

Committee report



Community Transport: UK Government response to the consultation on the use of section 19 and section 22 permits for road passenger transport in Great Britain

Committee Operations

Date of meeting 26 April 2019

Date of report 1 April 2019

Report by Senior Director

1. Object of report

To update the Committee on the UK Government's response (attached at Appendix 1) to the UK Department for Transport's (DfT) "Consultation on the use of section 19 and section 22 permits for road passenger transport in Great Britain"¹, which relates to bus services, and in particular, the provision of Community Transport (CT).

2. Background

- 2.1 Organisations that provide transport on a 'not-for-profit' basis can apply for permits under Section 19 or Section 22 of the Transport Act 1985. These permits allow the holder to operate transport services for hire or reward without the need for a full public service vehicle operator's (PSV 'O') licence. The permit system is a reserved matter for the UK Government.
- 2.2 Members will recall that SPT previously responded to the DfT Consultation as approved by the Operations Committee on 4 May 2018².
- 2.3 The consultation followed concern that some CT operators using section 19 or 22 permits were operating services or competing for contracts in direct competition with commercial bus operators holding PSV licences. The DfT has previously advised that this is not permitted under European law, which only exempts operators from holding PSV licences in very limited circumstances.
- 2.4 The West of Scotland Community Transport Network, facilitated by SPT, recently met on 29 March and was attended by 13 Community Transport operators from across Strathclyde. As part of the agenda the DfT response to the consultation on the use of section 19 and 22 permits was discussed by attendees.

3. Outline of proposals

- 3.1 The UK Government's response to the consultation summarises the key issues raised and the Government's position on possible exemptions. The response recognises the

¹ The consultation paper is available at:

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/680319/section-19-section-22-permits-consultation.pdf

² <http://www.spt.co.uk/documents/latest/Agenda%20item%207.pdf>

unique position of community transport and aims to balance the need to continue support and promote the sector while not undermining the position of commercial bus operators. The UK Government proposes to do this in a number of ways including:

- By updating the guidance³ on section 19 and section 22 licences

The aim here is to provide greater clarity for the community transport sector and wider transport industry. In particular, the new guidance states that an operator's engagement in road passenger transport must be ancillary or complementary to another activity which must demonstrably be their main occupation and details the types of evidence that can be submitted to support a claim.
- By introducing a 'short distance' exemption for community transport operators

The legislation would automatically recognise as a 'short distance' either:

 - > Any service within a radius of 10 miles, with the radius being measured from a specified central point; or
 - > A distance of 10 miles measured in a straight line from the first point at which passengers are able to embark to the last point at which passengers are able to disembark.
 - > Operators in rural areas will be able to make the case that a 'short distance' is longer than the otherwise specified 10-mile distance.

This new, additional exemption aims to provide greater certainty for community transport operators who fit within scope to retain and expand services for their passengers. It also aims to allow for local circumstances to be considered when making decisions benefitting communities in rural areas where community transport is often the only transport option.

- By undertaking a review of section 19 and 22 permit system

The domestic permit system was designed to recognise the value of 'not-for-profit' organisations that provide services of social/charitable benefit where their profitmaking counterparts would not, often in relation to isolated or vulnerable people. The UK Government recognises that, since the legislation's introduction in 1985, the community transport sector has changed significantly, in part facilitated by past legislative changes and successive Government's policy. In some instances, this has unintentionally impacted on the viability of commercial profit making operators.

In light of this, the DfT intends to carry out a review of the current domestic permit regime later in 2019 to see if the legislation is still fit for purpose and provides the correct balance for the bus sector as a whole. The terms of reference will be drawn up in due course but are likely to include a review of permit issuing bodies and whether there should be limits on the size of operations.

As noted, the DfT also awaits the High Court's judgement on the 'non-commercial' exemption. Until that decision, the DfT considers that it would be premature for any local authority to end or withhold community transport contracts.

³ <https://www.gov.uk/government/publications/section-19-and-22-permits-not-for-profit-passenger-transport/section-19-and-22-permits-not-for-profit-passenger-transport>

3.2 In terms of feedback at the recent meeting of the west of Scotland Community Transport Network, chaired by SPT, concerns were expressed about how the DfT's proposals might work in practice. In particular, there is uncertainty in the sector around the interpretation of the proposed 'short distance' exemption. CT partners emphasised the unique nature of the sector in Scotland which reflects the very rural nature of its operations. There was no sense that bus operators in Scotland felt their commercial operations were being undermined by the community transport sector. Indeed, there was a strong view that there is considerable scope for the commercial and community sectors to work more closely to improve services for the travelling public. With this in mind, the CT sector is keen that any future review of permits should not introduce a 'one size fits all' approach but should instead aim for an approach that reflects local circumstances and provides a strong degree of flexibility.

Relatedly, Community Transport Glasgow confirmed they had been granted a PSV Operators' Licence for two vehicles (in addition to their permit operations) and that North Area Transport Association already hold a PSV Operators' Licence for two vehicles, in addition to their permit operations.

4. Conclusions

- 4.1 The implications of the DfT's proposed exemption to the permit system for the operation of Community Transport services are wide-ranging. SPT continues to be of the view, as expressed at the time of the consultation, that the UK Government's proposals could lead to negative consequences for CT operators, and more importantly, some of the most vulnerable groups in society.
- 4.2 SPT therefore welcomes the commitment by DfT to review the current guidance on permits and the advice to local authorities that it would be premature to withdraw current contracts until there is further clarity following the High Court's impending judgement on the 'non-commercial exemption'.
- 4.3 SPT remains concerned that these proposals could have significant negative impact on the west of Scotland transport network, with the knock-on effect of more requests for public sector organisations such as SPT to support bus services to fill gaps.
- 4.4 SPT officers will continue to closely monitor the situation and will advise the Committee of future outcomes in due course.

5. Committee action

The Committee is recommended to note this report.

6. Consequences

Policy consequences	<i>SPT views are in line with the RTS outcomes of access for all.</i>
Legal consequences	<i>None at present.</i>
Financial consequences	<i>None at present. Potential for increased costs in future.</i>
Personnel consequences	<i>None at present.</i>
Equalities consequences	<i>DfT proposals may have significant impact on equalities groups.</i>

Risk consequences

Risk that there will be more requests for SPT services and therefore more pressure on budgets to be closely monitored.

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Department
for Transport

Government response to the consultation on the use of section 19 and section 22 permits for road passenger transport in Great Britain

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Foreword

Transport is so much more than physical infrastructure. The Government has always recognised the vital contribution of community transport operators in connecting people to their communities, to employment, to local services and to each other. That's why we pay community transport operators over £4 million a year in Bus Service Operator Grant and have funded the purchase of over 400 new minibuses.

I understand the importance of resolving the issues on the use of section 19 and section 22 permits in Great Britain. Today, I am providing greater clarity to the community transport sector so that operators can continue to play a valuable role in improving the lives of the passengers that they serve. Most community transport operators provide vital social care services to those who are elderly, isolated or disabled.

We have listened closely to the views of a wide range of individuals and organisations across Great Britain. These include community transport operators, local authorities, commercial operators and their respective representative organisations, as well as passengers. The responses we have received highlight the delicate balance of interests that we aim to address.

The Government response and associated guidance I am publishing today set out a framework for decisions on a case-by-case basis about whether operators are exempt from the EU Regulation on operator licensing.

I am giving legal effect to a new short distance exemption; no existing UK legislation does this. Implementing this new, additional exemption will provide greater certainty for community transport operators who fit within it to retain and expand services valued by their passengers. It will also allow for local circumstances to be considered when making decisions; this will benefit communities in rural areas where community transport is often the only transport option.

The Department awaits the High Court's judgement on the non-commercial exemption. Until that decision, the Department continues to believe that it would be premature for any local authority to end or withhold community transport contracts.

If we want community transport to thrive over the coming decades, it is vital that we continue to improve and strengthen the sector. I have therefore asked the Department to carry out a review of the current domestic permit regime in 2019. I would like to ask community transport operators and local authorities to continue working with us to achieve the right balance for this vital sector. If we can build a bright future for community transport operators, we will also achieve a bright future for the communities they serve.



Nusrat Ghani MP

Parliamentary Under Secretary of State for Transport

Introduction

- 1.1 The Government recognises the importance of 'not-for-profit' community transport operators that provide services to their local communities enabling access to existing transport networks, jobs, education, shops and services. This is particularly the case for older, disabled and isolated members of the community for whom travelling on public transport is not always a viable option. Access to public and local transport, including community transport, plays a key role in tackling loneliness, and the Government is committed to creating a transport network which supports people's social connections and helps people to be connected to their community.
- 1.2 Set against this background the legality of the domestic permit regime under which most 'not-for-profit' community transport operators are permitted to run services has been challenged. This challenge has come from some commercial operators who have raised objections that organisations operating under the permit system are competing unfairly because they are not subject to the same regulatory requirements as commercial operators and so benefit from the lower costs of the 'not-for profit' system. The challenge has focused on whether domestic legislation is in line with EU Regulation 1071/2009 on operator licensing ("the Regulation").
- 1.3 When the Regulation was negotiated, the Government's view was that community transport operators would fall under the exemption for operators engaged in road passenger transport exclusively for 'non-commercial' purposes. This was on the basis that 'not-for-profit' equated to 'non-commercial'. However, it is this interpretation that has been contested. Following an investigation by the Driver and Vehicle Standards Agency, the Government recognised that its position was no longer sustainable and wrote to stakeholders explaining this and saying that it would consult on the issue.
- 1.4 The Government's "Consultation on the use of section 19 and section 22 permits for road passenger transport in Great Britain" closed on 4 May 2018. The consultation sought views on:
 - amending existing domestic legislation to provide greater legal certainty as to how it fits with the Regulation;
 - the introduction of an exemption for national transport operations with a minor impact on the market because of the short distances involved; and
 - draft guidance as to the interpretation of the exemptions from the Regulation to illustrate when the exemptions might apply.
- 1.5 Nearly 500 consultation responses were received, and over 550 people attended workshops run by the Department during the consultation period. The number of responses, their length and complexity were unusual for consultations of this nature and the consultation analysis was a more complex task than anticipated. The Department issued an interim summary of responses on 20 July 2018. A full analysis has now been completed and is available at:
<https://www.gov.uk/government/consultations/section-19-and-22-permits-how-to-apply-eu-regulation-10712009>.
- 1.6 This report provides background to the legislation, a high-level summary of stakeholder views and the Government's response to the consultation.

Background to the legislation

- 1.7 On 23 June 2016, the EU referendum took place and the people of the United Kingdom voted to leave the EU. The government respected the result and triggered Article 50 of the Treaty on the Functioning of the European Union on 29 March 2017 to begin the process of exit. Until exit negotiations are concluded, the UK remains a full member of the EU and all the rights and obligations of EU membership remain in force. During this period the Government will continue to negotiate, implement and apply EU legislation. The outcome of the negotiations will determine what arrangements apply in relations to EU legislation in future once the United Kingdom has left the EU.
- 1.8 EU Regulation 1071/2009 established common rules governing those seeking to pursue the occupation of road transport operator, and sets out the requirements that operators of road transport services must comply with unless they satisfy one of the exemptions from the Regulation.
- 1.9 The exemptions in the Regulation that 'not-for-profit' organisations might fall under are for undertakings (operators):
 - a. "...engaged in road passenger transport services exclusively for non-commercial purposes" (article 1(4)(b) - the "non-commercial exemption"); or
 - b. "...which have a main occupation other than that of road passenger transport operator" (article 1(4)(b) - the "main occupation exemption").
- 1.10 In addition, the Regulation also enables Member States to:

“...exempt from the application of all or some of the provisions in this Regulation those road transport operators engaged exclusively in national transport operations having only a minor impact on the transport market because of...the short distances involved.” (article 1(5) - the "short distance exemption")
- 1.11 The short distance exemption had not previously been given effect in Great Britain domestic legislation and the consultation sought views on implementing this.
- 1.12 In Great Britain, operators require a Public Service Vehicle (PSV) operator license to show compliance with the Regulation. The Transport Act 1985 enables permits to be issued under sections 19 and 22 of that Act to enable qualifying 'not-for-profit' organisations to run passenger transport services without a PSV operator licence. Permits should only be granted to organisations that fall within one of the exemptions from the Regulation. In effect, all permits issued since 2011 have been subject to the Regulation as it is directly applicable. However, the previous position was to work on the basis that all 'not-for-profit' organisations that engaged in road passenger transport activities must be engaging in those activities for purposes that do not include any commercial purpose. This meant that any organisation meeting the 'not-for-profit' requirements of the permit system was assumed to be exempt from the Regulation, instead of this being determined objectively on a case by case basis.

Government response

- 1.13 The following paragraphs set out the Government's response to the consultation. They summarise the key issues raised during the consultation and the Government's position on each of the exemptions. It is worth noting that often commercial operators or those supporting their position did not comment in great detail on the draft guidance, as they opposed the use of the exemptions. This means that many of the

comments reflect those of the community transport sector and those that support them. A more detailed view is provided in the summary of responses.

- 1.14 The Government has issued, alongside this response, guidance for community transport operators and permit holders on the interpretation of the main occupation and short distance exemptions from the Regulation. The guidance reflects the position set out in this response and will be kept up to date and revised if necessary as the new interpretations are used.
- 1.15 In December 2018, solicitors acting on behalf of the Bus and Coach Association applied to the High Court for permission to judicially review the Department's current position in respect of community transport. Specifically, they are challenging the Department's approach to the 'non-commercial' exemption. The Government will therefore not make any further statements about what the 'non-commercial' exemption means and so the guidance does not include any advice on this. The definitive view of what the non-commercial exemption means will be a matter for the High Court. While the Department awaits the Court's judgement, it would in general be premature for any local authority to end or withhold community transport contracts.

Non-commercial exemption

- 1.16 The responses to the consultation highlighted that there is no consensus amongst stakeholders on how the non-commercial exemption should be interpreted. Views were divided, between those who think the Regulation should apply to all operators to ensure a level playing field and those who believe that 'not-for-profit' does equate to 'non-commercial'. The draft guidance on the 'non-commercial' exemption was not generally supported. Those who commented on the detail raised concerns over the requirement for all services to be provided either free of charge or substantially less than cost, except in circumstances in which community transport operators are able to provide evidence that there is no competition in a market. The text preventing an operator from raising income through occasional private hire of vehicles was highlighted as being a major issue for many community transport operators. The interpretation of this exemption is not helped by the lack of relevant case law¹.
- 1.17 As set out above, while legal proceedings are being brought against the Department, the Government will not be making any further statements or providing any guidance on the 'non-commercial' exemption.

Main occupation exemption

- 1.18 The main issues raised on this exemption also reflected the opposing views of the community transport and commercial sectors. Commercial organisations wanted a level playing field and were worried about larger organisations which might have a significant, but not main, part of its occupation as road passenger transport operator. Community transport operators thought that main occupation should be determined by an organisation's constitutional documents or its wider social aims and objectives. Some also wanted the guidance to specifically say whether certain organisations such as schools or local authority in-house services would fall under the exemption.
- 1.19 The Government's position on this exemption remains largely unchanged to that set out at consultation. The new guidance states that an operator's engagement in road passenger transport must be ancillary or complementary to another activity which

¹ The Department does not agree with the view expressed by some respondents that the Lundberg case provides a definitive interpretation of the non-commercial exemption.

must demonstrably be their main occupation. As requested by respondents, the new guidance details the types of evidence that can be submitted to support a claim.

- 1.20 The draft text in the consultation guidance said that "an organisation's constitutional documents may be clear enough to justify a decision that road passenger transport is not their main occupation". Despite many respondents supporting this position, this is no longer the Government's view, based on further legal advice obtained by the Department. Whilst these documents can be a relevant consideration alongside other information about the time and resources spent by an organisation on non-road passenger transport activities, they are not on their own sufficient to determine an organisation's main occupation.
- 1.21 Many respondents thought that community transport operators should not be defined as road transport operators because of their wider aims and objectives and the way that their services are adapted to meet the specific needs of users. Most community transport operators provide services of social and charitable benefit. The main occupation exemption will therefore ensure that those organisations providing community transport services alongside their main social and charitable activity will be protected.
- 1.22 The new guidance sets out the factors that a permit issuer should take into account when considering if an applicant satisfies the exemption (e.g. statement of all sources of income and amounts received). Whilst respondents asked for specific examples to be given in the guidance, decisions need to be made objectively on the facts, and not based on any general statements that a specific type of organisation is exempt.

Short distance exemption

- 1.23 The consultation sought views on how this exemption might be implemented and how it would work in practice. The wording of the Regulation makes clear that only those operating exclusively in the UK can satisfy the exemption. No other Member State has given effect to this exemption and so there is no precedent to follow. The consultation made clear that there was no flexibility for the Government to introduce additional exemptions that better reflect the uniqueness of the community transport sector in the UK, which stands apart from other European Countries.
- 1.24 Views on implementing the exemption were mixed. Commercial bodies generally opposed its use on the basis that the same rules should apply regardless of the impact or distance of the service. In general community transport operators and local authorities supported its inclusion. Most raised concerns over how it would work in practice. Many asked for more clarity on what was meant by 'the transport market' and 'minor impact'. The point was strongly made that different distance thresholds were needed for rural and urban areas. Many did not understand the need to focus on distance given that community transport has a minor impact on the national market, with some arguing that each market should be considered on its own merits.
- 1.25 Based on consultation responses and in line with the Government's desire to see locally based community transport operators continue to provide services to their local community, the Government intends to implement the short distance exemption for the benefit of 'not-for-profit' organisations. If an operator meets the exemption it can apply for a permit under the Transport Act 1985.
- 1.26 In determining how to identify a 'minor impact' on the transport market, the Government recognises that many respondents suggested that most community transport operators were of the size and scale to only have a minor impact on the national or local transport markets. Suggestions were made on how the impact could

be measured such as a threshold based on a percentage share of contracts or passengers. The Government believes that the minor impact needs to be linked to the 'short distance' travelled and that, in this context, all services within a specified 'short distance' will be judged to have a minor impact on the market. However, the exemption will only be available to 'not-for-profit' operators. This means that the existence of a degree of competition in a local market with operators holding PSV operator licences will not preclude reliance on this exemption, provided that the impact on the wider market is small. The 'transport market' for this purpose is that for vehicles carrying more than 8 passengers (i.e. those in scope of the Regulation).

- 1.27 The responses highlighted that a single 'short distance' cannot be universally applied across Great Britain due to its diverse and wide-ranging population density. Respondents were asked to provide details of the proportion of their services that would fall within the exemption, if it were to apply to journeys within various radii from 5 to 20 miles. There was a wide variation in the proportion of respondent's services that came within the percentage ranges in the question. In light of this, instead of having a one size fits all 'short distance' prescribed in the legislation, the Government intends to adopt a more flexible approach.
- 1.28 The intention is that the legislation will automatically recognise a specified distance as a 'short distance'. The automatic 'short distance' would be satisfied if the routes travelled by the operator's bus services generally do not exceed the set short distance, save for occasional² special services (e.g. day trips). The definition of 'short distance', however, would be non-exhaustive. This means that those operating in less densely populated areas would be able to make the case to the permit issuer of extenuating circumstance that, in view of the nature of the area in which they operate, a 'short distance' is longer than the automatic distance set in the legislation.
- 1.29 In this context, in less densely populated areas, the 'short distance' requirement could continue to be met on the basis that journeys need to be longer than normal due to the increased distances between settlements. The decision on the appropriate length of a 'short distance' in such cases would fall to the permit issuer.
- 1.30 Respondents also suggested a number of approaches to measure the distance, in addition to those in the consultation where a radius or geographical area with a distance of 15 to 20 miles was being considered. Suggestions included routes measured in a straight line or total route mileage or distances measured from a specified central point rather than an operating centre.
- 1.31 The Government has decided on a revised approach in order to provide flexibility to operators. The legislation would automatically recognise as a 'short distance' either:
- any service within a radius of 10 miles, with the radius being measured from a specified central point; or
 - a distance of 10 miles measured in a straight line from the first point at which passengers are able to embark to the last point at which passengers are able to disembark.
- 1.32 As set out above, operators in rural areas will be able to make the case that a 'short distance' is longer than the automatic 10 mile distance.
- 1.33 This dual approach of allowing an operator to choose between a radius and a straight line distance will enable it to select the option which best suits its operating practices. For example, a radius might better suit an operator whose start and end points

² In this context 'occasional' means the frequency with which services in excess of the automatic short distance occur, rather than that the service does not have fixed stopping places.

change constantly throughout the day, whereas the route-based approach allows an operator to flex its services depending on who its passengers are and where they want to go. The route-based approach might also be favoured by section 22 permit holders whose services have fixed start and end points.

Review of the section 19 and 22 permit system

- 1.34 The domestic permit system was designed to recognise the value of 'not-for-profit' organisations that provide services of social/charitable benefit where their profitmaking counterparts would not, often in relation to isolated or vulnerable people. The Government recognises that, since the legislation's introduction in 1985, the community transport sector has changed significantly, in part facilitated by past legislative changes and successive Government's policy. In some instances this has unintentionally impacted on the viability of commercial profit making operators.
- 1.35 In light of this the Department intends to carry out a review of the current domestic permit regime in 2019, to see if the legislation is still fit for purpose and provides the correct balance for the bus sector as a whole. The terms of reference will be drawn up in due course but are likely to include a review of permit issuing bodies and whether there should be limits on the size of operations.