, furthermore Dean Cawsey, on commenting on the wages paid to drivers and others referred to a "*broad commitment to the organisation being a good living wage payer.*" Salaries were reviewed annually.

44. Later, on being questioned by his counsel on what DANSA Ltd took into account when reviewing salaries on an annual basis, Dean Cawsey referred to the minimum wage, commitment and performance; he said "*Just to be clear, we don't seek to pay a driver or an office member of staff huge amounts of money for the sake of it or because we want them to come and work for us, we want to be competitive, we want to pay more. It's an acknowledgement of our commitment to the regeneration of our communities and going that extra mile.*" He referred to the organisation being one where "*profit is not the bottom line.*"

45. It was explained by Dean Cawsey that Susan Evans's salary increased as she took on additional responsibilities including line managing other staff.

46. Neither Dean Cawsey nor Leanne Jones were councillors when contracts were issued although both were subsequently elected, this was after taking up their current positions in DANSA Ltd.

47. I referred to the low profit element within the PSV industry and the fact that this had been an issue in Wales which resulted in my organising seminars with the Welsh Government and Business Wales to assist the small family businesses in Wales. Finances produced by DANSA Ltd to demonstrate financial standing showed a very healthy financial position. I went on to ask about remuneration of directors and expenses. Dean Cawsey confirmed that none of the directors were paid, furthermore they all chose not to claim any expenses.

#### **Evidence from Leanne Jones**

48. Leanne Jones, Business Development Manager confirmed that she joined DANSA Ltd in August 2018, having previously worked at the local MP's office in Neath. She also confirmed that she was currently a councillor. Leanne Jones agreed that

having a section 19 permit was not consistent with being the holder of a PSV operator's licence.

### **Evidence from Susan Evans**

49. Susan Evans gave detailed oral evidence and answered questions. Whilst she had qualified as a transport manager in 2010, she had not attended a specialist transport manager refresher course, something I advised would be helpful. It was also confirmed that although a PSV operator's licence was obtained in 2010 it had not been utilised.

50. Currently there were approximately 40 employees in total. A number of drivers who were employed did not hold PCV driving entitlements and drove vehicles utilising section 22 permits, however they were paid at the same rate as those who held PCV entitlements.

51. Whilst initially the figures were not clear, Susan Evans confirmed that 12 out of the 23 drivers had PCV entitlements. Only one of the drivers was under 55 years of age.

52. If DANSA Ltd had to utilise its PSV operator's licence instead of its section 19 and section 22 permits, the organisation would probably lose some of the drivers who did not currently hold PCV entitlements. I commented on this issue, pointing out that at least one other local authority in the same region insisted on both PCV entitlements and CPD qualifications as a form of quality assurance and safeguarding.

53. I mentioned my publicised seminars for the PSV industry run with considerable assistance from both the Welsh Government and Business Wales and referred to specialist training for PSV operators to assist their professionalism in tendering for contracts. As a result of references by DANSA Ltd to potential difficulties in recruiting drivers with PCV entitlements, I also pointed to initiatives involving the Department for Work and Pensions (DWP) which included free training for unemployed people in obtaining a PCV licence; the quid pro quo for this financial assistance was a commitment to someone within the operator's organisation, preferably the transport manager, attending a diversity course. I went on to refer to the low level of female PCV drivers within the industry, the initiative with DWP was an opportunity to address this.

54. On being questioned Susan Evans confirmed that drivers that did not have PCV entitlements were being put through the formal driver CPC qualification as a matter of good practice, this was an ongoing programme. It was explained that as a result of the uncertainty in the community transport sector that it was now felt prudent to do so.

55. At this I asked why, if drivers were being put through the driver CPC qualification, why not take the next logical step and put them through the PCV driving licence qualification, was it an issue of cost? Susan Evans responded acknowledging the cost involved. Referring to the (now closed) consultation exercise being conducted by DfT *"if... At the end of the consultation we didn't need to go down that route because going back to how our operation operates at the moment, there is a very very small section of work that we do that you mentioned under the tendering process. All the section 22 work we carry out is what commercial operators have handed back and nobody wants, and there are pockets within our geographical area where there are no services and the local authorities come to us to plug this gap."*



56. On being asked about tendering for contracts it was explained by Susan Evans that the business coordinator undertook this function. The last exercise was undertaken in 2016 or 2017, the next one being due in 2020/21.

57. It was confirmed by Susan Evans that local authorities provided grant support, albeit not for the specific purchase of vehicles. It was one of the functions of the Business Development Manager to seek funding streams for replacement vehicles. The last new vehicle obtained was in 2018 as a result of European funding. It was also confirmed that if anyone contacted the organisation to ask for specific details about accounts and funding that it was available and in the public domain.

### **Representations at the hearing by Counsel**

58. Counsel confirmed that he did not disagree with my interpretation of the law as set out at the commencement of the hearing and also set out in writing above. He confirmed that DANSA Ltd did not seek to rely on the main occupation issue, instead it sought to rely on the organisation being “*exclusively non-commercial*”.

59. It was agreed that as I was adjudicating as a first-tier Tribunal, I was obliged to apply clear law, and had no discretion. We discussed the common law developed by the higher courts, furthermore as a mere traffic commissioner I had no such discretion.

### **Further written representations and evidence**

60. A substantial bundle of additional submissions, representations and written evidence was provided after the hearing. I granted an extension of time to that originally agreed at the hearing to provide the additional evidence as I did not want to place any impediment on DANSA Ltd in this regard. There was no request for the hearing to be reconvened with a view to additional oral evidence being heard with questioning of new witnesses.

61. The history of DANSA Ltd was set out together with details relating to finances. It was explained that DANSA Ltd run a small community-based cafe which was opened in 2014 with the assistance of around £70,000 in grants, it endeavoured to provide a community-based service transporting people from their homes to the cafe.

62. Further details were also provided in relation to the salaries applicable as follows:

1. Transport and Operations Manager - xxxxxxxx (2019-2020);
2. Assistant Coordinator - xxxxxxxxxxxx (2019-2020);
3. Business Development Manager - xxxxxxxx (2019-2020 pro rata);
4. Finance Officer - xxxxxxxxxxxx (2019-2020 pro rata);
5. Admin Officer - xxxxxxxxxxxx (2019-2020);
6. Drivers - xxxxxxxxxxxx (2019-2020, on basis of 30 hours per week);
7. Passenger Assistants xxxxxxxxxxxx (2019-2020, on basis of 12.5 hours per week);

63. A plethora of representations from DANSA Ltd describe the excellent services that it undoubtedly provides. There are also references to it being a “not for profit” organisation whereby funding is reinvested into the delivery of services. The service provided is described as often being niche and small in numbers. There is also a

reference to the difficulty in a working definition of “*substantially less than cost*”. I do not repeat all the related comments as Counsel agreed at the hearing that the organisation relied on the exemption relating to “*exclusively non-commercial*” and of course that is not the same as “*not-for-profit*”.

64. Evidence provided demonstrated that the criteria for both section 19 and section 22 permits were met, however in describing evidence I concentrate on the issue relating to the requirement to be “*exclusively non-commercial*” in view of the fact that this is an obstacle that has to be addressed **prior** to considering whether section 19 and or section 22 are met.

65. Detailed job descriptions were provided, including that for the Transport/Operations coordinator who works a 36.5 hour week. This job description is clearly intended to meet the formal transport manager role, although I comment that many of the individual duties listed in standard transport manager contracts are missing, perhaps this is not surprising as the operator’s licence is not utilised. It is clear that the ultimate responsibility for transport compliance lies with this post holder as she has line management responsibility for all staff and for the functions of DANSA Ltd. The job description is what one might expect from an operational chief officer post and I do not seek to be critical.

66. The Business Development Manager is the second-highest paid individual (pro rata) working a 21 hour week. The list of principal duties includes a number of functions that I would typically expect from a Business Development Manager including (I have abbreviated some of the responsibilities below):

- complete and submit tender documentation to win contracts
- develop and administer the marketing strategy for DANSA services, ensuring brand recognition
- source and secure both capital and revenue funding...

67. The Finance Officer has a job description that aligns with what I would expect and I make no comment on it. The same applies to the job description for the Administration Officer; for the various drivers; and additionally for passenger assistants.

68. A financial breakdown was also provided for a number of activities conducted by DANSA Ltd, including:

- contract costs for Waunceirch Primary School
- costings for Glandwr Day Service, Route 1
- costing for 578 Crynant/Ysgol Gynradd Gymraeg Blaendulais
- costing for ADS Route 1
- costing for YMYCPED10 – Seven Sisters/Cilfrew/Ysgol Maes Y Coed
- costing for 579 Banwen – Ysgol Gynradd Gymraeg Blaendulais

69. In respect of each of the bullet points listed above a full breakdown is included, the management fee varies between 5% and 10% in each case. I would expect a management fee as the figures did not provide for the central management costs, typically they detailed vehicle, driver and escort costs.

70. Information in relation to funding and local authority contracts were provided in a letter from Catherine Swain, Integrated Transport Unit Manager for Swansea Council, together with a witness statement from her equivalent in Neath Port Talbot Council, Peter Jackson.

71. **In respect of Swansea Council**, a description was made of a reduction in the Council's budget for funding public transport in 2013. DANSA Ltd provide a service using a minibus from the Council's fleet during its downtime, with DANSA Ltd paid for driver costs and their management fee. Monies collected came back to the Council to offset some of the costs. Similar arrangements are made for a variety of services using DANSA Ltd.

72. A description was also given of contracts for social care services which were tendered in April 2017 through an open tendering system. The following features were described:

- there were eight bidders – one was disqualified (no tender submitted)
- 10 lots were offered for tender (two possible combinations)
- The contract length was 36 months with an option to extend for up to 24 months
- Award criteria: price/quality split – 70% price and 30% quality
- DANSA Ltd tendered for two lots and won two lots as set out below.

73. Lot 1: - 4 bidders

Placed	Scored	Price per day	Quality
1 <sup>st</sup>	100%	£110.50	28
2 <sup>nd</sup>	88%	+ £14.50	20
3 <sup>rd</sup>	81%	+ £24.50	28
4 <sup>th</sup>	80%	+ £27.50	29

74. Lot 9 – 5 bidders (note the local authority's written evidence was that there were two joint second scores, despite their apparently having different quality marks).

Placed	Scored	Price per day	Quality
1 <sup>st</sup>	100%	£112.85	28
2 <sup>nd</sup>	90%	+ £12.15	28
2 <sup>nd</sup>	90%	+ £12.15	20
4 <sup>th</sup>	83%	+ £22.15	28
5 <sup>th</sup>	78%	+ £31.15	29

75. **The statement from Neath Port Talbot Council** described how DANSA Ltd currently operated four home to school transport routes which were awarded following a tendering process in 2017. That process involved operators registering on the sell2wales website and applying for routes via the e-tenderWales website. Operators apply on-line. All operators are assessed on their pre-qualification questions in order to determine their suitability to enter the tendering process.

76. DANSA Ltd were awarded four home to school routes in the 2017 tendering process. The letter from Peter Jackson goes on to describe how mainstream routes were awarded following a reverse auction process where bidders were ranked on the bid value submitted but could not see the other participants' bids. The Council only

publicly identify the operator to whom the contract is awarded after the process has finished and at the same time all operators who took part are informed of where they were positioned.

77. Details of each of the four routes awarded to DANSA Ltd were given as follows:
1. Route awarded following a reverse auction. There were six other operators that expressed an interest in this route. DANSA Ltd's initial bid was £50.50, the other operators initial bids ranged from £65 to £205. Following the auction process DANSA Ltd were offered the route for £44.80. At the end of the process other operators ranged from £45 to £150.
  2. Route awarded following a reverse auction where six other operators expressed an interest in the route. DANSA Ltd's initial bid was £54.20, the other operators initial bids ranged from £111 to £205. Following the auction process DANSA Ltd were offered the route for £54.20. The other operators reduced their bids but did not reach the price that DANSA Ltd submitted. Despite the reference above to the route following a reverse auction, the letter from Peter Jackson advised that DANSA Ltd did not take part in the reverse auction process. At the end of the process other operators ranged from £80 to £195.
  3. Route awarded following a closed bidding process where the operator puts in one bid and the Council awards to the lowest bid submitted. There were six other operators that expressed an interest in this route. DANSA Ltd were ranked in second place on price. The cheapest quotation was £70, DANSA Ltd quoted £80.30 and the most expensive was £140. The operator with the £70 quotation was offered the route, however that offer was declined. The route was then offered to DANSA Ltd (as second placed operator) who accepted the route.
  4. Route awarded following a closed bidding process where the operator puts in one bid with the council awarding to the lowest bid submitted. There were six other operators that expressed an interest in the route. DANSA Ltd were ranked in second place on price. The cheapest quotation was £64, DANSA Ltd quoted £68.50 and the most expensive was £90. The operator with the £64 quotation was offered the route, however it was declined. The route was therefore offered to DANSA Ltd (as second placed operator) who accepted the route.

78. It was claimed by the Council that DANSA Ltd entered the tendering process as a section 19 Transport Act 1985 permit holder, suggesting that it was adhering to DfT guidance which suggested that there was no restriction on section 19 permit holders from bidding for home to school contracts as long as there was no view to profit.

79. DANSA Ltd only operate 1.3% of Neath Port Talbot's home to school contracts and on value receive only 0.82% on home to school contracts.

80. Considerable evidence was provided to me of the significant benefits to the community provided by DANSA Ltd.

### **Decisions and reasoning**

81. I do not articulate here any detail on the issue of whether DANSA Ltd meets the wording set out in sections 19 and 22 of the Transport Act 1985, it is evident that it does. However that was not the point of the hearing which related to whether one of the essential pre-conditions set out in EC Regulation 1071/2009 applied. On behalf

of DANSA Ltd it was accepted that it relied on the exemption relating to “*road passenger transport services **exclusively** for non-commercial purposes.*” Furthermore it was accepted that one had to meet the exemption relating to being “*exclusively for non-commercial purposes*” **prior** to consideration of sections 19 and 22 of the Transport Act 1985.

82. For the avoidance of doubt I set out the above paragraph to make it clear that if DANSA Ltd meets the test in being “*road passenger transport services **exclusively** for non-commercial purposes*” then I consider that there would be no difficulty in respect of sections 19 and 22 of the Transport Act 1985.

83. In other words the issue for me to decide is whether DANSA Ltd is an entity that is engaged in “*road passenger transport services **exclusively** for non-commercial purposes*”. The word that causes particular difficulty is “**exclusively**”.

84. As referred above, I am aware that proceedings in the High Court may consider this very issue. Meanwhile as a creature of statute I must apply the law.

85. In the absence of case law I seek to determine whether DANSA Ltd is “**exclusively non-commercial**” by considering a range of factors:

- The accounts - has there been any attempt or suggestion that any issue relating to monies should not be in the public domain? In this case there has been no hint of withholding any financial information from me
- Profit - Are the profits reinvested or provided for the benefit of others including shareholders? In this case as a limited company by guarantee the profits are reinvested.
- Are the directors paid? The answer is no, and they don't even claim expenses.
- Do senior staff have performance-based bonuses or incentives? No, they don't. On this point, I appreciate that performance-based pay is common in some non-commercial organisations, including the civil service, however in this context I am looking at a range of indicators.
- Are the salaries of staff competitive? Here the Board have sought to pay staff at least a living wage, that is more than many operators. The staff of the chief officer is in my judgement well paid for this sized operator, reflecting on what others can be paid. As TC for Wales I regularly see details of pay scales including those for management.
- Are drivers paid? In this case they are paid above the minimum wage. My experience as TC for Wales gives me specialist knowledge of wages and salaries in this marketplace. As a local TC with very detailed knowledge of the market rates, gleaned from industry events as well as evidence from public inquiries, I confirm that the drivers are well paid.
- Are there posts that suggest the organisation has a commercial role? The answer is affirmative, the job title of the Business Development Manager and some of her functions point to a commercial element.
- How are services procured? Does the operator bid for contracts in the same way as ordinary commercial contractors? The answer here is affirmative, DANSA Ltd has entered genuine competitions, albeit it often wins. Contracts are allocated using the same IT portal as that for standard national PSV licence holders which are unequivocally commercial enterprise. The open tendering

system would suggest a commercial enterprise and an inability to fall within the exemption set out in EC 1071/2009.

86. Each case involving a section 19 or section 22 permit holder must in my view be considered on its merits. In this case the overwhelming majority of the work is not commercial, indeed the directors and staff impressed me with their social responsibility and desire to help those who are vulnerable. However if I ask myself if this organisation is “**exclusively non-commercial**” I reluctantly have to conclude that it is not. I use the word “reluctantly” as I recognise the very good people and the motivation for the work undertaken.

87. For the avoidance of doubt in this specific case it is the tendering for and procurement of contracts against PSV licence holders that tips the balance so that I cannot conclude that DANSA Ltd is exclusively non- commercial.

88. I suspect that DANSA Ltd has appreciated this point and that is why it took the step of applying for a standard national licence, something that it has accepted is inconsistent with having section 19 and 22 permits.

89. In fairness to DANSA Ltd it has relied on advice and guidance given by both Welsh Government officials and DfT. Recent guidance sets out to ensure that it does not comment on what amounts to being “exclusively non-commercial”. I am required to make a decision on what I understand to be the law. I am comforted in that Counsel for DANSA Ltd accepted the view of TCs as to what is the correct interpretation of the law.

90. Correspondence between the central licensing office and DANSA Ltd has made it clear that it is inconsistent to have both a PSV licence and also section 19 & 22 permits. This was accepted at the hearing before me. It is clear from what was said to me and from the correspondence in my brief that there is a hope that there will be a change in the law to allow this organisation to continue as it has done.

91. In another case involving permit holders and tendering for contracts, I previously indicated that the Welsh Government (and local authorities in Wales) would assist the position if it ensured that there was a different procurement process for section 19 and section 22 permit holders. If it is claimed that there is no genuine competition, then a separate procurement process must surely be attainable.

92. Here the evidence from the two local authorities corroborate the evidence given at the hearing that it cannot be said that DANSA Ltd is exclusively non-commercial.

93. I do not seek to prevent the many good works undertaken by DANSA Ltd and that is one of the reasons why I have dated the revocation relatively far ahead. I have also recognised that DfT has previously indicated to local authorities that existing arrangements could continue. Whilst I must apply the law, even where it conflicts with policy, I seek to give time to put matters right. I have even made provision for the Senior Traffic Commissioner to further extend if it is necessary and appropriate. That does not mean that DANSA Ltd can ignore my decision, it will very likely need to make application for an increase in authorisation of its PSV licence. To ensure that this given every assistance I delegate to any senior team leader member of staff authority

to grant an increase, subject of course to paperwork, finances etc being in order. I do not see any issue with this coming about.

94. I note that some of the drivers may not have the correct entitlements, I reflect that they are paid better than many other drivers who do have all the correct entitlements. I take some comfort from the fact that I was told at the hearing that this is being addressed. Some neighbouring authorities require full PCV driving licences and CPD as an essential criterion for the grant of any public monies. In this case this will necessarily come about as a result of the need to operate utilising a PSV licence.

### **Decisions**

95. I make the decisions, as set out in paragraphs 1-9 above.

### **Other**

96. My decisions in this case reflect both my understanding of the law – and importantly – my findings of fact. I emphasise that each case involving assessments as to whether an entity is “***exclusively non-commercial***” must be determined on its own merits. No two cases are the same.

A handwritten signature in black ink, appearing to read 'Nick Jones', with a horizontal line underneath the name.

**Nick Jones**  
**Traffic Commissioner for Wales**  
**Comisiynydd Traffig dros Ardal Drafnidiaeth Cymru**

**20 August 2019**