Local Transport Act 2008

Improving local bus services:

Guidance on voluntary partnership agreements

February 2009
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INTRODUCTION

1. The Local Transport Act 2008 (“the 2008 Act”) includes various provisions designed to enable more effective partnership working between local transport authorities (LTAs) and bus operators. The aim is to improve the opportunities for authorities and operators to work together to deliver bus services that better meet the needs of local people – helping to promote accessibility, reduce road congestion and support the Government’s environmental objectives.

2. Section 46 of and Schedule 2 to the 2008 Act amend the Transport Act 2000 (“the 2000 Act”) to introduce new provisions about “voluntary partnership agreements” (VPAs) and other “qualifying agreements”. These provisions come into force in England on 9th February 2009. This guidance provides an introduction to VPAs and qualifying agreements: what they are, what they might include, and (briefly) the competition tests that apply to them. Readers of this guidance may also wish to refer to separate guidance published jointly by the Office of Fair Trading (OFT) and the Department for Transport¹, as it provides a more detailed explanation of how competition law applies to VPAs and to other agreements and schemes in the bus market. References to the 2000 Act in this guidance are references, where appropriate, to that Act as amended by the 2008 Act.

3. This guidance is aimed at interested parties in England; it would be for the devolved administration to consider whether to issue similar guidance in Wales.

¹ To be published in February 2009 at www.oft.gov.uk.
What are "voluntary agreements" (VAs) and "voluntary partnership agreements (VPAs)"?

4. In general, the term "voluntary agreement" (or "quality bus partnership agreement") is a non-statutory term used to describe any agreement entered into voluntarily by one or more local authorities and one or more bus operators, and possibly other relevant parties. A voluntary agreement can cover any matters on which the parties involved are able to reach agreement, so long as it is within each party's powers to deliver their side of the bargain. There are understood to be hundreds of such agreements in existence, ranging from "overarching" agreements covering whole local authority areas to much more local, corridor-specific agreements. A voluntary agreement can range from a simple document detailing heads of agreement, formed on the basis of a signature and/or a handshake, to a comprehensive and detailed legally-binding document. It might relate to just a single route or even part of a route, or to a wider network of routes within the authority’s area.

5. Amendments to the 2000 Act made by the 2008 Act introduce a statutory definition of a "voluntary partnership agreement" (VPA). A VPA is a particular type of voluntary agreement, and is defined in the 2000 Act as any voluntary agreement under which:

- a local transport authority, or two or more local transport authorities, undertake to provide particular facilities, or to do anything else for the purpose of bringing benefits to persons using local services, within the whole or part of their area, or combined area, and

- one or more operators of local services undertake to provide services of a particular standard.

6. It is envisaged that most voluntary agreements that are entered into by local transport authorities and operators will fall within the definition of a VPA. But some kinds of agreement may not - see below for a further discussion.

7. It is important to note that an agreement must involve at least one local transport authority in order to satisfy the definition of a VPA. So, for example, an agreement involving two or more bus operators but no local transport authority cannot be a VPA. It will, however, be a “qualifying agreement”, as discussed later in this guidance.
What are the consequences if my VA does not meet the definition of a VPA? Is it unlawful?

8. An agreement does not have to be a VPA in order to be lawful, and in many cases the question of whether or not an agreement is a VPA will be of no consequence. The distinction becomes significant where an agreement (or series of agreements) has as its object or effect the prevention, restriction or distortion of competition - in other words, where competition law is engaged.

9. Where a local authority (or group of authorities) enters into an agreement with only a single bus operator, issues of competition law should not generally arise; it is where authorities enter into an agreement (or series of agreements) with two or more operators that competition law is more likely to be engaged. Authorities might be working with multiple operators either directly (in multilateral discussions or agreements) or indirectly (in separate, but linked, bilateral discussions or agreements).

10. The question of whether or not an agreement is a VPA becomes important in these circumstances because, if competition law is engaged, it determines which competition test must be satisfied in order for the agreement to be lawful. In particular, the competition test in Part 2 of Schedule 10 to the 2000 Act, designed specifically for the bus market, applies in relation to VPAs.

11. The question is also important for determining which enforcement regime applies, as this will vary depending on which competition test applies to a particular agreement. The separate competition law guidance (referred to above) provides more detail, but the key difference is that, where an agreement falls under the new competition test in Part 2 of Schedule 10 to the 2000 Act, the power for OFT to impose financial penalties in respect of a non-compliant agreement does not apply. However, the OFT would be able to direct that a non-compliant agreement be varied (in order to make it compliant) or terminated. Moreover, for as long as a non-compliant agreement is in existence, the agreement is void and so cannot be enforced in the courts.

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2 Competition law will only be engaged if the authority is acting as an undertaking. The term ‘undertaking’ is not defined in the Competition Act, but its meaning has been set out in European Community law and extends to any entity engaged in economic activity regardless of its legal status and the way in which it is financed. It includes companies, partnerships, individuals operating as sole traders, agricultural co-operatives, associations of undertakings (for example, trade associations), non-profit making organisations and (in some circumstances), public entities that offer goods or services on a given market. A parent company and its subsidiaries will usually be treated as a single undertaking if they operate as a single economic unit, depending on the facts of each case.

3 Price-fixing agreements are excluded from the Part 2 competition test, so financial penalties are not excluded in relation to such agreements.
What about agreements between bus operators that do not involve a local transport authority?

12. There are some situations where two or more bus operators might want to enter into an agreement without the local transport authority being directly involved. In each case, the bus operators need to consider carefully the nature of the agreement in order to ensure that it does not infringe competition law. An agreement between bus operators (defined in paragraph 17(4)(a) of Schedule 10 to the 2000 Act as a “qualifying agreement”) may arise through bilateral discussions or as a result of requirements of a quality partnership scheme where, depending on the local circumstances, cooperation could well be in the interests of both operators and passengers. A quality partnership scheme may for example include requirements about frequencies or timings on a route (or in an area) where services are provided by two or more operators, and those operators may need to reach an agreement about which operator will run which services so that services operate at evenly-spaced intervals.

13. Even though there is no need for a local authority to be a formal party to this kind of agreement, because it does not require the authority to take any particular actions, the Government would encourage bus operators in these circumstances to discuss their proposals with the local transport authority. This is likely to be beneficial to all parties, as it maximises the scope for the authority and the bus operators involved to ensure that the key objectives are met in a practical way.

14. Moreover, where the qualifying agreement has been endorsed and certified by the local transport authority in accordance with paragraph 18 of Schedule 10 to the 2000 Act, the competition law provisions set out in Part 2 of that Schedule will usually apply in place of Chapter I of the Competition Act 1998. This means that the tailored competition test that is more readily applicable to the bus market (see paragraph 10 above) applies to such agreements, as well as the different OFT enforcement powers, as explained in paragraph 11 above.

15. A summary flow-chart relating to competition law can be found at the end of this guidance, and separate competition law guidance (mentioned above) sets out further detail.
How do I tell the difference between a VPA and a quality partnership scheme?

16. There are clear differences between a VPA and a quality partnership scheme. A VPA is negotiated between two or more parties - the local authority (or authorities) and the bus operator (or operators), and perhaps others. By contrast, a quality partnership scheme is "made" by a local transport authority or authorities (or jointly with one or more metropolitan district councils) after consultation with interested parties. Under such a scheme the authority or authorities will undertake to provide particular facilities in their area, and operators wishing to use those facilities will undertake to provide services to a particular standard.

17. A quality partnership scheme will be open to any operator in the relevant area to participate in, subject to their giving an undertaking to the relevant traffic commissioner that they will provide services to the standard specified in the scheme while using the relevant facilities. This will also be subject to any "registration restrictions" specified in the scheme (see separate guidance on quality partnership schemes).

18. Another key difference is that, in a VPA, there is no mechanism to prevent non-participating operators from using any improved facilities in competition with those operators that have entered into the agreement. By contrast, a quality partnership scheme gives enforcement powers to the traffic commissioners against an operator that uses the facilities without complying with the requirements of the scheme. Separate guidance mentioned above will contain more information about quality partnership schemes.

How might a VPA and a quality partnership scheme work together?

19. It may well be useful for a quality partnership scheme to be supported by one or more VPAs. For example, where a quality partnership scheme includes requirements about frequencies or timings on routes or networks served by two or more operators, it may be helpful for a separate VPA or qualifying agreement to set out which operators will operate which services so as collectively to achieve the frequencies or timings set out in the quality partnership scheme.

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Draft guidance on quality partnership schemes was published for consultation in July 2008 (www.dft.gov.uk/localtransportact). A final version of that guidance will be published on the Department for Transport website in spring 2009.
20. There may be other reasons why a local authority making a quality partnership scheme might prefer to cover some aspects of the standard of service in a VPA – for example it might wish to include a minimum standard to apply to all services covered by the scheme, and to negotiate additional standards with individual operators on a voluntary basis depending on their particular service patterns and other circumstances.

21. Accordingly, local authorities and operators should bear in mind that VPAs and quality partnership schemes are not necessarily substitutes: the two kinds of arrangement could complement each other.

CONTENTS OF A VA OR A VPA

What sort of "facilities", or other benefits, can a local transport authority undertake to provide as part of a VA or a VPA?

22. A local transport authority can provide any facilities or other benefits it wishes as part of a voluntary agreement, subject to it being within the scope of their powers to do so. The powers provided by section 111 of the Local Government Act 1972 (subsidiary powers of local authorities), section 2 of the Local Government Act 2000 (promotion of well-being) and section 99 of the LTA 2008 (power of Integrated Transport Authorities to promote well-being) are broad in scope; these sections will usually provide the necessary legal powers for local authorities entering into voluntary agreements with bus operators. Part 2 of the Transport Act 1968 also includes powers for Integrated Transport Authorities and Passenger Transport Executives, which may be relevant. It is for individual local authorities to ensure that they have the necessary powers to enter into a particular agreement.

23. In order for a voluntary agreement to be a VPA within the meaning of the 2000 Act, the LTA must undertake either to provide "facilities", defined as:

- facilities provided at specific locations along routes served, or proposed to be served, by local services within the area to which the agreement relates, or
- facilities which are ancillary to such facilities,

or “to do anything else for the purpose of bringing benefits to persons using local services”.

24. The following is by no means an exhaustive list, but in this context "facilities" might include, for example: the provision of bus lanes; improvements to bus stations or bus stops; provision of real-time information for passengers; installation of CCTV, improved lighting or other security measures at boarding points; or provision of audio-visual information at bus stops or stations for people with disabilities.
25. For a voluntary agreement to be a VPA, it is not essential that all or any of the things a local authority wishes to provide are "facilities" within the 2000 Act definition. For example, if a local authority undertakes as part of an agreement to publish timetable information covering all local bus services in their area, and distribute it to every household\(^5\), that is unlikely to constitute a "facility" within the meaning of section 153 of the 2000 Act because it would not relate to "specific locations along routes served...". But it would still be covered by the final words of paragraph 23 above – something done “for the purpose of bringing benefits to persons using local services”.

26. A VPA might also include measures which are not directly within the local transport authority's direct ability to secure. For example, a county council might wish to offer strengthened enforcement of parking restrictions at bus stops - a matter lying within the control of the relevant district councils (or the police, if parking is not subject to civil enforcement in the area concerned). In such cases, the district council (or the police) could be a party to the VPA in question, or the county council could reach a separate agreement with the relevant district councils (or the police).

**What sort of "standards of service" can be included in a VPA?**

27. Bus operators could commit to any standards of service they wish as part of a VPA. But where more than one operator is involved in discussions with a local authority, either on a multi-lateral basis or through a series of separate bilateral discussions or agreements coordinated by the local authority, care will need to be taken to ensure compliance with competition law. Issues of competition law are particularly likely to arise where timings, frequencies or fares are being discussed.

28. *Competition law does not preclude such discussions taking place*, so long as the relevant competition test is met in relation to any agreements which have as their object or effect the appreciable prevention, restriction or distortion of competition. Particular care should be exercised in order to avoid discussions about actual fare levels between operators, as any agreement about fares is likely to amount to a price fixing agreement\(^6\). Further guidance is provided below and in the separate OFT guidance.

29. For an agreement to be a VPA, one or more bus operators must undertake to provide services of a particular "standard" within the meaning of section 153(3) of the 2000 Act. The legislation makes clear that any requirements relating to the vehicles used to provide services, the frequency or timing of services, or maximum fares, constitute a "standard" of service. But the legislation does not limit "standard" to these matters: other standards, such as the provision of a particular level of driver training in relation to customer care, can also meet the definition.

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\(^5\) The assumption here is that, in the particular circumstances, the LTA considers that the provision of information in this form goes beyond the requirements of sections 139 to 141 of the 2000 Act.

\(^6\) However, where a *maximum* fare is included in a VPA, that maximum fare is not treated as a price-fixing agreement (see paragraph 19(2) of Schedule 10 to the 2000 Act).
Can existing "facilities" be included in a VPA?

30. There is no legislative barrier to the inclusion of existing facilities in a VPA. However, in many circumstances, there will be no point in including an existing facility: a bus operator will derive no particular benefit from its inclusion, as it would have access to the facility regardless of whether it participated in the agreement.

31. However, there could be benefit in an agreement covering the maintenance or improvement of existing facilities - or even the continuation of the provision of an existing facility, if there were a realistic possibility that the local authority might otherwise stop providing it.

How might a VPA work with joint ticketing arrangements?

32. Where an LTA is keen to introduce joint ticketing arrangements as part of a package of improvements to local bus services, there are two possible routes it might wish to consider:

- including arrangements about ticketing within the scope of a VPA that involved each of the relevant operators; or

- making a ticketing scheme under sections 135 to 138 of the 2000 Act, alongside a VPA covering other improvements.

33. An important difference between the two approaches is that a ticketing scheme under the 2000 Act is a statutory scheme, made by the LTA, with which all operators of services covered by the scheme must comply. On the other hand, a VPA relies on the willingness of bus operators to enter into the agreement. The more appropriate approach will depend on the particular local circumstances, and is a matter for the local authority itself to consider – preferably in consultation with local bus operators.

34. Another difference is that, while a VPA could specify a maximum fare for ‘joint’ or ‘through’ tickets (subject to meeting the relevant competition test), there is no power for the local authority to include provisions about fare levels in a statutory ticketing scheme\(^7\). There is no statutory barrier to making a separate VPA that included a maximum fare for ‘joint’ or ‘through’ tickets as part of the agreement, so long as the VPA meets the relevant competition test. But agreeing the actual price of joint or through tickets as part of the agreement is likely to constitute price-fixing, which is not permitted under competition law.

\(^7\) The effect of a statutory ticketing scheme is to require bus operators in the area of the scheme to make and implement the arrangements required by the scheme to enable passengers to purchase prescribed types of joint or through tickets.
35. Different competition law provisions apply in the two cases: the test in Part 1 of Schedule 10 to the 2000 Act will always apply to the making of a ticketing scheme by an LTA, whereas a VPA will be normally be subject to the provisions of Part 2 of Schedule 10. However, if the ticketing provisions within a VPA fall within the scope of a block exemption order, then there would be no need to apply the competition test in relation to those specific provisions. However, any element of the VPA that did not fall within the block exemption would still need to meet the Part 2 test.

**How can a VPA be enforced?**

36. There are no statutory provisions about enforcing a VPA. In many cases there may be no formal enforcement mechanism: in such cases, the incentive to continue complying with an agreement may simply be reputational. However, where a VPA takes the form of a formal written agreement, the agreement could include provision for what happens if either party fails to comply with its terms. This would be a matter for negotiation between the parties to the agreement.

**COMPETITION ISSUES**

**What competition issues do participants in a voluntary agreement need to be aware of?**

37. The amendments made by the 2008 Act change the way in competition law applies to “VPAs” and certain “qualifying agreements” (as defined in the 2000 Act). The intention is to tailor the relevant law so that it can be applied more clearly to the bus market. It is hoped that this, in turn, will encourage more such agreements, particularly those involving more than one operator.

38. Where one or more local authorities are entering into agreement with only one bus operator, the question of compliance with competition law should normally not arise. However, where more than one operator is involved in discussions with a local authority, issues of competition law could arise in two sets of circumstances:

- where the local authority (or authorities) enter into a single, multi-lateral agreement with more than one bus operator. If the object or effect of such an agreement is appreciably to prevent, restrict or distort competition, the agreement is lawful only if the relevant competition test is met;

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• where the local authority (or authorities) enter into a series of separate bilateral agreements with bus operators. If the object or effect of two or more such agreements, when taken together, is appreciably to prevent, restrict or distort competition, the agreement can be lawful only if the relevant competition test is met.

39. It is important to recognise that an "agreement" does not have to be a formal contract or written agreement: it could simply be a verbal agreement, or even a "nod and a wink" if its intention is to signify agreement. Nor does "agreement" refer only to the end-product of negotiations between authorities and operators: it is quite possible that "agreements" might be struck during the course of discussions or negotiations about a proposed voluntary agreement.

40. The relevant competition test will depend on the nature of the agreement (or agreements) concerned, and a flow-chart summary is annexed to this guidance. Where the agreement(s) meet the definition of VPAs, the relevant competition test will be the test contained in Part 2 of Schedule 10 to the 2000 Act. This is a test specifically tailored to the bus market. This test will also apply to "qualifying agreements" between two or more bus operators, but only where the agreement in question has been endorsed and certified by the local transport authority. However, where one or more of the relevant agreements is not a VPA, but is an agreement between two operators which the local authority has not endorsed and certified, the competition test set out in section 9 of the Competition Act 1998 will need to be met.

41. Both of these competition tests, and the local authority endorsement and certification process, are explained in separate OFT guidance. This includes a worked example of how local authorities and operators can work together within the framework of competition law.

For an agreement that just involves bus operators, how is the process of “certification” by a local authority expected to work?

42. As explained earlier in this guidance, the competition test in Part 2 of Schedule 10 to the 2000 Act will apply to certain agreements between bus operators only ("qualifying agreements"). One important condition is that the agreement must have been certified by the local transport authority.

43. The stimulus for an agreement of this kind might come from either the local authority or bus operators identifying scope for operators to work together to agree to coordinate their activities in a particular way. Where operators are contemplating an agreement of this kind, they are encouraged to discuss their proposals with the local transport authority at an early stage. Early engagement should help to identify any potential difficulties from the local authority’s perspective, and should help to increase the likelihood that the authority will ultimately be able to certify the proposed agreement.
44. The legislation is not prescriptive as to the form the certificate should take. However, it is likely to be in the interests of all parties for a certificate to:

- give a clear indication of the nature and content of the (draft) agreement that the LTA is certifying, perhaps by annexing a copy of the agreement itself. This will help to avoid any doubt as to whether the agreement considered by the LTA is expressed in the same terms as the agreement that is actually entered into by the bus operators concerned.

- specify that the authority is making a statement for the purposes of paragraph 18(3)(b) of Schedule 10 to the 2000 Act.

- state that, having considered the terms and effects (or likely effects) of the agreement, the authority’s opinion is that the agreement meets the requirements mentioned in paragraph 18(4) of Schedule 10.

45. In addition, if the authority is unsure as to whether the agreement satisfies the appropriate requirements in Schedule 10, or whether the agreement constitutes a price-fixing agreement, it would be advisable for the authority to say so – and give its reasons – as part of any certificate. This is important because, if a qualifying agreement has not been appropriately certified, or if it includes price-fixing, the Chapter I prohibition of the Competition Act 1998 would apply in place of Part 2 of Schedule 10. Ultimately, it is for the operators making the agreement to satisfy themselves as to which competition law provisions apply. The existence of a certificate from the LTA does not, of itself, provide legal certainty either that Part 2 of Schedule 10 applies, or that it is satisfied.

46. The legislation is also not prescriptive about when the certificate needs to be obtained. There is no explicit requirement for it to be obtained before the agreement is entered into. However, proceeding with an agreement before the certificate has been obtained would carry risks from the operator’s perspective: until the certificate has been provided, the agreement will be subject to the Chapter I prohibition in the Competition Act 1998.

**How do the new provisions affect procurement law?**

47. Existing procurement law, including the *de minimis* rules, is unaffected by section 46 of, and Schedule 2 to, the 2008 Act. LTAs should seek legal advice if they have any concerns that their particular proposals for a VPA might engage procurement law.

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9 These are that the agreement (a) is in the interests of persons using local services within the area of the authority, or the combined area of the authorities, and (b) does not impose on the undertakings concerned restrictions that are not indispensable to the attainment of the bus improvement objectives. The term “bus improvement objectives” is defined in paragraph 17(9) of Schedule 10 to the 2000 Act.
Which competition test do I need to consider?

- Is it one of the following functions:
  - making or varying a QPS
  - making or varying a ticketing scheme
  - inviting or accepting tenders to operate subsidised services?

  - Part 1 test applies
  - Competition tests are not engaged – though other statutory conditions may need to be met

- Is it a VBA?

  - One (a “VBA”)
  - Part 2 test applies to the agreements

- Are there other bus agreements in the area?

  - NO
  - Competition tests are not engaged

- Two or more (a “VMA”)

  - Does the agreement involve price-fixing?

    - NO
    - Part 2 test applies

  - CA98 test applies, but is unlikely to be met

- Two or more operators entering into an agreement to which the LTA is not a party (a “qualifying agreement”)

  - Exercise of a function by a LTA

  - Does the agreement involve price-fixing?

    - NO
    - CA98 test must be met

  - Does the agreement been certified by the LTA?

    - NO
    - CA98 test applies, but is unlikely to be met

- How many undertakings are party to the agreement?

  - Two or more (a “VMA”)

  - CA98 test applies, but is unlikely to be met

- Do the agreements, taken together, have a “significantly adverse” impact on competition?

  - NO
  - Competition tests are not engaged

  - Part 2 test applies