

EXPLANATORY MEMORANDUM TO
THE TRANSPORT ACT 2000 (COMMENCEMENT OF QUALITY
CONTRACTS SCHEMES) (ENGLAND) ORDER 2005

2005 No.75

1. This explanatory memorandum has been prepared by the Department for Transport and is laid before Parliament by Command of Her Majesty.

2. **Description**

This Order will reduce the minimum time period between the making and coming into force of a quality contracts scheme for bus services wholly within England from 21 months to 6 months. The existing time period has proved to be a major deterrent to the proposing and making of these schemes.

3. **Matters of special interest to the Joint Committee on Statutory Instruments**

None.

4. **Legislative Background**

4.1 This Order is made under section 127(10) of the Transport Act 2000 ("the Act"). Quality contracts schemes are provided for in sections 124 to 134 of the Act. They are schemes under which the local transport authority (or more than one acting jointly) determines what local bus services should be provided in the area of the scheme and lets contracts by competitive tender for the operation of those services. A local transport authority is (in England) a passenger transport authority for a metropolitan area, or elsewhere a county council or unitary authority. The legislation does not apply to London, where different provisions for bus services are made under the Greater London Authority Act 1999.

4.2 Quality contracts schemes must be approved by the Secretary of State and may only be made if their making is the only practicable way of implementing the policies set out in a local transport authority's bus strategy in the area of the scheme, and is an economic, efficient and effective way of implementing those policies.

4.3 A quality contracts scheme is made, following local consultation and approval (with or without modification) by the Secretary of State, when it is published in its final form. Section 127(2)(b) of the Act provides that at least 21 months must elapse between the date on which the scheme is made and the date on which it comes into force ("the lead-in period"). Section 127(10) of the Act makes provision for the 21 month period to be varied by Order subject to negative resolution.

4.4 This is the first use of the power in section 127(10). There is no restriction on its subsequent use, should the substituted period also prove inappropriate.

5. Extent

This instrument applies to England (excluding London, to which the primary legislation does not apply). In Wales the power under section 127(10) rests with the National Assembly for Wales.

6. European Convention on Human Rights

The Parliamentary Under-Secretary, Charlotte Atkins, has made the following statement:

In my view the provisions of the Transport Act 2000 (Commencement of Quality Contracts Schemes) (England) Order 2005 are compatible with the Convention rights.

7. Policy background

7.1 Part 2 of the Transport Act 2000 made provision for the improvement of local public transport, in particular buses, giving new duties and powers to local transport authorities. It aimed to increase these authorities' influence over the provision of local bus services while reinforcing an approach based, so far as possible, on partnership with bus operators within the deregulated system. For cases where that would not be possible, the power to make quality contracts schemes was included.

7.2 A quality contracts scheme effectively replaces the deregulated system of bus service provision in the area affected with a franchised network on similar lines to that operated in London (though not necessarily over a wide area). The effect of a quality contracts scheme is that an operator cannot provide local bus services in the area of the scheme unless it is doing so under a quality contract with the local transport authority. A scheme could therefore have significant impact on local operators and the 21 month minimum time period set out in the Act was intended to protect them. The period begins when the scheme is made, and ends on the date when the scheme comes into force. The effect of a scheme coming into force is that, apart from any services or classes of service excluded from the scheme, the contractor or contractors have exclusive rights to operate within the area of the scheme from that date until their contracts expire. Contracts have a maximum duration of 5 years.

7.3 In providing for the lead-in period to be varied by Order, Parliament accepted that it might need to be amended in the light of experience. In the event, the length of the period has proved a significant deterrent

to applying for approval of quality contracts schemes. In almost three years since the provisions came into force (on 26 October 2001) no applications have been received and only one local authority has consulted on a proposal (which was subsequently withdrawn). While the difficulties foreseen with a lengthy transitional period are not the only reason for the lack of applications, it appears to have been a significant factor. Although very large schemes could need 21 months or more, small scale schemes could come into force much more rapidly without significantly disrupting the business of operators.

7.4 Hence the Department for Transport consulted on the substitution of a shorter time period proposing various options between 6 and 15 months. Among the 16 bodies which responded, there was little support for any of the intermediate options. (Further information on the consultation responses is in the Regulatory Impact Assessment).

7.5 It should be borne in mind that 6 months is a *minimum* period and the Secretary of State would have the power to modify a proposed scheme, requiring it to allow a longer lead-in period, if in his opinion the 6 month period would be too disruptive of operators' businesses in a particular case. There are other external factors, such as compliance with Community legislation, which could in some circumstances require a longer period than 6 months between making and implementing a scheme.

8. Impact

8.1 A Regulatory Impact Assessment is attached to this memorandum.

8.2 The impact on the public sector is that the Order would remove a significant deterrent to the making of quality contracts schemes by those local transport authorities who consider that the criteria set out in the Act are met. Hence it will increase the likelihood of such schemes being proposed and submitted to the Secretary of State for approval. Bearing in mind the requirement that schemes are economic, efficient and effective, there should be no significant impact on public sector expenditure.

9. Contact

Peter Openshaw at the Department for Transport, Tel: 0207 944 2284 or e-mail: peter.openshaw@dft.gsi.gov.uk can answer any queries regarding the instrument.

REGULATORY IMPACT ASSESSMENT

THE TRANSPORT ACT 2000 (COMMENCEMENT OF QUALITY CONTRACTS SCHEMES) (ENGLAND) ORDER 2005

INTRODUCTION

1. This regulatory impact assessment looks at the risks and benefits (there are no direct compliance costs) of the Transport Act 2000 (Commencement of Quality Contracts Schemes) (England) Order 2005. It takes account of the responses to a consultation exercise carried out between March and May 2004. The Order applies to England (excluding London which is subject to a different regulatory regime for buses). Although the primary legislation also applies in Wales, the order-making powers are devolved. The primary legislation does not apply to Scotland or Northern Ireland.

Objective

2. This Order will reduce the minimum time period between the making and coming into force of a quality contracts scheme for bus services from 21 months to 6 months. The existing time period specified in the Transport Act 2000 has proved to be a major deterrent to the proposing and making of these schemes.

Background

3. The Transport Act 2000 reinforced an approach to the provision of local bus services based on partnership between local transport authorities and bus operators. It introduced various new powers to increase authorities' influence over the provision of local bus services within the deregulated system. It requires each local transport authority to produce a bus strategy, after local consultation with bus operators and other stakeholders, as part of its Local Transport Plan. (These provisions will be disapplied, in respect of English local authorities categorised as "excellent", if the Local Authorities' Plans and Strategies (Disapplication) Order 2005, currently laid before Parliament in draft, is approved, but the Transport Act 2000 powers will continue to be available to those authorities). In pursuit of the bus strategy the authority may make quality partnership schemes with statutory force and multi-operator ticketing schemes.
4. There is also a more far-reaching power to make **quality contracts schemes**. Such a scheme would suspend the deregulated market and allow the authority to determine what bus services operate within the area covered by the scheme. Schemes may cover the whole or any part of the authority's area, and two or more authorities may make schemes jointly. Specified services, or classes of service, within the area can be excluded from a scheme.

5. An authority making a scheme would be obliged to tender competitively for the services covered by the scheme and let one or more contracts for a maximum of 5 years (the scheme itself lasts a maximum of 10 years).
6. Any proposed scheme, following local consultation, must be submitted to and approved by the Secretary of State before it can be made. Once a scheme has been made, and published by the local transport authority, it comes into force on a date that must be no earlier than a specified time after the date on which it is made. The time specified in the Transport Act 2000 is 21 months, and there is a power, in section 127(10) of the Act, to vary it by Order.

Purpose and Intended Effect of the Order

7. The Order substitutes a shorter minimum period ("the lead-in period") of 6 months in respect of schemes wholly within England. The power to make a quality contracts scheme (which came into effect on 26 October 2001) has so far been unexercised: no local transport authority to date has submitted a proposed scheme for approval. One apparent reason for this lack of take-up is that a period as long as 21 months has effectively made the provision unworkable because of the perceived disbenefits of such a long transition.
8. The intended effect of the Order is to strike a better balance between the objectives of the authorities to improve bus services, the needs of operators to reorganise their businesses, and the interests of the users of the bus services affected by the scheme. This shift in balance should increase the likelihood of the provision being used in cases where it is appropriate and in the public interest. It will not in any respect relax the criteria, set out in the primary legislation, against which the appropriateness of schemes is assessed.
9. The Department for Transport consulted in June 2004 on draft (non-statutory) guidance on the quality contracts legislation. The guidance as drafted for consultation covered many of the issues considered below and has been amended to take account of the effect of this Order as well as responses to consultation and other policy developments. It is being issued in its final form concurrently with this Order.

Options

10. The primary legislation provides only for the substitution of another single limit for the 21 month limit, hence the available options are limited. In consultation, alternative limits of 6, 9, 12 or 15 months were proposed. There was no significant support for the intermediate options.
11. The consultation paper also proposed a change to another period specified in the Act that can be varied by Order - a 3 month **maximum** period between making the scheme and inviting tenders. Since this period runs concurrently with the lead-in period it was felt that it might be a useful

complementary measure to reduce it to either one or two months. However there was no support for this change, and it is not being pursued.

Impact

12. The change will have an impact on local transport authorities and bus operators, though it is only a change of procedure and does not affect the criteria for approving schemes; hence the impact is expected to be relatively modest. Besides the direct impact of the change in the minimum lead-in period itself (in cases where a scheme is approved), the change will increase the likelihood that applications for quality contracts schemes will be made (successfully or not) and hence the likelihood of schemes being approved and coming into force.

Risks: reduction of minimum period

13. The 21 month period in the Act was designed to give a generous amount of time for unsuccessful tenderers operating in the area of the scheme to make arrangements to withdraw or redeploy their assets or personnel, or to sell or transfer them to the successful tenderer. It is recognised that a reduction of that period will increase the risk that they would be unable satisfactorily to make these arrangements or, in the case of sale, to achieve the best price.
14. However, not all schemes will involve major business risks. Some will be small scale and in other cases, where the main incumbent local operator wins a contract, there may be little change in the share of the market, as distinct from the regulatory system. In such cases, the length of the lead-in period will not be a significant factor.
15. Although operators would only know if they had won a tender or not *after* the scheme had been made, ie after the lead-in period had already begun, all affected operators would be aware of the *possibility* of losing the right to operate services in that area from the time when the scheme was first consulted on. The consultation requirements are specified in the Act and must be completed before the scheme is submitted to the Secretary of State for approval. Operators would therefore have reasonable time to draw up contingency plans in the event of the scheme being made and their not winning a contract.
16. It is accepted that a period as short as 6 months will not provide a sufficient transition in the case of all quality contracts schemes. In some cases it would not be practicable because of other legal requirements, such as the need to publish proposals in the *Official Journal of the European Communities*. In other cases, the interests of local operators would require a longer adjustment period. However, the period specified in the Act is a **minimum** and there is no provision for varying this other than by substituting another minimum period. There is, however, a power to postpone the implementation of a scheme if this proves necessary.

17. Local authorities will, at all events, need to weigh up the costs and benefits of adopting the minimum 6 month period or a longer one. The Departmental guidance referred to above covers these points in some detail. The Secretary of State has the power to approve schemes with or without modification, and may, if necessary, use that power to require a modification to the lead-in time in cases where he considers that 6 months is too short.

Risks: increased number of applications

18. The reduction in the minimum lead-in time is expected (and intended) to lower one barrier to the development and implementation of Quality Contracts schemes, that barrier being the length of time before any results are apparent and, related to that, the uncertainties surrounding the transitional period. The change is therefore expected to increase the likelihood of applications being made, though it is difficult to estimate their numbers. There are still many other factors which will limit the scope for quality contracts schemes and ensure that any put forward will be considered in detail. The criteria that must be met for a scheme to be approved, the consultation requirements and the role of the Secretary of State, not least in applying the "public interest" test, all afford protection to operators against unnecessary or ill-conceived schemes being made.

Benefits: reduction of minimum period

19. The principal benefit of the shorter minimum period lies in reducing the waiting period before the users of buses receive the improved services resulting from the scheme. Once a scheme has been approved there will be public expectation that it will be implemented reasonably quickly. Although in some cases an extended lead-in period may be unavoidable, in others it will be seen merely as an unnecessary delay.
20. A shorter minimum period will also reduce what in some circumstances may be a difficult transitional period during which existing services are not improved and may be withdrawn or deteriorate as an operator prepares to pull out of an area. Besides the hardship to individual passengers, there is a danger that a relatively short term deterioration in standards can lead to a longer-term loss of patronage (generally in favour of more journeys by car) which can place other pressures on local transport and traffic management. This in turn may adversely affect the environment through the higher emissions that result from increased congestion. A shorter transitional period, even if not entirely preventing these developments, should reduce their scale and impact, and increase the likelihood that they can be swiftly reversed when the tendered services are introduced.

Benefits: increased number of applications

21. Quality contracts schemes can only be justified where the status quo has failed to deliver the local bus strategy (or equivalent policies where an "excellent" authority does not have a bus strategy) and where they offer

the only practicable way of delivering the strategy. They will only be approved where the local authority has demonstrated that such a scheme will do so in the area concerned more effectively than the current deregulated system. Expected benefits may include, for example:

- better integration of local transport services, including interchangeable tickets and passes;
 - better co-ordination of timetables between services;
 - regulating fares to promote social inclusion and modal shift.
22. While the competitive tendering process means that not all operators can be winners, the social benefits of a well-constructed scheme should outweigh the disbenefits to particular operators. The Secretary of State will be the arbiter of whether a proposed scheme, besides complying with the specific statutory criteria, is in the public interest. He will need to take account of representations made during the local consultation or directly to himself when the scheme is submitted for approval.
23. Although, as noted above, the prospect of a quality contracts scheme is seen as a threat by operators, it also provides significant opportunities to those who win contracts. It guarantees them a period of up to five years during which their services will be supported and free from competition. This already happens in London, where there is no shortage of interest from operators in participating. A well-conceived quality contracts scheme may also involve successful tenderers in developing the network and using their accumulated expertise and knowledge of the local market.

Costs

24. The reduction in the minimum period brought about by the Order imposes no direct costs. Increased costs will arise only from the secondary effect that the change will increase uncertainty for operators by increasing the likelihood of quality contracts schemes being made. Operators see this as a risk, though clearly for any individual scheme there will be both winners and losers (and many operators will be entirely unaffected). It is very hard to quantify the cost involved in this increased risk factor, not least because no such schemes have been made (or even submitted for approval) to date and the extent to which the change will encourage schemes being proposed is uncertain.
25. The Confederation of Passenger Transport UK (CPT), in response to the consultation, warned that operators would need to set aside a contingency to cover themselves against the perceived risk, by charging higher fares or tender prices in anticipation of such schemes being approved. They point out that an increased contingency amounting to 0.5% of the total value of business in the metropolitan areas (where they consider quality contracts schemes are most likely to be proposed) would represent an estimated £4.5 million across the industry. However, the 0.5% figure appears to be illustrative only. The actual impact would depend on many unknown variables including the number and size of the schemes submitted, the

contractual arrangements proposed, the extent to which the lead-in period was reduced to the statutory minimum, and, most of all, the number and nature of the schemes actually approved. If the risks are spread sufficiently thinly across the industry they will be no different from the kind of risk affecting any player in a competitive market.

Competition assessment

26. The change effected by this Order does not directly affect competition. The secondary effect of increasing the number of schemes put forward may do so.
27. The making of a quality contracts scheme effectively replaces one form of competition ("on-road") with another ("off-road"). On-road competition arises from the ability of any licensed operator to register and operate services of their choice, including those directly competing with an existing service. Off-road competition takes the form of tendering for a service or network defined (at least in outline) by the local transport authority; once a contract has been let, the contractor has an exclusive right to provide the service until the contract expires (maximum 5 years).
28. The question of whether off-road competition is more or less competitive than on-road will depend on the local market and the terms of the quality contracts scheme and the tendering arrangements. In many areas there is one dominant operator with little effective on-road competition. Experience of franchising in London is that this can be a highly competitive market, though this is not necessarily indicative of what would happen elsewhere.
29. Much depends on how local authorities organise the letting of contracts within a quality contracts scheme. The Departmental guidance advises them to have regard to the maintenance of a healthy competitive market, including in the longer term when contracts come up for renewal, eg by avoiding the concentration of too many services in the hands of a single operator.

Monitoring and review

30. The Department for Transport will take a close interest in the progress of any early quality contracts schemes both before and after they are submitted for approval, besides its involvement in the approval process itself. The lead-in time will be kept under review, as will the general policy.

Consultation

31. The proposal was subject to consultation between March and May 2004. 16 responses were received. Local authority organisations overwhelmingly favoured the shortest practicable period, 6 months. Operators disputed the need for any change. There was no significant support for the intermediate options offered of a lead-in period of 9, 12 or 15 months. Nor

was there support for the secondary proposal described in paragraph 11 above.

Summary and Recommendation

32. Experience since the commencement of the quality contracts provisions suggests that the 21 month period in the Act is a strong disincentive to the use of the power to make schemes. It is clearly unsatisfactory if a power provided by Parliament is effectively unusable. It was on the basis that this should be remedied that the Department consulted. Nothing in the responses received suggests that this perception was incorrect, though operators rightly pointed out that there is no more evidence available as to the practical effect of a long lead-in period than there was at the time of enactment. However, that would remain the case as long as the provision remains unused.
33. Having considered the responses we are of the opinion that there is no one lead-in period which would be appropriate for any scheme that could be made under this provision. However the period specified in the Act is a *minimum* and there is strong support from the local authorities that a 6 month minimum period should be available for circumstances where it is appropriate. The Act does not allow different minimum periods to be specified in different circumstances. However, it does require the Secretary of State to approve schemes, and he may do so with modifications. It would therefore be open to him to approve a particular scheme only if it were modified so as to include a provision that it would not come into force until a longer time period had elapsed. It would be open to operators affected by the scheme to make representations on this point. There are also provisions in the Act for the postponement of a scheme's coming into effect subject to certain conditions being satisfied.
34. Taking all these matters into account, we are satisfied that the variation of the minimum time limit from 21 months to 6 months will not impose an undue burden or risk on operators, given the other checks and balances against inappropriate use of this minimum. Given these checks and balances, we do not think the additional risk represented by this change is as great as the industry's own assessment. Although operators were opposed to any change in the limit, there was no significant support for the intermediate limits proposed. From the bus user's point of view there are clear advantages in bringing an approved scheme as soon as practicable, given that a scheme would not be approved unless it offered significant benefits compared to the existing standard of bus service provision in the area concerned. Hence we have decided to reduce the minimum period to 6 months.
35. If in the light of experience it is found that a 6 month minimum lead-in time is unsatisfactory, it remains open to the Secretary of State to make a further variation Order as there is no restriction on the number of times the power may be exercised.

Declaration

I have read the Regulatory Impact Assessment and I am satisfied that the benefits justify the costs.

Parliamentary Under Secretary of State
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