

# **DfT CONSULTATION ON DRAFT PROPOSAL ON PUBLIC TRANSPORT SERVICES BY RAIL AND BY ROAD**

## **Response from *pteg***

### **Introduction**

***pteg*** represents the seven Passenger Transport Executives (PTEs) of England and Scotland which between them serve more than thirteen million people in Strathclyde ('SPT'), Tyne and Wear ('Nexus'), West Yorkshire ('Metro'), South Yorkshire, Greater Manchester, Merseyside ('Merseytravel') and the West Midlands ('Centro'). Transport for London (TfL) is an associate member of ***pteg***. The PTEs plan, procure, provide and promote public transport in some of Britain's city regions, with the aim of providing integrated public transport networks accessible to all. The PTEs have a combined budget of more than a billion pounds a year, and are funded by a combination of local council tax and grants from national government. They are responsible to Passenger Transport Authorities (PTAs), made up of representatives of local councils in the areas they serve.

All PTEs will be affected and several will be significantly affected by the draft proposal. Greater Manchester, South Yorkshire and Centro have tram franchises and Merseytravel has a heavy rail franchise that will have to be prematurely terminated under the provision for maximum contract durations. This is likely to lead to major compensation claims and could also shape future franchises concluded elsewhere. Strathclyde and Nexus directly operate underground and light rail networks and would therefore be affected by the requirement to have formal contractual relationships in place between authorities and internal operators. All PTEs procure substantial amounts of secured bus services to provide socially necessary transport provision which could be affected by the proposed €1m threshold.

### **Main points of concern**

***pteg*** has the following key points of concern, the reasons for which are developed in this response:

- The new arrangements should not apply to pre-existing contracts, and we would strongly question whether it is legal that they should apply to those contracts;
- The maximum length of contracts should be increased to 20 years for rail contracts (30 years if they include significant investment) and to 15 years for bus contracts with significant investment, in order to secure maximum value for money;
- The de minimis provisions should be amended to protect the powers that local authorities currently enjoy under UK legislation as regards bus contracts.

### **General Comments**

If UK law allowed provision of services by the competent local authority, then, subject to the concerns expressed below, the over-arching principles of the draft proposal would be welcome. The proposal clearly recognises the need to preserve and promote the status of public passenger transport across the EU. The ability of

authorities to continue to directly operate services without the compulsion of competitive tendering is maintained, and the important role of PTEs in bridging the gap between social need and commercial imperatives is largely preserved.

Of greatest concern is the proposal to terminate concessions or franchises that comply with the spirit of the regulation. We would argue strongly that pre-existing contracts should be left in place and exempted from the requirements of the regulation. Their early termination serves no useful purpose and will, almost certainly, be extremely costly as well as undermining the confidence in the private sector regarding future PPP bids.

The draft proposals potentially affect some PTEs to a greater extent than others, and in different ways. Therefore whilst this **pteg** response is representative in general terms of the seven PTEs, it cannot provide a definitive overall view, and does not supplant any views that may be expressed by individual organisations.

### Public Service Contracts and general rules

The proposed duration of Public Service Contracts (PSC) is an issue of major concern to **pteg**, especially in respect of light rail franchises where the level of initial investment by the franchisee normally results in the specification of design, build operate and maintain (DBOM) franchises with durations in excess of the proposed 22½ year maximum identified in the proposal. A 30-year term is widely regarded by franchisees as an appropriate term to recoup outlays and to make an acceptable rate of return over the franchise lifetime. Even for those rail contracts with no significant investments, we would question whether the 15 year time period for maintenance of rail-based systems allows the optimum use of resources. Even for contracts that are largely maintaining existing systems, quite significant investment in equipment may be necessary, and our view is that the maximum period should be extended to 20 years (together with the provision for a 50% extension for those contracts with significant investment).

**pteg** is also concerned at the difference that is being created between road and rail contracts at a time when the differences between modes is being eroded. The increasing interest in bus rapid transit indicates that investment in vehicles may be high and require rather longer than the 12 year period allowed within the draft regulation. This is primarily a matter for Central Government to judge, but the initial advice being received by PTEs is that concession periods of at least 15 years are necessary, more if significant infrastructure provision is required. We would suggest that the drafting of the Regulatory Impact Assessment is considerably strengthened to make clear these quite significant impacts.

Subject to meeting the Altmark requirements, it seems perverse that, in the relatively lighted-regulated transport sector where local authorities can operate the services themselves, a contract to a third party is under more restrictive regulation in respect of the exceptions to tendering than under the existing procurement regulations. This could affect UK local authorities that wish to rely on the existing tendering exemptions, i.e. Regulation 10(2). There seems no logic to this, particularly considering the proposed new Article 4(2), which equates to the fourth Altmark regulation and needs to be satisfied in respect of any PSC awarded

### Transition periods

Article 8 of the Proposal provides that Public Service Contracts already awarded should only be allowed to continue for a period limited and comparable to the periods set out in the Regulation. This means that it may be necessary to renegotiate existing light rail contracts where the contract length exceeds 15 years or even where the operator provides significant assets linked exclusively to the services, where the contract length exceeds 22.5 years. This will have serious potential cost implications for those authorities that have PSCs that have already been competitively awarded.

Also **pteg** considers that Article 8 of the Proposal, which makes it clear that Public Service Contracts already awarded should only be allowed to continue for a period limited and comparable to the periods set out in the Proposal, is in breach of certain general principles of EU law, namely a breach of the parties' legitimate expectations, a breach of legal certainty and a breach of the principle of non-retroactivity of EU legislation. We consider that future legislation which is then applied retroactively to PSCs which have already been awarded breaches the parties' legitimate expectations and the general principle of legal certainty which requires that "issues of certainty and foreseeability must be observed strictly in the case of rules liable to entail financial consequences" (clearly the renegotiation of existing Public Service Contracts could trigger very significant financial consequences). The European Court of Justice has held on a number of occasions that EU laws should not apply to a period before their enactment and their publication in the Official Journal - allowing existing contracts to only continue for a period set out in a new Proposal breaches this principle of non-retroactivity of EU legislation.

Furthermore it constitutes a waste of public money to re-negotiate contracts that have already been procured within the spirit of the Regulation, even though they exceed the proposed new maximum time periods. We would therefore strongly argue that any pre-existing competitively procured contracts should be allowed to run their course, as the net cost of termination or reduction in future years is likely to incur significant costs, including major compensation claims by incumbent operators, with no material gain in most cases.

**pteg** therefore strongly opposes this element of the proposal, and proposes that all PSCs procured in line with the then current EU regulations be exempted from Article 8. We would expect the Human Rights Act to be invoked by operators

#### Extension of current contracts

In respect of Article 5, in paragraph 3 the exemptions to the requirement to award public service contracts via an invitation to tender are very limited, and in fact more limited than contained in the public procurement Directives 92/50, 93/36, 93/37 and 93/38 (as amended) this seems an anomaly. We would like to see paragraph 3 of Article 5 extended to read " .... except in the cases specified in paragraphs 4, 5 and 6, and in accordance with Directives 92/50/EEC, 93/36/EEC, 93/37/EEC and 93/38/EEC (as amended)" or it should simply state where invitations to tender are sought the existing regulations should apply.

#### Emergency contract provisions

The proposal includes provision for a maximum one-year duration of emergency contracts in the event of the default of a franchisee. **pteg** views this period as insufficient to put in place effective alternative provision, in the light of the experience gained during the transfer of operations between Connex South Eastern and South East Trains. Should such a situation arise with a light fare concessionaire, PTEs may

be put in a position where continuity of service could not be guaranteed. We consider the period should be lengthened to 18 months as regards rail services.

As the DfT would be an important stakeholder in the replacement of a failed concessionaire, we seek a clear statement from DfT that they would act to facilitate the speedy replacement of any contract within the period allowed by the regulation to ensure service continuity.

#### De minimis provisions

The proposed €1m annual limit to be applied to PSCs has implications for bus service contracts awarded on a de minimis basis. Although such a threshold appears high in the context of individual route-based bus contracts, it potentially restricts the ability of PTEs in developing potential area-based bus quality partnership schemes. Given the relatively recent decision of the DfT to set de minimis limits for bus tendering at 25% of the annual budget, we consider that the regulation should not further impinge on this freedom. **pteg** therefore proposes this level of threshold should be raised to €1m or 25% of the annual budget whichever is the large in order to maintain current freedoms.

#### Publicity

Also Article 7 outlines a requirement for each authority to publish a detailed report on the public service obligations for which it is responsible, the selected operators and the compensation payments/exclusive rights granted to such operators. There is also a requirement to publish an advert indicating the name and address of the authority, type of award chosen and the services and areas covered by the award, at least one year before the invitation to tender procedure commences, or one year before a direct award. Most PTEs already have similar obligations under the current Public Procurement Regulations, but it is felt that the proposed requirements are cumbersome and unduly onerous.

#### Cross-boundary provisions for internal operators

**pteg** seeks an assurance that draft regulation's restriction on the activities of an internal operator's activities within the jurisdiction of the awarding authority will be addressed during negotiations to reflect the fact that travel-to-work areas are not necessarily coterminous with areas served by PTEs. The DfT's Regulatory Impact Assessment cites the London example, however this applies also to some PTEs. It is suggested that internal operators should be allowed to operate according to the provisions of Section 20 of the Transport Act 1968, viz. up to 25 miles beyond PTE areas. This will ensure that adjacent areas receive the same quality of services as that provided within the major conurbations.

#### Specific comments on initial RIA

1. The major concerns expressed about the changes in duration of the PSC, and the inadequate transitory arrangements expressed above need to be fully explained in the RIA.
2. The costs of establishing formal 'arms-length' trading arrangements between awarding authorities and internal operators are expected to be substantial. In the event of these requirements becoming law, the Department for Transport should commit to meeting the costs incurred by local authorities and PTEs. As regard

PTE operations, these will be particularly important in the case of Nexus and Strathclyde PTE.

3. The prospect of greater opportunities for UK public transport operating companies elsewhere in the EU is welcomed, however it is important that in doing so, the objectives of the PTEs in terms of providing better public transport services are not put unnecessarily at risk.

#### Assistance and clarification from DfT in implementation

*pteg* seeks clarification from the DfT on the following detailed matters:

1. The impacts on existing long-term contractual arrangements with tram and train operators. Will compensation be payable by the DfT to PTEs in the event of the proposal being implemented in its current form, by what means and under what UK legislation? Similarly, does DfT propose to make special grants to PTEs to formulate new PSCs with in-house operators, where these would be required?
2. Confirmation is sought that the regulation will not affect the validity of current concessionary travel schemes operated under the Transport Acts 1985 and 2000.
3. The definition of 'significant assets linked exclusively to services' needs to be more closely defined as this is currently open to interpretation.
4. The status of joint venture operators, in the event of the legislation applying to existing operations, requires clarification.
5. The definition of 'minimal influence' in relation to the activities of an internal operator in taking part in competitive tendering procedures outside the jurisdiction of the awarding authority should be more precisely defined as should the definition of the geographical area.
6. Clarification as of the definition of a "competent authority" the effect of the Regulation and its interface with the Transport Acts, in particular the issue of whether it is intended that PTEs will be able to operate services themselves.
7. It is not clear in the regulation if all public transport is covered by the draft regulation regardless of the modes involved.

#### Closing remarks.

We trust these comments are helpful in informing HM Government's contributions to the ongoing discussions within the Transport Council, and we would be happy to elaborate further on these views if this would assist. We feel that it is important that DfT fully appreciates the significance of the points we have raised and the need to tackle a range of issues, whether by means of redrafting the regulation or by mitigating the direct impacts on PTEs, and would therefore request a meeting where we can develop a way to make progress on these important issues. It may, for instance, assist the Department if we were to identify the key existing contracts affected and make initial assessments of the costs of implementing the regulation as currently drafted.

Please contact Tim Lerner, Director, *pteg* Support Unit, if further elaboration of our views is required.

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