

Legal Regulations Briefing on Permits and Operator Licensing

This document looks at the legal regulations on permits and operator licensing. You can find our full suite of resources on the topic at ctauk.org/advice-resources/permits-operator-licensing where you there's more information on hire and reward and what permits you'll need to run your services.

1. What is the relevant legislation?

Where a person is carried in a vehicle (with 9 passenger seats or more) for reward the activity is governed by EU Regulation 1071/2009. Under Article 1(2) the presumption in law is that any such vehicles will be subject to the requirements of an operator's licence as set out in the Regulation and domestic law.

In UK law an operator is defined as an entity that undertakes passenger transport for 'hire and reward.' The DVSA has issued guidance on what is meant by 'hire and reward' which states:

"Hire or reward is any payment in cash or kind which gives a person the right to be carried, regardless of whether or not that right is exercised. It is also regardless of whether or not a profit is made. The payment may be made to the operator, the driver or any agent or representative acting on behalf of the operator. The payment may be made by the passenger, or on the passenger's behalf. It may be (a) a direct payment (e.g. a fare) or (b) an indirect payment (this could be an exchange for services such as a membership subscription to a club, payment for a bed in a hotel, school fees or payment for concert tickets where travel is included; the payment does not have to be money and the right to travel does not need to be taken up)."

By footnote the guidance highlights that "a court may view indirect payment as hire and reward".

In European and domestic law, there is a presumption that any entity operating passenger transport will do so under an O Licence.

2. Exemptions to the Law

Article 1(4) and Article 1(5) provide exemptions to the general rule:

- i. Transport is not the primary purpose of the entity
- ii. Transport is provided for exclusively non-commercial purposes
- iii. Transport provided has a minor impact on the transport market because of the short distances involved.

These exemptions are enacted in UK law by the 1985 Transport Act (as amended) and are governed by the permit regime established in sections 18-22, known as section 19 and section 22 permits.

An entity that meets the requirements of one of the three exemptions is not required to obtain an O Licence, even if they are engaged in hire and reward, provided they also meet the not-for profit requirement of the Act.

3. Applying for Permits

The derogation from the presumption on holding an O Licence applies to the entirety of the organisation.

In other words, an undertaking either complies with the general rule, that is it operates under a PSV O licence, or the undertaking in its entirety relies upon one of the exemptions and meets the not-for-profit test.

In simple terms the whole of the undertaking either complies with the Regulation and obtains an O licence or the entirety of the organisation applies one of the derogations. That means an organisation cannot hold a permit and an O Licence in the same entity.

Also an entity cannot hold permits issued under more than one derogation. An entity cannot hold a permit issued under the exclusively non-commercial purposes exemption while also holding a short distance exemption permit. The entity must choose which exemption they rely upon and all permits are issued on that basis.

This means that for an organisation using a permit, all of their activities must allowable under the permit regime.

4. Not-for-Profit

The key test for operating under a permit is Section 18 of the Transport Act 1985 – the not-for-profit test. This has already been decided in the courts, the DfT guidance states:

"Commercial organisations, including privately owned schools, nursing homes, activity centres are not eligible to be granted a permit. Also, where the permit holder provides transport services on behalf of another organisation (e.g. the permit holder is a separate legal entity formed to provide

transport services for another organisation), that other organisation must also not carry on its activities with a view to profit.

The law on the meaning of vehicles being used incidentally to an activity carried on for profit has been considered by the courts. In that case the permit holder was a company established for the sole purpose of providing transport services for 5 independent schools owned by a partnership, and was a separate legal entity from the partnership. The court held that, whilst the permit holder did not operate with a view to a profit, the partnership did, and the permit holder was therefore using the vehicle incidentally to an activity which was carried on with a view to profit. The permit holder was not therefore eligible to operate those services under a section 19 permit.”

The concern is paragraph 2 above. You cannot use a permit where payment for the service, direct or indirect benefits a profit making entity.

This means that an organisation holding a permit cannot carry on business that may make a profit for someone else. The most common example is where shops, pubs or supermarkets ask a permit holder to take people to and from their business premises for payment.

For example, a permit holder could be approached by a supermarket who offer to pay for people in residential accommodation to be taken to that supermarket. While this is laudable on the supermarkets part, the conveyance of passengers to that supermarket helps that shop make money. However, if the resident who has access to a dial a ride scheme asks the permit holder to take them to that supermarket, this is permissible, as the resident themselves is paying for the trip not the supermarket.

5. Solutions

The most straightforward solution is for the permit holder to obtain an O Licence by either:

- a. Charity surrenders Permits and Whole entity is governed by an O Licence

It is possible to be a charity (or other not for profit organisation) to operate transport under an O licence rather than permits. This does not affect their charitable status and once an operator they do not need to be concerned about the issues of profit or incidental profit. A handful of CTA members have already successfully ceased using permits entirely.

While the charity is may still be governed by the ‘not-for-profit’ rules, they can undertake commercial work related to their objects or non-related to their objects up to £80,000 (depending on total turnover), under the charities small trading exemption.

- b. Trading Arm

A permit holder could choose to operate by permit and O Licence if they establish a separate trading arm/company that undertakes work for profit (or incidental to a profit) that pays any surplus back to the charity.

This is governed by Department for Transport guidance issued in November that guidance states:

"The legal position is that the same "undertaking" can't undertake both commercial and non-commercial work. So CT operators may wish to consider establishing a separate undertaking to carry out commercial work which then applies for a PSV operator's licence, whilst keeping their non-commercial work in the existing organisation."

6. Issues

The main concern members will have with the above options is:

- i. A reluctance to give up permits or be perceived to be operating commercially.

This is a longstanding issue within the sector. Several commercial operators have complained that work undertaken by a permit is commercial and should not be subject to the non-commercial purposes exemption. This was a long fight that ended in a court case last year. While the ramifications of the judgement are worked through, the court case appears to have been settled in CTs favour and there may be reluctance to move away (or give the appearance of moving away) from a structure that was hard won in a court case.

- ii. Drivers

Drivers under the permit regime are not subject to the same qualification and testing requirements applied to drivers operating under an O Licence. Persons driving under a permit are considered to be operating a vehicle under the driving exemption for the non-commercial carriage of passengers. If permit holders move to an O Licence all drivers will require a PCV D1 licence with DCPC. This can be a costly process. For those drivers who passed their car driving test before 1997, the cost is about £300 per driver. If a person passed their test after 1997 the cost is c. £1500, although it is unlikely that many people who passed their test after 1997 would be driving as paid drivers as the rules are restrictive.

If the permit holder establishes a trading arm, then only some of their drivers would need to obtain the qualification and these drivers would be the only members of staff who could be utilised in the trading arm

- iii. Volunteers

Moving to an O Licence precludes volunteers from driving for the entity. Even if a driver is unpaid, they are still required to have the professional driving licence.

It is also worth considering that grandfather rights (i.e. rights held by those who passed their test before 1997 only have circa 25 years left (providing legislative change does not come before drivers holding grandfather rights turn 70). This may be an opportunity to help members resolve this problem.
