

## Explanatory note from *pteg* on 'high hurdles for QCs'

### Context

There is some confusion in the debate around bus policy over what is meant by 'franchising', 'quality contracts', 're-regulation', and a London-style system. So it might be helpful to address this before moving onto the specific issue of hurdles to QCs.

There are three options for local transport authorities in the Local Transport Act 2008 for improving bus services.

- **Voluntary partnerships**
- **Statutory Quality Partnerships (SQPs)**
- **Quality Contracts (QCs)**

A further tool, known as a **Qualifying agreement (QAs)**, can also be used in relation to both voluntary and statutory quality partnerships.

A **Voluntary Partnership** describes either a written or unwritten understanding between operators and local transport authorities. It can therefore describe a very wide range of arrangement.

A **Statutory Quality Partnership Agreement (SQP)** allows for a binding agreement to be entered into between a local transport authority and a bus operator. Under a SQP a PTE can provide improved infrastructure (such as bus priority measures) on a corridor and negotiate the arrangements for the use of that infrastructure by bus operators. These agreements can now cover minimum vehicle quality standards, maximum fares, frequencies and timings. Following a slow start SQPs are now becoming more prevalent.

A **Qualifying Agreement** allows a Local Transport Authority to certify that a partnership agreement (to which the LTA is not a party) and has been made between two or more participating operators, passes the Competition Test. As such a Qualifying Agreement protects the parties against potential prosecution by the competition authorities should the Agreement subsequently be found to breach competition law. This has allowed more co-ordination between operators on fares and timetables where they have been introduced.

A **Quality Contract** allows an LTA to franchise routes or networks of services. The Local Transport Authority specifies the bus service it wishes to be provided and the private sector competes to provide the service. In essence a quality contract would allow an LTA to secure local bus service provision in the same manner as London. Franchising is also the system that the Government uses to provide national rail services, and the same system that is used to provide many other public services.



## The hurdles to a Quality Contract

Many local transport authorities (and indeed passengers and their elected representatives) would like the outcomes that a franchising system can bring. A contractualised system that is based on the delivery of concrete outcomes (fares levels and integration, service stability, customer satisfaction, service quality and so on). Yet so far no Quality Contracts have yet been delivered. What is the explanation for this paradox?

The main difficulty is moving from a deregulated environment (nominally a free market, but in reality a market dominated by large multi-nationals operating local monopolies) to a franchised environment.

It's difficult because:

- It's unknown territory, as usually the transition to franchising is from public sector ownership/operation to franchising;
- The incumbent operator has the vehicles, staff, depots and market information, thus giving them a considerable advantage in a franchise contest and also the option of non-corporation before a QC came into force;
- Incumbent operators are naturally reluctant to give up a poorly regulated (and often highly profitable) local monopoly for a franchise which they may not win and where some form of profit capping may well be operated;
- Incumbent operators have deep pockets and some have threatened to frustrate any moves to a Quality Contract through all avenues of legal challenge and through 'scorched earth' tactics like closing depots and withdrawing services;
- Operators make offers of improvements to services as an alternative to QC. These offers may fall short of what a QC would provide (and may not be fully delivered in practice) but come with less risks attached than that of a QC;
- Both the former, and current Government, has been agnostic rather than supportive of any QC first movers;
- When local government funding is being cut there can be a tendency towards caution in pursuing anything perceived as having risks attached.

Overall then there are considerable 'first mover disadvantages' on QCs.

The statutory process for an LTA moving to a Quality Contract is arguably less of a hurdle than the above factors. This is not to say that the process couldn't be further reformed to lower the statutory hurdle. However by and large the process in the Local Transport Act 2008 is a workable and appropriate process.



The process for an LTA moving to a Quality Contract is as follows:

An LTA has to satisfy itself that a QC proposal will satisfy the following public interest tests;

- (i) have a positive impact on the use of bus services
- (ii) will be of benefit to users of bus services by improving quality
- (iii) will contribute to the implementation of the local transport policies
- (iv) achieve all the above in an economic, efficient and effective manner, and;
- (v) that the adverse effects of a QCS on operators is proportionate to the improvement in wellbeing of persons living or working in the QCS area.

A Quality Contract Scheme Board (made up of a Traffic Commissioner and two members drawn from a panel with relevant expertise) has to be consulted and give an opinion on whether or not the proposal meets the public interest tests

The LTA is free (once the QCS board has given its opinion) to make the scheme.

The route for an appeal is via the Transport Tribunal rather than direct to the Courts.

If the QCS Board opinion was that the proposal did meet the public interest tests then the right of appeal is restricted to points of law only.

The advantages of this process are:

- It is the decision of the LTA whether or not to go ahead with a QC
- The process is compliant with European Law and Domestic Law and also routes appeals to Tribunals on matters of law rather than to the Courts. It also seeks to restrict appeals to process rather than reconsideration of the arguments
- An LTA does not have to exhaust all other options before going ahead with a QC. It does not have to be the last resort.
- The SoS does not make the decision – the LTA does

The areas where the legislation could be improved would be on transition issues (to a first QC, and between a first and subsequent QCs, and possibly on a further easing of the public interest tests.

Although these changes would be desirable they would require primary legislation which in turn risks reopening far wider debates about the use of Local Transport Act 2008 tools (and consequent blight of their use). There would also be a time penalty while the legislative changes were made.



In our view it is not legislative change to the existing QC legislation that is the top priority but a more supportive approach from Government to get some initial Quality Contracts 'over the line'. This would allow an assessment of the merits of QCs and also make it easier for other LTAs to follow the trail that the pioneers had established.

#### The 're-regulation' option

If any Government wanted to 're-regulate' the buses ie take some form of national initiative to ensure that buses were operated on a franchised basis then arguably the best way of doing so would be to introduce new legislation that would give the Secretary of State permissive powers to designate 'deregulation exemption zones'. Within those zones the local transport authority would be compelled to trigger an amended QC process. In this way bus services would be re-regulated but with the detail implemented locally. National Government would have the choice over how fast and how extensively it wished to 're-regulate' overall. It would seem unlikely that the present Government would adopt such a policy however.

David Brown / Jonathan Bray

26 March 2012