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Net Zero, Energy and Transport Committee
The Scottish Parliament
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22 October 2024

Dear Convener,

Thank you for your letter of 9 October to Fiona Hyslop MSP, Cabinet Secretary for Transport, in which you have listed several questions relating to the Local Services Franchises (Traffic Commissioner Notices and Panels) (Scotland) Regulations 2024 before the Committee can determine whether to make any recommendations to the Scottish Parliament.

Please find attached to this letter a table setting out detailed responses to the questions listed in your letter.

I hope this is helpful.

Yours sincerely,

JIM FAIRLIE

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Table of questions and answers in relation to the Local Services Franchises (Traffic Commissioner Notices and Panels) (Scotland) Regulations 2024

1. Why was the power to approve any bus franchising scheme given to a panel appointed by the Traffic Commissioner for Scotland, rather than to elected members of the relevant transport authority or Scottish Ministers?

A. In developing the franchising model set out in the Transport (Scotland) Act 2019 it was considered that a final approval stage, external to the local transport authority, was required to ensure that the decision the authority had made to make a franchising scheme was carefully considered.

As set out in the Policy Memorandum to the Bill at introduction, the inclusion of an independent panel appointed by the Traffic Commissioner (as opposed to Ministerial scrutiny) was intended to de-politicise the final decision-making process. Particularly as the Traffic Commissioner is an independent regulatory role, which is independent from all parties involved in the franchising process, including the Scottish Ministers, and indeed, potential operators. These measures remained throughout the three bill stages without anyone seeking to amend them. The rationale for the panel to be independent was set out and accepted by Parliament.

The approval process also potentially mitigates the risk of legal challenge to a local transport authority's franchising proposals that are considered by a panel, since the franchising proposals will have received independent and impartial scrutiny via the consideration of the panel before they are put in place. Without this process, it may be possible that such scrutiny is sought instead via a legal challenge.

Franchising is an important tool for local transport authorities to improve services in their area. However, it is also a significant intervention in the local bus market.

The role of the panel is to provide an additional safeguard to ensure that the local transport authority, in proposing to making a franchising framework, have complied with the relevant procedural requirements contained within these regulations, had regard to guidance issued by the Scottish Ministers on the preparation of the assessment of the proposed framework, have given appropriate weight to the matters prescribed by regulation 12 of these regulations, and have otherwise carefully considered their decision to in make the proposed framework.

This structured approach will ensure that the decision making is more transparent via a process of rigorous assessment and evidence-based analysis.

2. Does the Scottish Government intend to publish guidance on the appointment, operation, and decision-making process of such panels? If so, when can we expect to see a consultation draft?

A. The Scottish Ministers will provide clear guidance for local transport authorities on how the panels will operate. This guidance is currently under development and will be published once the remaining franchising legislation is completed.

The Act and these regulations sets out the matters that the panel must consider when assessing a local authority transport franchising proposals. In addition, these regulations provides that the Traffic Commissioner may give guidance to panels on the exercise of their functions to ensure consistency of approach by different panels.

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<p>3. How will the views of current and potential bus users, bus operator staff and the wider community be represented on such panels?</p>
<p>A. Feedback from bus users and stakeholders to our consultation on the implementation of the Part 3 (bus services) of the Transport (Scotland) Act 2019 was used to inform the development of this instrument. The instrument sets out the eligibility criteria for appointing panel members, which is focused on ensuring members have knowledge or experience relevant to the panel’s functions. This is likely to include industry and passenger representation experience.</p> <p>In addition, the Act and these regulations, sets out the means by which people may make representations in relation to the franchising proposals before the panel approval stage, (and these representations must be provided to the panel) and by which they seek to provide evidence to the panel when making its determination.</p>
<p>4. What safeguards are in place to ensure that any panel appointed by the Traffic Commissioner is truly independent of any commercial parties that may be involved in any bus franchising exercise?</p>
<p>A. To ensure that the panels can carry out their functions effectively, this instrument sets out the eligibility criteria for appointing panel members, which is focused on ensuring members have appropriate knowledge and experience and that any real or perceived conflicts of interest are avoided.</p> <p>Regulation 3 of this instrument precludes the appointment to a panel of any person employed by an operator who in the Traffic Commissioner’s opinion is likely to be affected by the franchising proposal or any other person whose appointment could, in the Traffic Commissioner’s opinion, reasonably give rise to a concern as to whether that person could act impartially as a panel member. While the selection of panel members will be a matter for the Traffic Commissioner alone, these constraints are designed to ensure, among other things, that commercial parties affected by franchising proposals may not sit on panels determining whether those proposals should be approved.</p>
<p>5. What additional measures could be provided in the guidance issued to the Traffic Commissioner to address some of the concerns raised about the Traffic Commissioner’s role?</p>
<p>A. Conferring the panel functions on the Traffic Commissioner was deliberate as the role is an independent regulatory role, which is independent from all parties involved in the franchising process, including Scottish Ministers.</p> <p>The Traffic Commissioner’s general functions are to promote safe, fair, efficient, and reliable passenger and goods transport through licensing and regulation of the commercial vehicle industries.</p> <p>The Traffic Commissioner for Scotland has further devolved responsibilities, which deal with regulatory matters relating to the operation of local bus services.</p> <p>In relation to the franchising approving process, the role of the Traffic Commissioner for Scotland is to simply establish the panel(s) and provide the necessary administration. The eligibility criteria set out in these regulations precludes the appointment of anyone</p>

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employed by an operator or commercial party who in the Commissioner's opinion are likely to be affected by the franchising proposals. The Traffic Commissioner has no direct role in the decision-making section of the process.

6. Does the Scottish Government intend to revisit the legislation giving final approval of franchising schemes to Traffic Commissioner appointed panels? If so, what legislative processes would need to be followed to enact such change and how long might this take?

A. The Scottish Government has no plans to revisit the Transport (Scotland) Act 2019 at this time, nor specifically the measures relating to the establishment and operation of the panels.

Any decision to significantly amend the panel process as set out in the 2019 Act would require primary legislation, and be subject to the relevant parliamentary timescales and processes. The committee will appreciate that the timescales for policy development of this

sort can be significant and it is unlikely that any local transport authority would look to progress their franchise proposals during such a period of legislative uncertainty, which would delay franchising being introduced in Scotland.

7. What assessment has the Scottish Government done on bus franchising models in England and Wales?

A. The current franchising model in operation in England only permits mayoral authorities to progress with a franchise without any form of central approval. Any other authority wishing to progress with a franchise is required to obtain consent from the Secretary of State prior to commencing the franchising process. However, we are also aware that the UKG is intending to amend this model via a new Buses Bill to enable all local transport authorities in England to use the franchising powers without prior approval. This legislation is currently under development, and we are not clear what, if any, alternative safeguards it may include.

Separately, we understand that the Welsh Government is exploring a national franchise, with a requirement for primary and secondary legislation for this work to take effect. A bus bill is expected to be laid in the Senedd (Welsh Assembly) this year to begin the process.

Officials have been engaging with DfT, the Welsh Government and local transport authorities in England to learn about the development of their franchising proposals, and how the schemes which are now in operation are working.

8. Could you set out the implications for the introduction of franchises if the regulations mentioned above are not approved?

A. These regulations are fundamental to the operation of the franchising process, not least in providing certainty to the local transport authority in how their franchising proposals will be considered. If the regulations are not passed, it may be that local transport authorities would be unwilling to invest in the franchising process if they are uncertain of the outcomes, which would delay franchising in Scotland.

Without these regulations, there will be no safeguards on the appointment of panel members to ensure that they are independent of parties affected by the franchising process. In addition, these regulations set out the important procedural and substantive

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requirements for the conduct of panels, as well as administrative certainty as regards to their operation.

The procedural requirements provide clarity and legal certainty on fundamental matters, including the rights of interested parties to seek to make representations to panels, as well as providing key legal safeguards against the appointment to panels of commercial parties who may be involved in any bus franchising exercise or who may otherwise not be able to act impartially in panel decision-making.

Regulation 12 sets out the criteria against which panels must assess local transport authorities' proposals, additional to those already set out in section 13J (5) of the 2019 Act, and in so doing further clarify what is and is not relevant to panel decision-making. From an administrative perspective, the instrument makes provision about the payment of panel members' remuneration and administrative support.

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