community transport association

The Department for Transport's consultation on the use of section 19 and section 22 permits for road passenger transport in Great Britain

A response from the Community Transport Association

May 2018

Contents

Introduction

The Community Transport Association (CTA) is the national charity that represents and supports providers of community transport - thousands of local charities and community groups in all parts of the UK that provide transport services which fulfil a social purpose and community benefit.

Our vision is of a world where people can shape and create their own accessible and inclusive transport solutions and our mission is to achieve this through championing accessible and inclusive transport, connecting people and ideas, and by strengthening our members and raising standards.

We do this by contributing to the formation of public policy that affects our sector and their service users and showing how better outcomes are achieved for people and communities when they have access to community transport. We create partnerships with like-minded organisations across all sectors; manage a national programme of quality assured education and training; provide comprehensive advice and guidance to those delivering community transport; and we take every opportunity to champion the vital and indispensable work that our members do.

Background

For over three decades, passenger transport in Great Britain has been governed by a commonly understood regulatory settlement, enabling community transport to operate services safely and legally using section 19 and section 22 permits. This system has worked effectively by upholding standards and safety at all levels of operation and has enabled services to evolve within a commonly understood framework, while providing the necessary confidence required by regulators, permit issuing bodies, passengers, and operators. This system is supplemented by distinct regulation of vehicles and drivers, and by widely-used and well-regarded training packages, notably MiDAS for minibus drivers and PATS for passenger assistants, which are often acknowledged by the insurance industry.

The current regulatory framework provides permit holders with an effective and efficient way to run their services safely, legally, and to the benefit of millions of passengers throughout the UK. There are areas of the current regulations that we may seek to clarify, but it would be preferable if the Department for Transport (DfT) were to conduct this type of review process through open and transparent channels in collaboration with community transport operators and passengers. The current process has only served to heighten confusion and fear within the sector.

The starting point for the review of services should not be a retrofitting of Regulation 1071/2009 into UK law. The DfT would be better served reviewing how the Transport Act 1985 operates and works with community transport organisations to ensure the sector is stronger and better equipped to operate for the benefit of the community they serve. During this consultation process, DfT officials have affirmed that Ministers understand the value of the community transport sector and are committed to preserving and supporting it. We welcome this commitment; however, the current consultation does not reflect that commitment and indeed represents real risks to the stated objective.

CTA is particularly concerned that the draft guidance and consultation does not provide an adequate rationale or basis for change. While it is accepted that some form of change may well be inevitable, particularly in light of the DfT's letter on 31st July 2017, the Department has failed to set out a rationale for this far-reaching change to the commonly accepted interpretation of the guidance.

Prior to the issue of the DfT's July 2017 letter, it was automatically assumed, due to not-for-profit charitable status, that permit holders were non-commercial. This assumption has been completely reversed and permit holders are now assumed to be commercial entities and the burden of proof is placed upon the organisation to prove otherwise. This is a fundamental and potentially fatal change for many operators.

The draft consultation document states:

2.18 In the past, the Department and the DVSA took the view that all holders of section 19 and 22 permits were exempt from the Regulation because they would be either "engaged in road passenger transport services exclusively for non-commercial purposes" or "...have a main occupation other than that of road passenger transport operator". For this purpose, it was believed the that the term "non-commercial" equated to "not-for-profit"; and it was not anticipated that permit-holders would compete with PSV licence holders.

2.19 However, following a legal challenge, it has become apparent to the Department and the DVSA that these assumptions are no longer sustainable. As a general rule, if a transport service is provided by an organisation in return for payment, that service should be treated as commercial, even where the organisation is not-for-profit. Payment includes any fares charged to passengers (either individually or in groups) and any other payments obtained from any third party (e.g. a local authority, under a contract or conditional grant arrangement) in exchange for providing the relevant service.

These statements form the basis of the DfT's case for change. However, CTA contends that these statements do not adequately explain why not-for-profit charities should no longer be permitted to rely upon a non-commercial status. In particular, CTA does not accept the premise in paragraph 2.18 of the consultation document that permit-holders are in competition with PSV O licence operators. Community transport was established to fulfil the need that the commercial sector was unwilling, or unable to serve. CTA is concerned that if the guidance is implemented the services provided by community transport will cease and they will not be operated by a commercial body, largely because they unprofitable. The presence of community transport in many areas reflects the reality of market failure. This makes it deeply concerning that the Department now believes that EU regulation requires the sector to be viewed through a market-based lens, and principally as an economic actor rather than a social one.

CTA contends that before making any change to current guidance, it is incumbent on the Department to demonstrate that they have a clear understanding of what the implications of the outworking of these proposed changes are. If the draft guidance, as published in the consultation, is implemented,

it will have a devastating impact on the elderly, vulnerable and disadvantaged communities throughout the UK; this damage will not easily be undone.

This consultation is an opportunity for the DfT to re-evaluate its foundational legal assumptions contained in the consultation document and to listen to community transport operators and understand properly how and why they deliver their services. This consultation process should serve as a starting point for an open and transparent process that provides confidence to the sector, while working towards strengthening the sector and enabling them to operate in a regulatory framework that is fit-for-purpose to serve future generations and communities.

Consultation Summary

We believe there are eight fundamental points that need to be reinforced from the outset which make up the basis of our submission.

The legal foundations of these reforms are questionable

The Community Transport Association acknowledges that the government cannot change the regulations or create new exemptions. However, it does have the discretion to decide what non-commercial means and to apply this to the undertaking rather than to individual services.

There is no obvious and compelling case law which ties its hands on either of these matters. The consultation says there is evidence but this has not been published and there should be a higher burden of proof on the need for change for something that is going to have such devastating costs and consequences.

As we will demonstrate, there is strong precedent and workable examples from other legislation that cites commercial activity as being for private gain and therefore non-commercial as being 'not for private gain' which forms the basis of every not-for-profit legal entity and applies to every permit holder.

The guidance is not clear in its purpose

This consultation is intended to test the content of new guidance for permit holders and the bodies that are designated for issuing them, but it fails in that task. It focusses too heavily on commissioning processes and managing competition to the extent that it does not achieve its main purpose.

Guidance should be an enabler – showing permit holders viable pathways for the continuance of their services and activities for the benefit of the people they serve. The reformed guidance leaves few permit holders with such pathways.

Trying to regulate by individual services is unworkable

We acknowledge that the Department has attempted in good faith to develop workable examples of pathways to compliance by looking at combinations of factors in the monetisation of individual

services. However, we have seen how these examples do little to manage and minimise the impact of these changes as they throw everything that permit holders do into doubt to great cost and consequence for the communities they serve.

The Department now needs to accept that the only clear, fair and workable means of applying and enforcing the non-commercial exemption is by relying on the indisputable assurance provided by the organisation being legally established as a not-for-profit entity.

We agree that how a service is monetised is important in the context of adhering to the requirements of the permit legislation, but we think a better approach would be to show how each type of funding can be used without contravening those requirements. This would be preferable to the range of complex and cumbersome combinations of factors described in the proposed guidance which leave few permit holders with an obvious pathway to compliance.

Allowing commercial operators to decide how to enforce the Regulation is the wrong approach

There is no credible means of directly assessing if competition exists that can inform a judgement on whether exemptions from the regulations can be applied. The government therefore has to find a way to infer this through some other means. We think allowing commercial operators to be the arbiters is a mistake.

An extract from a message that one of CTA's members received from a commercial operator in 2015 illustrates perfectly why this approach is the wrong one:

"When your wings are clipped, and you are told to either comply with the O-licence scheme (which we both know you can't because of the need to spend public money on private enterprise) or shut down, I want you to know that whoever wrote these two paragraphs in your accounts formed the evidence we needed to shut you (and all of your other s.19 permit holders) down. Further, I also want you to know that it was me that instigated everything that is about to happen. Me and 25 other operators in the land. Me."

CTA would argue that local authorities and other public bodies which commission services are better placed to do this because they at least have public accountability, although it should be acknowledged that this won't solve all the problems we foresee.

There are too many costs and consequences that go beyond settling the nature of the complaints about community transport

We acknowledge that the Department wishes to manage and minimise the impact of these reforms and note their assertion that this will mainly affect larger operators.

However, these reforms cannot only deal with the intended targets (charities that compete for local authority contracts) without damaging anything else. Accepting a premise that any transaction in any

form makes something commercial, will threaten the sustainability of many more charities and community led activities than just those who compete for contracts. And once the impact of applying the same principles to Driver CPC is realised this will have a massive impact on even more charities, schools, churches and sports teams and make many of the things they currently do unviable in the future.

This will not create fair competition or end the challenges and disruption to community transport

Despite assurances to the contrary, the reforms as described leave too much room for the continuation of vexatious anti-competitive practices – indeed parts of the proposed guidance seek to legitimise such practices.

These reforms will place costly restrictions on charities and others in the community that will actually insulate commercial operators from competitive forces – the opposite of what the government said it was setting out to achieve.

Forcing permit holders to have to work under PSV O-licences will not remove the grievances either. There is evidence to suggest that at least one complainant is trying to prevent charities from getting PSV O-licences. These reforms will have a devastating effect on communities, and only displace the problem without solving it.

Fair competition is important but the government should also recognise that a lack of level playing field can be tolerated if it enables other public goods to be created – such as the maintenance of uneconomically viable services that create equity for people facing disadvantages that inhibit their personal mobility. In this context it would mean creating circumstances in which contracts can be fulfilled using a permit because this enables those providers to do other things for which there is no market.

Local authorities and other public bodies that commission services are best placed to determine the nature of a local market and enable fair access to it

The Department needs to rethink its approach and start by looking at how local authority and other public commissioners' frameworks can be used to create a level playing field between different types of operators. The conditions of contract would require the same safety and operating standards of all contractors, regardless of the licensing regime that they operate under.

When used well, public commissioning practices already give us transparent, rule-governed processes for assessing local markets and defining the terms of how operators can participate within them. These require a commissioner to have assessed needs, and designed a suitable service to meet them, before it finds and engages providers for the service.

This would also provide a means of recognising and protecting the distinctiveness of community transport services within the commissioning environment and the unique social value they deliver.

This requires a rethink on how some transport services are commissioned to prioritise the creation of 'social goods' and reduce the reliance on procurement through tendering as a crude 'one size fits all' way of meeting the needs of people who face disadvantage through a lack of accessible transport options.

The UK Government needs to assert its leadership over the tone and terms of its approach to community transport

We understand that this action does not result from policy decision within government, and our sense is that they would rather not be doing this. We accept that it is important that the UK Government are satisfied that they are regulating in the right way and deal with the challenges from the European Commission, but their other priority must be to keep these vital services in good shape and sustainable so they can continue to deliver the benefits that people in many communities across the whole of the UK rely on.

However, it has allowed others to set the tone and the terms in which community transport is understood and discussed for too long. One example is the narrative that permits cannot be used where 'money changes hands'. This is not true as one of the purposes of the legislation which created section 19 and 22 permits was the enablement of payment.

By not challenging this for so long and then actually joining in and encouraging this narrative they have changed the terms in which community transport is understood in an inaccurate and unhelpful way.

The other thing which has led to this narrative is that the proposed guidance is so unclear and unworkable that people are using this as a short-hand way of summarising a complex set of issues that are difficult to comprehend in their current form.

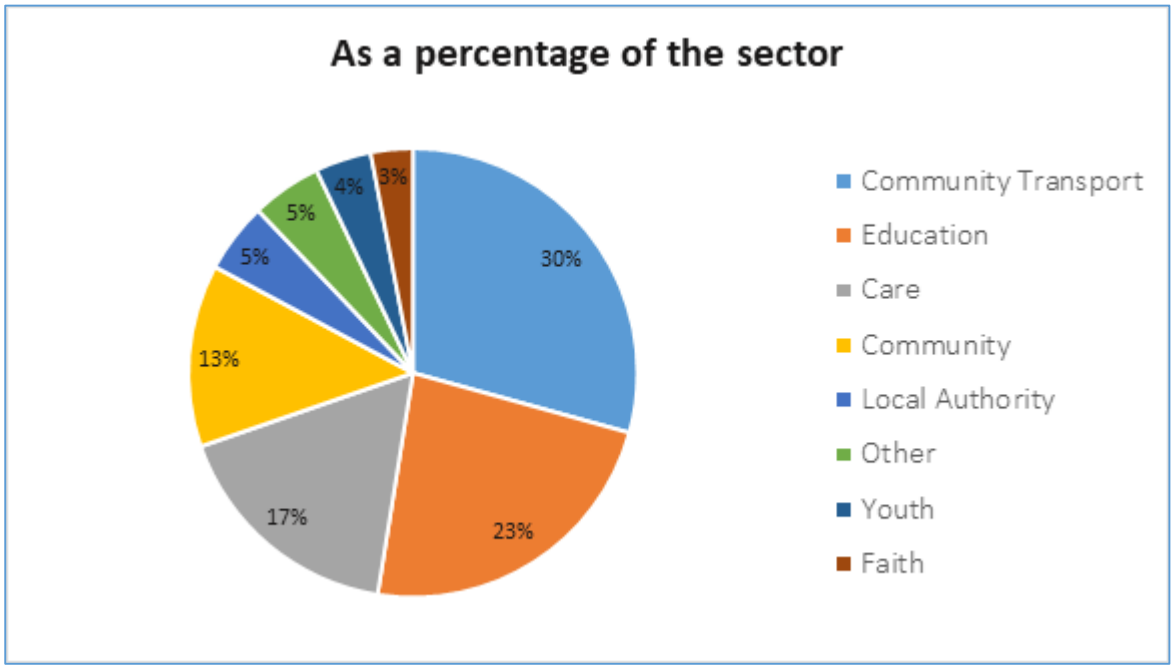
We recommend that the Department take the following actions as a means of asserting its authority on this matter:

- That it commits to working with the sector to create a better settlement that establishes some clear, fair and workable pathways to compliance. This should demonstrate how they can adopt new practices, demonstrate permissible models for how they can operate different services under licences and permits to enable them to fulfil local authority contracts and conduct other services, such as providing transport and training to other charities.
- That the Department makes a clear statement of how it, or one of its agencies, intends to address concerns on Driver CPC which is intrinsic to these reforms but not considered within this consultation. This is likely to have a considerable impact on the group of organisations the Department has said are unlikely to face compliance issues and it is important that they are clear on the terms and costs they will have to work to in future.
- That it increases the size of its proposed £250,000 transition fund by a significant magnitude to support permit holders to appraise their business models and identify the most appropriate pathways to compliance for their organisation.

- The Department consider an alternative way of adjudicating competition through the commissioning of public services and implementing a system to adjudicate disputes fairly.
- The Department commit to a review of this area of legislation, post-Brexit, to lower the burdens on all SMEs regardless of legal structure which enables both community-led organisations and small, often family run, businesses to function in a safe and sustainable way which enables a greater range of transport needs to be met. This could include the development of a hybrid model for PSV Operator Licensing which addresses some of the concerns about parity, but also recognises that the nature of charitable organisations who deliver a public benefit and cannot make a profit could comply with some requirements differently, for example, good financial standing requirements.

The Importance of Community Transport

The Community Transport Association, as the national membership body for organisations who deliver community transport, has a membership profile reflective of the diversity of the sector as a whole. 70% of the community transport sector operate transport as an activity secondary to their main purpose; the remaining 30% are organisations that exist primarily to provide transport to further a social purpose or community benefit.



1 in 6 people in the UK rely on not-for-profit community transport organisations that exist primarily to enable them to live independently, participate in their community, access education, employment, health and other services. The organisations these people rely upon use and adapt conventional vehicles to do exceptional things- always for a social purpose and community benefit, but never for a profit.

There are around 1,800 organisations with community transport as their primary purpose across the UK. Together they deliver services for 10 million individuals, and 700,000 other charitable organisations on an annual basis.

They specialise in delivering transport that is accessible and inclusive, providing opportunities for people to live their lives where public transport or driving their own car isn't an option. Often this is for members of our society who would be considered 'vulnerable'; 98% of these organisations work primarily with older people and people with disabilities.

These organisations have operated transport for this purpose, and have been supported by successive governments to do so for well over 30 years. They have spent years supporting, and adapting to the needs of their beneficiaries in order to deliver high quality, inclusive and accessible transport and a positive holistic service from the moment a passenger leaves their front door to when they are back home again.

This way of operating is reflected in the statistics:

- 71% of vehicles are wheelchair accessible.
- 93% undertake some form of work in rural areas where public transport is less available or not available at all.
- 77% deliver services to help people access healthcare and medical services.

The wider community transport sector consists of a hugely diverse range of organisations. Making up 70% of the sector as a whole, or around 4,500 organisations. This includes schools, colleges, universities, churches, care homes, community centres, sports teams, hospitals, local authority in-house services, and support groups.

Whilst for these organisations, delivering transport isn't a main function of their organisation, they rely on transport for their beneficiaries and users to access and make the most of the services they provide. Community transport enables these organisations to deliver national citizens service schemes, run lunch clubs and activities for people who are socially excluded, ensure people get to their medical appointments, practice their faith and access the support they need.

Across the sector, 300,000 individuals have been trained on the Minibus Driver Awareness Scheme (MiDAS), a specialist training assessment for the delivery of accessible and inclusive transport. It focuses on this type of delivery with an additional module for drivers of accessible vehicles.

Without community transport, the ability of millions of people to have a decent quality of life and feel that they belong is put at risk.

CTA's response to the consultation questions

For questions 1, 2 and 3, we have aimed to take a consistent approach in framing our submission by using a common format for each constituent part. The headings in each section will be:

- **Policy and regulatory context**
  - Consideration of relevant policy and regulatory context for the exemption.
- **Organisations that will be able to rely on this part of the exemption**
  - Assessment of which organisations would clearly be able to rely on this part of the exemption as described.
- **Barriers to compliance**
  - Assessment of circumstances in which there may be uncertainty and questions over compatibility – especially where the content of draft guidance as described prevents organisations that would ordinarily expect to comply from doing so.
- **Perverse effects**
  - Consideration of any perverse effects resulting from implementation of the proposed guidance on this exemption, i.e. unforeseen consequences and/or outcomes that may be contrary to what the UK Government is aiming to achieve.
- **Impact on the practices of permit issuing bodies**
  - Assessment of likely impacts on permit issuing bodies in conducting their duties.
- **Recommendations**
  - Summary of CTA's recommendations for improving the Department's approach and guidance.

Question One

Do you have any comments on how the proposed guidance clarifications in respect of organisations **"…engaged in road passenger transport service exclusively for non-commercial purposes"** could be further improved or clarified? In particular, do you believe there are further examples of "non-commercial" activity which we should include?

Introduction

1. EU Regulation 1071/2009 required Member States to implement changes to national law by the end of 2011. Clearly, the UK Government gave consideration to the wording of Article 1(4)(b) of the regulations when it was published and determined that no change to UK law or guidance was required.

2. Consequently, the DfT upheld the long-standing assumption that permit holders, largely due to their not-for-profit charitable purpose, were non-commercial. The wording of the Regulation and its derogations have not changed, yet the Department has issued a new interpretation. It is incumbent on the Department to set out the reasons why it abruptly changed its interpretation eight years after the Regulation was published. While CTA accepts that the government is under no obligation to publish its legal advice, government departments do have an obligation to properly and clearly explain the legal basis for what they do. That burden is even greater when the Department abruptly changes its position, and especially when the impact of that change is far-reaching.

3. The language used in drafting the derogation requires careful consideration.

   Article 1(4)(b) enacts a derogation to the Regulations for:

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

4. The UK Government's new interpretation of how the regulations apply differs from its previous interpretation in two fundamental ways.

5. Firstly, it asserts that it is now the services that must be exclusively non-commercial and not the undertaking. There is nothing in the construction of the exemption which implies that the 'non-commercial purposes' element can only refer to the services, so it is equally valid to assert that it's the undertaking itself that must have a non-commercial purpose for the exemption to apply and there is a stronger case for it to be interpreted that way, as we will also demonstrate below.

6. Secondly, instead of considering what non-commercial means, it attempts to re-define commercial as a means of limiting how the non-commercial exemption can apply. The Regulation makes no mention of what commercial means, giving the Department greater freedom to interpret how it

views non-commercial. We will demonstrate how this should be considered below and in our analysis of the tests set out in Table A.

Consideration of the non-commercial purpose of the undertaking

7. CTA contends that the wording of the Regulation legitimately invites a member state to look at the overall purpose of an organisation when determining whether or not an organisation is operating in a non-commercial way.

8. The DfT's draft guidance ignores the statutory language of "purpose" and instead, in determining the meaning of "non-commercial", the Department has focused on the service delivery mechanism utilised by the organisation. Given the language employed by the drafters, a proper determination of the statutory intent of the Regulation requires that DfT focus on organisational purpose rather than the means by which that service is delivered. Consequently, the starting point for a proper statutory interpretation requires DfT to define and examine the meaning of "purpose" in the context of passenger transport.

9. An organisation's purpose is typically found in its objects as stated in its constitutional documents (depending on what type of legal entity it is). In other words, the Regulation requires that DfT examine why an organisation exists in determining if it is "non-commercial", rather than how an organisation functions. Using organisational purpose as a means to regulate passenger transport is not only the foundation of Regulation 1071/2009 but also underpins section 19 of the Transport Act 1985.

10. A section 19 permit can only be issued to organisations concerned with the purpose of: education, religion, social welfare, recreation or other activities of benefit to the community. CTA submits that, given organisational purpose underpins the validity of section 19 permits, this should be read across into the interpretation of Regulation 1071/2009. This approach would be consistent with statutory interpretation across legislative instruments in the UK: for example, the Gambling Act 2005 S.297 defines non-commercial, even where money changes hands, by reference to the organisational purpose (i.e. where "no part of the proceeds is to be appropriated for the purpose of private gain"). In that context, "non-commercial" purposes are defined as charitable or for the benefit of community good. It is the organisation's purpose (not payment for the service) that is the definitive starting point in defining "non-commercial" activity.

11. The Department have failed to explain why they have ignored the wording of the Regulation by focusing on the delivery of individual services, rather than implementing the legislative intent of the regulation and looking at the purpose for which the organisation was established. On this basis, it would be reasonable to conclude that permit holders have already passed the "purpose" test, as purpose was the material consideration when they applied for and were granted their permit; on the basis of proper statutory interpretation this derogation could safely be applied to permit holders in the UK.

Consideration of 'non-commercial'

12. The phrase "non-commercial" has not been legally defined; consequently, the DfT have flexibility in how it chooses to give guidance on the application of what is "non-commercial" for those engaged in passenger transport. In its 31st July 2017 letter, the DfT stated that the term "non-commercial" is *"quite distinct from the colloquial use of the same term".* CTA disagrees with this interpretation - the starting point for determining the meaning of "non-commercial" is by examining the ordinary meaning of the term as any reasonable person would. In interpreting the meaning of regulations and in the wider context of determining the operation of social and public services, The European Commission and The Court of Justice of the European Union (CJEU), asserts the purposive principle to statutory interpretation. This makes the ordinary meaning, at the very least, an aid to proper interpretation. The DfT need to demonstrate how it has concluded that the intended purpose of Regulation 1071/2009 was to change how charitable organisations in the UK deliver social and public service. It is unlikely, given the emphasis on social and public service provision advocated by the EU institutions, that any regulation would be drafted with the intention of ending certain charitable services in a member state.

13. CTA is concerned that in interpreting the meaning of "non-commercial" the DfT have not considered the charitable actions of community transport, which form the purpose they were established to promote. Moreover, as charities, community transport operators can never be comparable to commercial operators as they cannot make a profit, even if they have a PSV O licence. Consequently, they are subject to different finance and planning procedures.

14. CTA urges the DfT to re-examine the legal foundation of its assumptions. CTA would contend that the charitable and social purpose of community transport organisations should form the foundation of proper interpretation of Regulation 1071/2009, rather than a misinterpretation of one CJEU case concerning the transport of goods in Sweden. There is little correlation with passenger transport, and in any event judgement was given in 2003, so the Department would have known about it at the time it was considering how to implement 1071/2009 in the period up to 2011.

15. By emphasising the charitable purpose of an organisation, this would enable the DfT to draft guidance that allows the overwhelming majority of permit holders to continue to provide services within the commonly understood framework.

16. The draft guidance asserts the general principle that payment renders a service "commercial". This is a major departure from the commonly accepted view that "non-commercial" equates to "not-for-profit". There are many services throughout the UK, mainly providing social and public good, which are provided on a "non-commercial" basis and involve payment or exchange. Indeed, the DfT's approach, as already demonstrated in the Gambling Act 2005 above, is out-of-step with proper statutory interpretation. Another relevant example from existing statute law is the Late Payment of Commercial Debts (Interest) Act 1998. This defines "commercial" debts, to which the Act applies, as ones arising from "a contract for the supply of goods or services where the

purchaser and the supplier are each acting *in the course of a business*." [emphasis added]. This cements the common idea that commercial relationships are those involving profit-making entities.

17. This radical shift in the Department's previously held policy position requires strong evidence to support that change. CTA do not believe the DfT have made a strong enough case or produced any compelling evidence to support this fundamental shift away from the commonly accepted guidance.

18. In asserting a general principle that payment renders a service commercial, the government have created a burden for charities to prove that their services are exempt. This is a major departure from UK charity and tax law, which allows charities to trade in pursuit of their primary charitable objects. Such a major change in commonly accepted charity law requires the Department to set out its legal advice in detail; otherwise some charities will be placed at a distinct disadvantage because of the way they deliver their charitable purpose.

19. In shifting the burden of proof to the organisation (requiring them to prove that every service they operate is "non-commercial"), the DfT's draft guidance sets out five tests an organisation could use to establish that they are able to continue to operate under a permit. CTA contends that these tests lack a proper understanding as to how charities operate, how commissioning of transport services work and how the procurement process is applied by local authorities. The tests are inadequate and lack a real-world perspective. The DfT needs to better explain and give more clarity to the operation of the tests if they are going to have applicability to permit holders.

CTA's views on the non-commercial tests

The service is free of charge

No charge is imposed, either on passengers or any third party (such as a local authority). Voluntary donations (including money or time), grants which are not conditional upon the provision of any transport service and income from non-transport activities can be ignored.

Policy and regulatory context

20. Any services that do not involve some element of hire and reward would not require a permit at all and would not be relevant in this part of future guidance to permit issuing bodies.

21. The implication that a service being free to the passenger creates an entitlement to operate using a permit is misleading and misunderstands the intention of those sections of the Transport Act 1985.

22. The purpose of the legislation was to enable operators to be exempt from the UK's predecessor legislation to EC 1071/2009 (Public Passenger Vehicles Act 1981) but nevertheless charge passengers to contribute to the costs of running the service.

23. The Department has not sufficiently challenged the growth of a narrative that says permits cannot be used where 'money changes hands' when it knows that the relevant sections of the 1985 legislation expressly creates the ability for this. By not challenging this, and then joining in with it, the Department has changed the terms in which community transport is understood in an inaccurate and unhelpful way.

Organisations that will be able to rely on this part of the exemption

24. CTA cannot see any workable examples of how this would apply in practice.

Barriers to compliance

25. CTA's State of the Sector survey in Scotland in 2015[1] showed that 84% of CT operators had fares as part of their business model and this would be typical of operators in Wales and England too.

26. Any permit holder that does monetise its services in the way described in the draft guidance is highly unlikely to have transport as its main occupation and would therefore rely on the exemption for organisations which have a main occupation other than road passenger transport operator.

27. There appears to be a misalignment between the label and the content of this category of exemption, which adds to the questions about its practical application.

28. The phrase 'free of charge' would ordinarily be taken to mean 'free of charge to the customer'. It would not be seen as also relating to wider considerations of how a service is monetised through other third party payments, thus creating a confusing picture about its scope.

29. CTA is concerned that the reference to 'grants' is confusing as it is unclear whether Bus Service Operator Grant and Bus Service Support Grant (Wales) could be included under this exemption, and whether concessionary fare passes meet this exemption.

Perverse effects

30. There are many permit-holders running small scale transport services of their own volition in response to an absence of public transport, especially in rural areas. They use a mix of fares, donations (financial and in-kind) and grants, and do not compete for contracts with local authorities. These services run under a section 22 permit would have had to demonstrate that they are not displacing a commercial alternative.

[1] http://www.ctauk.org/UserFiles/Documents/In%20Your%20Area/Scotland/State%20of%20the%20Sector%20Scotland_2015.pdf

31. These permit holders would expect guidance to set out the terms in which these services can continue under a permit. However, the way this and the other two of the first three categories are contrived leaves these organisations without a clear path to compliance.

32. We have had evidence from permit holders who would organise their services in this way that they are likely to close. They will not be replaced because these are not services that local authorities commission and they will not be in a position to readily identify alternative provision given that these services are often the last resort.

Impacts on the practices of permit issuing bodies

33. As we think this isn't a plausible category as described, we would make a general point that the means of assessing compliance on the terms described would be difficult.

34. Aside from the terms being unclear it also assumes a snapshot can be taken of some fluid and ever changing factors at the point of applying for a permit.

Recommendations

35. The Department needs to make a clear and unambiguous statement that it is false and misleading to say that permits cannot be used when money changes hands, and challenge its own agencies and third parties that continue to use this description.

36. CTA recommends that future guidance needs to cover payments by passengers and payments by third parties as two separate matters.

37. Future guidance should include better descriptions and clearly explain how funding agreements ought to be written to enable those services to be operated using a permit.

Any charge for service is substantially less than cost

Any charge imposed on passengers or any third party (such as a local authority) is substantially less than the cost of providing the service because the cost is heavily subsidised (for example, by voluntary donations of money or time, unconditional grants or income from non transport activities). As a broad rule-of-thumb, "substantially less than cost" means more than 10% less than cost.

Policy and regulatory context

38. Achieving full cost recovery in public service delivery has been encouraged by successive governments that have supported programmes to embed this as common practice in public commissioning. It has also enabled organisations to respond to the push from the public sector to rely less on grant-funding for core charitable work, even when the services and the beneficiaries have not changed.

39. This approach has enabled charities and other not-for-profit entities to generate funding to support the overall running costs of the organisation in which the service sits and support other vital services that are difficult to monetise without subsidy. By recovering the true costs of running the services, but no more, it has also discouraged charities from trying to recover excessive costs and also provides a strong counterargument that services are being run below cost to win contracts or that they have some 'commercial' intent.

40. The Charity Commission states in its guidance *Charities and public service delivery: an introduction and overview (CC37)* that "Charities should expect and negotiate for full cost recovery in any case where a public authority is purchasing a service from them, unless the charity decides it is in its beneficiaries' interests to forego full cost recovery".

41. Some charities will be prohibited from doing this if their governing documents expressly forbid the charity to relieve or subsidise statutory funds.

Organisations that will be able to rely on this part of the exemption

42. We cannot see any workable examples of how this clause could be used by a permit holder to apply for or renew a permit.

Barriers to compliance

43. Current guidance (PSV 385) says that full cost recovery models should be used as a means of monetising a service operated fairly using a permit within the requirements of the Transport Act i.e. operating without a view to profit.

44. This exemption would preclude a local authority from grant funding a community transport group unless the grant was only 89% of the cost. Some community transport groups would be unable to find the remaining 11% of the cost of the service, especially as this money could not be charged to a passenger or recovered from another conditional grant. This might mean that although local authorities may be willing to grant fund some services, the service would become unsustainable.

45. There are few circumstances where permit holders will have a sufficient level of free resources, or can readily monetise the value of volunteer time or in-kind support, especially when fulfilment of contractual work has hitherto been seen as a means of generating surpluses to support the provision of other charitable services.

46. All community transport operators benefit from donations of volunteer time, in the form of unpaid trustees and, often, volunteer drivers. However, the administrative burden and cost of evidencing and accounting for the value of volunteer time, against each service operated, as would be required to meet this test, would be unacceptably high – particularly for the smallest operators, who are often disproportionately reliant on volunteers to perform management and administrative functions.

47. Many of the things a permit applicant would be asked to demonstrate are fluid and even if they could confirm compliance on a given day, their circumstances might be different on any other day.

48. CTA is also concerned that this test lacks the necessary clarity required to give certainty to permit holders or the bodies that issue them. The phrases "As a broad rule-of-thumb" and "substantially less than cost" are unclear. Moreover, the Department has not provided reasons why they have proposed 10% less than cost as the permissible income level. We would welcome clarity on the rationale for 10% being the figure used and which other figures were considered and rejected.

Perverse effects

49. **This clause does not deal with the nature of the complaints against community transport operators and is likely to create further challenges.** One of the grievances expressed by commercial operators is a perception that permit holders are cross-subsidising contracts to lower the price of bids. Whilst we would dispute this standpoint, we do feel that guidance which expressly encourages permit holders to only partly recover their costs in public service delivery and to subsidise the rest, could be seen as an unhelpful intervention in reaching a settlement.

Impact on the practices of permit issuing bodies

50. We see no effective means for permit issuing bodies to effectively manage an application for a permit based on the organisation relying on this part of the exemption.

51. We would only reiterate our general point that the means of assessing compliance on the terms described would be difficult, principally because it is assuming a snapshot can be taken of some fluid and ever changing factors at the point of applying for a permit.

Recommendations

52. We recommend that the government remove this from the proposed guidance, or find a better way of expressing what this is supposed to achieve through this particular non-commercial test.

Any charge for service equals (or exceeds) cost

Even if a charge is imposed which equals (or exceeds) cost, if there is no competition for any of those services from the holders of PSV licences ('commercial operators'). This includes situations in which no commercial operator:

- *pre-qualifies or bids for any local authority contract; or*
- *provides any equivalent service (i.e. for a similar class of passengers, on a similar route and during a similar time period).*

If a CT operator is relying on the absence of competition from commercial operators, the CT operator must be able to provide appropriate evidence. For example, confirmation might be obtained from:

- *the relevant local authority, to the effect that local commercial operators have shown no interest in competing for contracts; or*
- *local commercial operators, to the effect that they have no intention of bidding for contracts or operating competing services.*

Policy and regulatory context

53. These reforms result from the Department being forced to address concerns about the markets permit holders participate in and the terms in which they do so. This category sets out to achieve this by making the permit issuing process the main means of controlling market access, ignoring that local authority commissioning practices are an existing and better means of achieving this.

54. The presence of an existing PSV Operator in a local area does not automatically mean that they can provide a suitable service that meets the needs of the passengers or the purpose of the existing service.

55. It is perhaps the most contentious in that it codifies and legitimises anti-competitive practices and throws a blanket of doubt over every type of service, not just those in the arena of the original complaints against community transport. Commercial operators are given two paths to inhibiting community transport operators – not only can they declare them as competition, they can also refuse to participate and remain silent which would have the same effect.

Organisations that will be able to rely on this part of the exemption

56. There will be a large number of community transport operators that will expect guidance to set out the terms on which they can and cannot use a permit to bid for and deliver a publicly commissioned contract. All the feedback we have had in our engagement in this consultation is about the shortcomings of this particular category.

Barriers to compliance

57. There are three obvious barriers: **Firstly** (and simply) this suggests that permits can be used to generate income through services which exceeds costs. This cannot happen as it would be considered as operating with a view to a profit which is prohibited by the Transport Act 1985.

58. **Secondly**, it creates an unclear, unfair and unworkable set of arrangements that permit holders would need to demonstrate prior to being issued a permit. CTA is particularly concerned with the potential for the draft guidance to create a 'commercial operator veto' preventing permit holders from operating any services.

59. The draft guidance requires permit holders to prove that there is no local competition for their service. To do this, they must contact local operators and submit evidence to a local authority or permit issuing body that no private operator wishes to compete for services. The veto, as currently proposed, would allow an operator to object even if they have no intention of running a service at any point; consequently, a commercial operator could legitimately object by simply stating that they may consider running a service at a later date. Therefore, the potential exists for commercial operators to refuse permission to community transport operators for a variety of different reasons, many of which would not include promoting a competitive market, but rather allowing commercial operators to be anti-competitive to protect their business. Indeed, this opens the possibility of commercial operators across the UK maliciously withholding consent.

60. Even if a commercial operator had no objection to the issuing of a permit, if it failed to provide written confirmation to that effect, this might prevent a not-for-profit community transport provider obtaining or renewing a permit. There would be no commercial or regulatory incentive for operators to provide this evidence or confirmation, yet on the basis of the criteria proposed by the Department, a permit issuing body or local authority might be unable to act without it.

61. **Thirdly**, it misunderstands the nature of local authority commissioning and how operators relate to that.

62. This part of the guidance does not provide a clear and obvious pathway for local authority commissioners to know when and how to commission services from permit holders. As a result, local authorities (to avoid legal challenge) will require all operators bidding to run services to hold a PSV O licence. The result of this change of practice will be the closure of community transport organisations in many local areas, with commercial operators unable to fulfil the work previously undertaken by permit holders due to the lack of appropriate vehicles, no access to volunteers, or no history or experience of fundraising activities. Consequently, this will leave many passengers without service.

63. CTA is also concerned that most local authorities have pre-qualification processes which all operators have to go through to be put on the local authority's framework to be considered able to tender for contracts. The presence of a commercial operator on this framework will preclude a

permit holder from also expressing an interest and being placed on the framework, even if there are circumstances by which the service would be allocated to them.

64. The Department needs to rethink this test and should start by looking at how local authority frameworks can be used to create a level playing field between different types of operators. The conditions of contract would require the same safety and operating standards of all contractors, regardless of the licensing regime that they operate under.

65. When used well, local authority commissioning practices already give us transparent, rule-governed processes for assessing local markets and defining the terms by which operators can participate within them. These require a commissioner to have assessed needs, designed a suitable service to meet them before it then goes and finds and engages providers for the service.

Perverse effects

66. One of the effects will be an impact on services other than those fulfilled for local authority contracts. As it covers all services it means these reforms will go further than limiting the ability for permit holders to fulfil those contracts.

67. CTA is concerned that some services, such as minibus brokerage, have developed as a means to pool resources such as community minibuses, giving community and voluntary groups access to affordable transport, at cost, where private hire is beyond their means. It is unlikely that these schemes would be able to meet the "no competitive market" test, as private hire providers do exist. As a result, minibus brokerage schemes would be consigned to operating well below full-cost recovery, in order to meet the second test above, leaving the whole future viability of such schemes, which provide a vital resource to many small charities and community groups, at risk.

68. Our assumption was that the commercial veto would only require permit holders to consult with PSV O licence holders in their area, as the text only refers to competition "from the holders of PSV licences". However, the Department has appeared to go further than this as the presentation at their consultation events (slide 9) takes the scope of this further and cites competition with "bus, taxi or PHV firms holding a relevant operator's licence".

69. We would appreciate confirmation as to whether this addition is correct and whether the intention would be that CT operators would need to consult with taxi firms prior to running a service under a permit.

70. Rather than creating fair competition, it is inviting commercial organisations to adopt anti-competitive practice and potentially breach competition law and good practice. There is also evidence in the public domain that at least one commercial operator associated with these complaints is attempting to find a legal path to prevent charities from applying for PSV O licences. This further illustrates the anti-competitive nature of the action against permit holders and indicates how this non-commercial test could not credibly be exercised on the terms set out.

Impact on the practices of permit issuing bodies

71. Of all the non-commercial test, this would be the most problematic to enforce for permit issuing bodies. It mandates them to require permit applications to prove a negative – the absence of something now and in the future, which is clearly unworkable.

72. The community transport operator will have to gather the evidence themselves, with the permit issuing body having no means of policing the process to ensure fairness.

Recommendations

73. CTA recommends that the Department acknowledges that it cannot reach a satisfactory legal settlement and achieve its policy objectives as stated in its impact assessment through placing the burden of enforcement on permit issuing bodies at the point at which permits are applied for. Instead the Department should consider how local authority commissioning practices can be clarified and improved as a means of managing market access in an appropriate way for permit holders that doesn't contravene EC 1071/2009.

Occasional Services

Even where the passengers pay for the cost, if the services are occasional and not regular in nature and are organised on a voluntary basis with an unpaid driver for a specific group of people (rather than members of the general public). This includes ad-hoc day trips for members of a recreational club or residents of a care home where the passengers share the costs.

Policy and regulatory context

74. Regulation (EC) No 1073/2009 gives a definition of an 'occasional service', the Regulation states:

- *'regular services' means services which provide for the carriage of passengers at specified intervals along specified routes, passengers being picked up and set down at predetermined stopping points;*
- *'special regular services' means regular services, by whomsoever organised, which provide for the carriage of specified categories of passengers to the exclusion of other passengers;*
- *'occasional services' means services which do not fall within the definition of regular services, including special regular services, and the main characteristic of which is the carriage of groups of passengers constituted on the initiative of the customer or the carrier himself;*

75. This definition is not reliant on the service being operated voluntarily or using unpaid drivers. Further, 'group hire' which is provided by many community transport operators, is organised, in almost all cases, on the initiative of the customer or carrier and wouldn't fall into the definition of a 'regular' or 'special regular service'.

Organisations that will be able to rely on this part of the exemption

76. It is unclear how this particular category of exemption would enable any activities that could not be enabled through the other categories. We understand it may be attempting to signal a type of activity that is unlikely to face competition from commercial operators but this does not come across clearly enough.

Barriers to compliance

77. The wording of the test in the consultation lacks clarity or precision. Operators will need a clearer definition of "occasional service" in the context of community transport services. It is unclear what the phrase "operated on a voluntary basis" means and it is unclear why the test refers to using "an unpaid driver". We would welcome clarity on whether it is intended to mean that there are no paid employees involved. Moreover, there is a lack of clarity as to how payment can be made or what it means for passengers to share the costs.

78. CTA is concerned that this test is not clear enough to be of benefit to permit holders in determining if service is non-commercial.

Perverse effects

79. The draft wording of this test lists residents of a care home as potential beneficiaries of this type of transport. The Department needs to re-evaluate their use of care homes as an example, as most care homes are run for private gain and cannot therefore be non-commercial or hold a permit (over 85% of care home beds are operated by commercial entities).

Impacts on the practice of permit issuing bodies

80. Given our reservations about the workability of this category of exemption it is not possible to comment on this in great detail, other than to reiterate that it is not clear how this should be enforced.

Recommendations

81. As it cannot be a service run under a section 22 permit (in that it must not carry the public or follow a regular timetable) we recommend that the Department should make it clear that this exemption only relates to section 19 permits and apply this approach more generally in distinguishing between different permit types in its categories of exemption. We also recommend that the Department clarify the status of the driver being paid or not in respect of this part of the exemption.

Incidental services

Where vehicles are used by an organisation to carry individuals who have paid for non-transport services which are provided by the same organisation and the carriage is merely incidental to the provision of the other services. This includes attendance at a day centre or participating in lunch club.

82. We have not followed the same format in giving feedback on this category of exemption as we only have a small number of points to make that are distinct from what we have said elsewhere. This category appears to describe services that are more likely to be run by undertakings that rely on the exemption for those that have an occupation other than road passenger transport operator. As with occasional services, this test lacks the clarity and precision needed for permit holders to determine how it applies to them.

Recommendations

83. Further explanation is required from the Department, for example, what does it mean that carriage is "incidental"? If the Department has particular charities and types of activity in mind this needs to be clearly defined.

84. We would also welcome clarity on whether this would cover community group use where the services of a community transport operator is used by a charity/non-profit organisation (e.g. on a group transport basis) to enable people to access a service or facility which they provide (i.e. the transport arrangement is solely between two charities/not-for-profit organisations and therefore outside any commercial market).

Occasional private hire

The "non-commercial" test must be satisfied in relation to every service. If an operator provides a community bus service using a vehicle driven by volunteers and subsidised by donations or grants, the "non-commercial" test will not be satisfied if the operator also raises income through occasional private hire of that (or any other) vehicle.

Policy and regulatory context

85. This is not a stand-alone test but rather it is described in the final paragraph of the draft guidance Table A. It is unclear what this text is referring to, does it apply to both section 19 and 22 permits? And what type of service is this describing?

86. Section 22(1)(b) of the Transport Act 1985 states:

    "in providing a community bus service and (other than in the course of a local service) carrying passengers for hire or reward where the carriage of those passengers will directly assist the provision of the community bus service by providing financial support for it."

87. This allows a permit holder to carry passengers for hire or reward where this will directly provide financial support for the provision of the community bus service under a section 22 permit. The current draft guidance potentially contradicts existing primary legislation. This needs to be clarified, as the current draft guidance places some section 22 services at risk because "occasional private hire" will potentially be prohibited by the guidance, in direct contravention of primary legislation.

Barriers to compliance and perverse effects

88. This will be of particular concern to organisations running services under Section 22, which aim to cross-subsidise the running of those services by lending the vehicles to others in the community for a financial consideration. The legislation includes allowing organisations to cross-subsidise these services through private hire, i.e. loaning out the vehicles. This paragraph says that cross-subsidy would no longer be allowed, which will have an impact on the viability of the services provided by small independent community buses.

89. Indeed, CTA is unclear whether the operator will have the opportunity to voice those concerns. Section 22 services are, in the main, delivered where commercial bus companies have already pulled out of the market due to the service being unviable. If the draft guidance is implemented in its current form, this has the potential to end bus services operated under a section 22 permit and leave many people with no other access to transport and without service.

90. CTA is unclear why the Department would show concern over the operation of section 22 services and whether they are commercial in nature. Every application to register, vary or cancel local bus services have to be published by the traffic commissioners via notice and proceeding, this is published fortnightly. The CTA feels this would give any commercial operator or local authority that has concerns about the service being in direct competition with a commercial operator the opportunity to voice those concerns.

91. It also states that the "non-commercial" test must be satisfied in relation to every service. If the guidance makes it unduly difficult to prove the "non-commercial" test in respect of certain types of service, then there is a clear risk that such services will be dropped completely, in order to move forward.

Recommendations

92. CTA recommends that the Department gives a clearer statement of the pathway to compliance for section 22 services, recognising that much of its proposed guidance, although not explicit, relates to the use of section 19 permits.

Feedback on other parts of the guidance related to Question 1

Running two legal entities

93. Paragraph 3.28 of the consultation document explores the possibility of permit holders splitting their operation between their charitable arm (regulated by permits) and a commercial company (regulated by PSV O licence).

94. This type of arrangement works for some community transport operators across the UK and is a model that could be adopted by others to ensure continuity of service, although we acknowledge that many organisations would not be willing or able to adopt this approach.

95. This option will attract greater costs in terms of administration and operational expense, which smaller charities may not be able to afford. If it is to be workable, this type of arrangement should not be made overly complex and bureaucratic by the Department and should allow operators to move vehicles easily from one part of the organisation to the other.

96. It is unclear if this will also apply to secondary purpose transport organisations such as local authorities, who may wish to hold a PSV O licence and permits. This should be clarified.

Recommendations

97. This will not be a solution for everyone, however this is a legal framework that is worthy of consideration and the Department should issue new guidance explaining how this model can be used, and the obligations required should be clear, easily implemented and understood.

Question Two

Do you have any comments on how the proposed guidance clarifications in respect to organisations **"…which have a main occupation other than that of road passenger transport operator"** could be further improved or clarified?

Policy and regulatory context

1. This exemption enables the Department to assert that the majority of organisations will be unaffected by the changes, if you overlook how changes to the rules on driver licensing will affect them. The Department's letter of 31 July 2017 suggested that its revised interpretation of "non-commercial" would also apply to driver licensing regulation, requiring a driver (other than a volunteer) to hold Driver CPC. CTA is concerned that the issues of PSV O licence and Driver CPC, as they impact permits, has been separated, and there is no mention of any change to Driver CPC requirements for permit operators anywhere in the consultation.

2. Curiously, the DfT's impact assessment accompanying the consultation, not only assesses impact on requirements for permit holders to obtain PSV O licence (if required), but also the impact for all permit holders with paid staff to obtain Driver CPC. This is at odds with paragraphs 3.29 to 3.32 in the consultation document and in particular the claim that *"[The Department] do not expect there to be any impact on organisations who use permits to operate transport that is a 'side-line' or incidental to main occupations. No change is proposed to how Scout or other youth groups, for example, can operate their minibus using section 19 permits".* It is worth noting that in Northern Ireland, new guidance on driver licensing, implementing EU Regulation into UK law, has now been issued. This requires paid employees and volunteers with no connection to passengers or the organisation to obtain Driver CPC. At all times during this process civil servants in Northern Ireland stated they were following DfT advice.

Organisations that will be able to rely on this part of the exemption

3. Most users of section 19 permits, and a minority of section 22 permit holders, will be allowed to use this derogation because it is obvious from what they do (i.e. a school or church) or from what their governing documents say (e.g. a youth charity). This exemption would include local authorities that operate their own fleets.

4. This exemption could also be used to enable community transport operators to merge with charities whose primary purpose is not passenger transport. While this may solve the problem in the short-term, in the long-term it will hamper the development of community transport, and the freedom operators enjoy to evolve services to meet the changing needs of communities in the future.

5. Table B on page 15 of the consultation document uses the term 'not-for-profit' organisations to describe those organisations that can rely on this exemption. Organisations such as churches, local authorities, sports teams or schools (except independent schools) would not necessarily describe

themselves as 'not-for-profit'. To improve its guidance, the Department should explain the types of organisations that it would expect to fall into this exemption.

Organisations that will be able to rely on this part of the exemption

6. Section 19 and 22 permit operators that may have community transport in their name, but their constitution and purpose registered with the charity commission or other regulator would define and show transport as being secondary to some other main purpose.

7. Many organisations will have been primarily established to alleviate rural isolation, to provide equality of access for people with disabilities, to help provide access to public transport or enable better health and wellbeing outcomes. Organisations with constitutional documents outlining an accepted charitable purpose consistent with the day-to-day activity must be allowed to avail themselves of this exemption, regardless of their legal name or how their resources are deployed.

8. The Department needs to be clear on whether this part of the exemption could also be relied upon by organisations whose governing document defines their primary purpose as something other than the provision of transport, even where their day to day activities would be the provision of transport.

9. We would not advocate seeking to close this option, but are highlighting it as an irreconcilable problem when the government has such a confusing message about circumstances in which organisational purpose can or can't be seen as relevant.

Perverse effects

10. **It creates a two-tier community transport sector** based on subtle and poorly defined nuances in how organisational purpose can or cannot be a factor in assessing eligibility for a permit. Many local authorities will be permitted to continue services with limited changes, yet organisations which have contracts with the same local authority, operating under the same permit regulation, will be prevented from doing so. CTA is concerned that this will only create further confusion in the sector and leave the guidance open to abuse and distort the way in which community transport is used in the future. It will also be a bitter pill to swallow for some charities to be inhibited from using the same rules as other charities because of subtle nuances in the way their activities are seen or described.

11. **Confusion over when overall purpose can and cannot be considered.** In dealing with the first clause of the derogation (question one above) the DfT has ignored the word "purpose" as it applies to "non-commercial", yet in interpreting the second clause the Department seemingly deems organisational "purpose" and "occupation" to be interchangeable terms. This further adds to the legal confusion as to how this derogation is being interpreted by the DfT. It is clear that the Department accepts that organisational purpose is key to determining "main occupation" but refuses to even consider "purpose" in the very clause that uses the word. This makes no logical or

legal sense in giving effect to the wording of the derogation. It is clear that the Department needs to re-examine the legal foundations upon which the consultation is based.

12. **It will not address concerns about permit usage.** The action from the European Commission and the Department for Transport is the result of threats of legal challenges from commercial operators whose grievance is based on their perceived unfairness of permit holder fulfilling contracts for public bodies.

13. If charities can rely on this exemption and fulfil local authority contracts using permits, then it just moves the threats and challenges from the anti-community transport lobby to another arena rather than bringing the challenges to an end.

14. **Organisations that might expect to benefit from this exemption will be penalised for having formally pooled resources.** Some community transport organisations (especially in rural areas) are in effect a consortium of charities and community groups that all have a main occupation other than that of a road passenger transport operator. This has enabled the pooling of resources and expertise – enabling small organisations who cannot justify the cost of owning and operating their own minibus to use affordable and accessible transport, and ensuring safe and legal operation by centralising the responsibility for vehicle management (rather than it being a small part of a wider role).

15. Under existing guidance where there is no differentiation between organisations based on purpose, there is no regulatory penalty for combining and sharing their resources. However, a penalty will exist if the non-commercial tests dealt with in question one are enforced as described.

16. This will undo decades of successful collaborative working, and replace this with increased competition between organisations for funding to buy and operate their own minibus, at a time when funding is already scarce. This would likely also result in less down-time use of minibuses, and therefore increased operational costs per passenger.

Impact on the practices of permit issuing bodies

17. CTA is concerned that the current guidance shifts responsibility for the proper implementation of Regulation 1071/2009 from the Department to permit issuing bodies. This potentially places legal liability on permit issuing bodies and places a burden of quasi-judicial function on permit issuing bodies who will be required to assess evidence and receive representations of what is and is not an organisation's occupation. To provide comfort to permit issuing bodies, more clarity is required to help determine what constitutes an organisation's occupation.

18. Those enforcement agencies and permit issuing bodies that are only familiar with regulating transport operators will not understand how to apply this exemption. We have already seen evidence recently of a District Council being refused a permit on the grounds that it has performed contractual work in the past, with these reforms being cited as the basis for this judgement. They

clearly have a main occupation other than that of road transport operator and should not have been refused a permit for the reason given.

Recommendations

19. That the Department confirm whether this part of the exemption could also be relied upon by organisations whose governing document defines their primary purpose as something other than the provision of transport, even where their day to day activities would be the provision of transport.

20. That the Department confirm whether permit holders that can rely on this part of the exemption would be allowed to fulfil paid work for public bodies, in a way that a primary purpose organisation that cannot meet the tests in Table A could not.

Question Three

Do you have any view on whether and how the category **"minor impact on the transport market because of the short distances involved"** could be used in practice?

Policy and regulatory context

1. In the preamble to the Regulation 1071/2009 it was stated that "it is unnecessary to include within the scope of this Regulation undertakings which only perform transport operations with a very small impact on the transport market". We believe this indicates an intention by the originators of the legislation to recognise and allow a form of transport to exist between commercial operations and private use. We believe this exemption provides the means of doing that for significant numbers of section 19 and 22 permit holders through the most liberal and pliable use of the exemption for the benefit of the people and communities served by those permit holders.

2. The exemption references the "transport market". Given this is a reference to the member state, the term "transport market" logically refers to the entire transport market of the UK.

3. CTA would contend that community transport already fulfils this exemption as community transport, when measured in the context of the national transport market, exerts a minor impact.

4. Arguably, many operators' services will have no impact on the transport market as they have been created in response to market failure so, by virtue of this, they cannot possibly distort a market they exist outside of and provide an alternative to.

5. Whilst community transport operators have a minor impact on the national transport market, they deliver an enormous social impact on the lives of passengers who rely on the service.

6. Given that the services undertaken by community transport operators are locally based, when compared to the national transport market, the aggregate distances travelled are short distances. Community transport evolved to meet the needs of people in particular geographic areas who cannot drive and were not served by alternative transport solutions. Consequently, in serving local communities and meeting individual needs, community transport only has a minor impact on the national transport market. Given the unique character of community transport, not just within the UK but the EU, CTA contends that it would be worth the Department advocating to the Commission to allow this derogation to apply.

Organisations that will be able to rely on this part of the exemption

7. With some clarifications that address the barriers to compliance listed below, we believe there is significant scope for this exemption to be used.

8. Those that should have a *prima facie* case for being within scope are those working only in their defined local area of benefit, running services of their own volition, i.e. they have not been commissioned by a public body.

9. It could also provide scope for publicly commissioned services to be delivered where the commissioner has identified scope for their inclusion in the market without distorting it, perhaps by agreeing a threshold for permit operations, for example, 10% of contracts can be fulfilled using a permit.

Barriers to compliance

10. We foresee a number of clear barriers to this exemption providing a pathway for permit holders to continue to operate their services using this exemption.

11. There are concerns about the viability of basing the exemption on a defined distance, especially of 15 to 20 miles, and it being based on a radius from the place where the organisation is located.

12. If an arbitrary radius of 15 to 20 miles was to be applied, it would fail to address the particular needs of rural areas. For many rural trips, the distance travelled with passengers on-board can be relatively short and fall within a 20-mile radius; however, the bus may be travelling several miles without passengers.

13. Here are some examples of how this may be problematic. In the more remote parts of Wales, such as Powys, a 20-mile radius would not be sufficient. There is no District General Hospital in Powys and consequently patients have to travel long distances to access healthcare facilities, trips often provided by community transport services. Similarly, in South West Wales, Hywel Dda health board published a new consultation about reshaping healthcare provision in that area. If these proposals go ahead, communities in the far west of Pembrokeshire will also have to travel greater distances to access many health services.

14. The Helmsdale Community Minibus in Scotland carries passengers 11.4 miles without a single stop between Helmsdale and Brora in the northern Highlands. It runs at 6:15am, allowing people to connect with a service run by a commercial operator leaving Brora at 6:38am travelling the remaining 56 miles to Inverness (arriving at 8:29am). The minibus then returns to Helmsdale in the morning and can, though rarely does, returns passengers to Helmsdale. This round trip involving no stops other than departure and destination therefore stretches over almost 23 miles. It carries fewer than 16 passengers, but for them it is the only transport option at that day and time other than the private car.

15. Highland Council, in its evidence to the Transport Select Committee stated “We believe that the longstanding Section 19 and section 22 permit approach has virtually no effect on commercial operators. In our area, a major bus company has an arrangement with a local community transport operator to provide a feeder service to one main route; this is mutually beneficial.”

16. Given the concerns about creating a meaningful metric to demonstrate minor impact on the market, we would welcome consideration being given to other measures such as number of passenger journeys.

17. One of the disadvantages of relying on a radius of 15 to 20 miles as the footprint for this exemptions is that many services do not follow fixed routes as they are demand-responsive and would not start from the base location. As an alternative, if radius must be used, then it could be the footprint of an upper tier local authority in which the operator is based, or as defined in their governing document. This may inhibit operators that wish to bid for contracts outside of their area so they would need to rely on other exemptions.

Recommendations

18. We recommend that the Department negotiates with the European Commission to enable the most liberal and pliable interpretation of this exemption to apply as a means of protecting the vast majority of activities run under permits, which have no impact on the transport market and in many respects have been created solely as a community-led response to market failure.

Questions Four and Five

Question 4: Based on how the Department proposes to apply the exemption for organisations **"engaged in road passenger transport services exclusively for non-commercial purposes" 1 (Table A, paragraphs 3.14 on page 12 to 3.18 on page 14)**, does your organisation fit into this exemption?

Question 5: Based on how the Department proposes to apply the exemption for organisations **"…which have a main occupation other than that of road passenger transport operator" (Table B, paragraphs 3.19 to 3.21 on page 15)**, does your organisation fit into this exemption?

1. The Community Transport Association does not provide transport services itself so these questions do not relate directly to our organisation. However, we are able to offer feedback on what we perceive are some of the challenges for operators in answering these questions.
2. Many of our members have reported that they are confused and concerned by the tone and content of consultation and believe that there is insufficient clarity on how any of the exemptions would operate in practice.
3. The lack of real-world relatability and the draft guidance's deviation from commonly held convention and practice, makes it difficult for CTA members to give the affirmation sought by the Department.
4. CTA notes that the challenging environment that has forced these reforms has led to operators' reluctance to reveal information which they perceive as leaving them liable to further investigation should their interpretation of the proposed guidance not fit with the DfT interpretation. We also note concerns amongst permit holders that their submissions may be subject to Freedom of Information requests and be used out of context as a result.
5. Given action which has already been taken against some operators as a result of the initial DfT letter, in some circumstances incorrectly applying the draft guidance, operators are understandably nervous.
6. CTA recommends that the Department commits to conducting a second impact assessment and leaves open the possibility of a second public consultation with revised guidance.

Question Six

Based on how the Department proposes to interpret the exemptions to the Regulation, do you think that there could be impacts for specific groups in society?

1. Given the nature of community transport and the communities they serve, the true impacts on the loss of services are difficult to quantify, but we are talking about risks to tens of thousands of our most vulnerable citizens who rely on community transport to have a decent quality of life and a feeling that they belong. This will directly contribute to an increase in loneliness and isolation, and compromise the accessibility of health services and activities which are provided to the most deprived members of our society. Given that many community transport organisations can demonstrate that these changes will lead to the closure of their services and the loss of the only form of transport for many vulnerable people, there will be significant impacts on several social groups, particularly people with disabilities, older people, younger people and rural communities.

2. Community transport organisations deliver essential services on a charitable basis to many groups of beneficiaries in need. Typically, a true market would not deliver such services with requisite coverage, quality and affordability for the public and/or the service users, or sustainability. The ongoing costs of operation under PSV O licences will mean that community transport operators will be forced to raise their prices, and this will jeopardise the delivery of services which are currently affordable to vulnerable passengers often on low incomes, as well as the small community groups and charities which they serve.

3. Most community transport organisations will struggle to claim an exemption for any of their services under the Department's proposed interpretation, even if they are not delivered through a contract. The cost of transferring one of these services to a PSV O licence can easily reach £100,000 – a cost that will be impossible to meet for many.

4. The consultation document fails to address the effects on the devolved administrations in Scotland and Wales. There are a number of policy approaches taken by the devolved administrations to which a thriving and effective community transport sector is key. For example, the Scottish Government is currently consulting on what will be the world's first national strategy on social isolation and loneliness. This strategy explicitly acknowledges the impact which community transport has on connecting people who may otherwise be isolated. The effect of these changes on Welsh policy and services is outlined in a submission by CTA's Wales Committee.

5. We are also submitting our review of the Department's Impact Assessment as a separate document which considers the financial impacts of these reforms.

Charitable support and community groups

6. Hundreds of thousands of people play sport, attend a day centre, go to school, go to hospital, are part of a scout group, access respite care, attend counselling, take a trip to a new place. More often than not, these things are facilitated by not-for-profit or third sector organisations.

7. Thousands of community transport providers run transport to enable these activities, either by providing the transport themselves or by offering group hire, with or without a driver, to hundreds of thousands of groups across the country.

8. CTA members deliver services for local branches of Mencap, Age UK, Mind, Leonard Cheshire, Scope, YMCA as well as the Scouts, Cadets, Girl Guiding, CVS', churches, schools, hospitals, GP surgeries, sports teams, housing associations, job centres, support groups and countless others. Without the unique service provided by community transport, thousands of community and voluntary groups will be denied access to a shared community pool of available vehicles. CTA is concerned that many groups will be forced to seek alternative transport solutions that do not best meet their needs and fail to compare to the high safety standards set by community transport vehicles.

9. Access to opportunities for younger people is a vital part of education and skills development, and key to reducing isolation and mental health issues. Several of our members work specifically with younger people with physical and learning disabilities, while others work with young offenders and young people in care.

10. The way that the Department is choosing to interpret the exemptions to the Regulation will mean that thousands of young people will no longer be able to access opportunities previously available to them, many of which are sponsored or enabled by government departments or exist as a result of charitable funding.

Loss of specialist knowledge

11. Community transport specialises in accessible and inclusive transport. MiDAS and Passenger Assistant training, built for the community transport sector, provides training to drivers specifically in delivering accessible transport, including assisting passengers with visible and non-visible disabilities and how to use specialised equipment intended for the carriage of disabled passengers. Public transport cannot provide these services in the same way. Drivers and passenger assistants in community transport services will more often be familiar faces to their passengers than on commercial services, thereby offering greater reassurance. Transport may no longer be accessible to people with disabilities should the Department implement these reforms in the way they are proposing.

12. Furthermore, local authorities across the UK say there is already a shortage of wheelchair accessible vehicles. Meanwhile, 71% of community transport vehicles are wheelchair accessible; if they cannot award contracts to community transport operators, this will only worsen the current shortage, meaning that they will not be able to deliver aspects of the statutory equality obligations, as specified by the Equality Act 2010.

Employment market

13. The community transport sector employs an estimated 24,000 people. Often, these are people who may have come to employment through a back to work scheme or have secured a paid and permanent position of employment through volunteering for community transport. Many organisations will have to cease operating or reduce the services which they provide, meaning that they will be forced to make a significant number of staff redundant. Due to the uncertainty which has clouded the sector since the Department's letter of 31 July 2017, numerous community transport operators have already been forced to either make staff redundant or to place them on redundancy notices.

14. The community transport sector is supported by the service which thousands of volunteer drivers provide; if their organisation requires a PSV O licence, all of their drivers, both paid and volunteer, will be required to undergo a full PCV D1 by test and Driver CPC qualification. There is a national shortage of drivers who hold the required qualification so these drivers would have to be trained using existing staff at organisations such as community transport operators, schools and other third sector organisations. Many of these drivers have joined community transport organisations as a second career to give back to their community and may be unwilling to undertake significant commercial training requirements.

15. It is estimated that 84% of organisations who currently operate under permits will be required to ensure that their drivers hold a Driver CPC qualification. Due to the nature of existing driver licensing legislation any driver who is a category B holder only will also be required to obtain a PCV D1 by test.

Impact on safety and standards

16. There has been no indication throughout this process that regulators, permit issuing bodies or local authority commissioners share the Department's view that community transport operators adhere to different safety standards to commercial operators.

17. If there is a requirement for drivers who are salaried to hold a Driver CPC qualification and possibly a full PCV D1 by test even where their organisation's main occupation is not transport, there is a danger that these drivers will be pushed out of the regulatory system. Drivers may be tempted to claim the 'personal use' exemption to avoid having to obtain a commercial driver's licence. This will create a pool of drivers who have not been assessed to any standard and hence an increase in unsafe practices.

18. Community transport is a lifeline for many elderly members of society, who rely on community transport to access health appointments, do their shopping and visit loved ones. If they are no longer able to access community transport they will be forced to continue to use their car, even if it may no longer be safe to do so, in order to maintain their independence.

19. The leading driver training programme in the community transport market is MiDAS, a nationally recognised training programme enabling drivers within community transport to develop the skills and knowledge necessary to safeguard themselves, their passengers and their vehicles.

20. MiDAS includes a driving assessment which is vital for maintaining safety and standards within the community transport sector. If drivers who currently use MiDAS are forced to gain a Driver CPC qualification they may have no choice but to, due to cost, only complete the mandatory Driver CPC training. This will have a detrimental effect on training standards and safety as the only requirement of a Driver CPC qualification is to attend 35 periodic training sessions over a 5-year period; drivers are able to sit the same modules over and over again and there is no requirement for drivers to pass an assessment.

21. CTA, like the Department for Transport, want to continue to support and protect community transport services that offer a lifeline to vulnerable people, and allow our communities to access the opportunities around them.

22. The Department needs to have a clear understanding of what the implications of the proposed changes are and that once the changes have been implemented, with devastating impact on the elderly, vulnerable and disadvantaged, they cannot be undone.

Contact details

For further information, please contact:

The Community Transport Association

12 Hilton Street, Manchester M1 1JF

hello@ctauk.org | 0161 351 1475