

2001 No. 2748 (S. 14)

TRANSPORT, SCOTLAND

**The Transport (Scotland) Act 2001 (Conditions attached to
PSV Operator's Licence and Competition Test for Exercise
of Bus Functions) Order 2001**

Made *24th July 2001*

Coming into force *25th July 2001*

Whereas a draft of this Order has been laid before and approved by a resolution of each House of Parliament in accordance with section 115 of, and paragraphs 1, 2 and 3 of Schedule 7 to, the Scotland Act 1998(a);

Now, therefore, the Secretary of State in exercise of the powers conferred upon her by sections 104, 112(1) and 113 of that Act and of all other powers enabling her in that behalf hereby makes the following Order:

Citation and commencement

1. This Order may be cited as the Transport (Scotland) Act 2001 (Conditions attached to PSV Operator's Licence and Competition Test for Exercise of Bus Functions) Order 2001 and shall come into force on the day after the day on which it is made.

Interpretation

2.—(1) In this Order—

“the 2001 Act” means the Transport (Scotland) Act 2001(b);

“the Director” means the Director General of Fair Trading(c);

“the Regulator” means the Rail Regulator appointed under section 1(1)(a) of the Railways Act 1993(d);

“relevant function” means any function to which section 37 of the 2001 Act applies; and

(2) Words and expressions used in this Order have, unless the contrary intention appears, the same meaning as in the 2001 Act.

Conditions attached to PSV Operator's Licence

3.—(1) Section 26(1) of the Transport Act 1985(e) (conditions attached to PSV operator's licence) is amended as follows.

(2) In paragraph (b), after “2000” insert “or section 8(4) or section 22(1)(b) of the Transport (Scotland) Act 2001”.

(a) 1998 c.46.

(b) 2001 asp 2.

(c) The Director General of Fair Trading is appointed by the Secretary of State under section 1(1) of the Fair Trading Act 1973 (c.41).

(d) 1993 c.43.

(e) 1985 c.67; section 26(1) was amended for England and Wales by paragraph 10 of Schedule 11 to the Transport Act 2000 (c.38).

- (3) In paragraph (ba) for the words “that Act” substitute “the Transport Act 2000”.
- (4) After paragraph (ba) insert “; or
 - (bb) the operator has failed to comply with section 32(1) or 34(3) of the Transport (Scotland) Act 2001;”.

Application to Director for decision

4.—(1) An application may be made to the Director for the Director to decide whether the exercise or proposed exercise of a relevant function meets the competition test.

- (2) An application may be made under this article by—
 - (a) the authority or authorities by whom the relevant function has been exercised or is proposed to be exercised; or
 - (b) any operator of local services who is, or is likely to be, affected by the exercise of the relevant function.

5.—(1) If an application is made under article 4 by the authority or authorities by whom a relevant function has been exercised or is proposed to be exercised, it or they must inform any operators of local services who, in the opinion of the authority or authorities, are or are likely to be affected by the exercise of the function that the application has been made.

(2) If an application is made under article 4 by an operator of local services, that operator must inform the authority or authorities by whom the relevant function has been exercised or is proposed to be exercised that the application has been made.

(3) The Director must arrange for an application made under article 4 to be published in such a way as the Director thinks most suitable for bringing it to the attention of those likely to be affected by it, unless the Director is satisfied that it will be sufficient for the Director to seek information from one or more particular persons.

(4) The Director may at any time decide not to consider, or further consider, an application made under article 4 if—

- (a) the Director is of the opinion that the Director has not been provided with sufficient information to do so by the person or persons by whom the application was made; or
- (b) article 5(1) or (2) has not been complied with.

(5) In determining an application made under article 4, the Director must take into account any representations made to the Director about the application.

Investigation by Director

6. If at any time the Director considers that the exercise or proposed exercise of a relevant function may not meet the competition test, the Director may conduct an investigation.

7.—(1) For the purposes of an investigation under article 6 the Director may require any person—

- (a) to produce to the Director or to a person appointed by the Director, at a specified time and place, any specified document; or
- (b) to provide the Director or such a person, at such a time and place, with any specified information,

which the Director considers relate to any matter relevant to the investigation.

(2) The power conferred by paragraph (1) above is to be exercised by a notice in writing indicating the subject matter and purpose of the investigation; and in this article “specified” means—

- (a) specified, or described, in the notice, or
- (b) falling within a category which is specified, or described, in the notice.

(3) Information required to be provided under paragraph (1) above shall be provided in the specified manner and form.

(4) The power conferred by paragraph (1) above to require a person to produce a document includes power—

- (a) to require that person to provide an explanation of the document; or

- (b) if the document is not produced, to require that person to state, to the best of that person's knowledge and belief, where it is.

(5) In this article "information" includes estimates and forecasts.

8.—(1) If a person, without reasonable excuse, refuses or fails to comply with a notice under article 7, the Director may apply to the Court of Session for an order requiring the person to comply with the direction within a time specified in the order.

(2) An order under paragraph (1) above may provide for all of the costs of, or incidental to, the application to be borne by that person.

9.—(1) A person shall not be required under article 7 to produce or disclose a privileged communication.

(2) In paragraph (1) "privileged communication" means—

- (a) communications between a professional legal adviser and a client of that adviser; or
- (b) communications made in connection with or in contemplation of legal proceedings and for the purposes of those proceedings,

being communications which would in legal proceedings be protected from disclosure by virtue of any rule of law relating to the confidentiality of communications.

10. Before the Director, as the result of an investigation under article 6, makes a decision that the exercise or proposed exercise of a relevant function does not meet the competition test, the Director must—

- (a) give written notice to the person or persons likely to be affected by the proposed decision, and
- (b) give that person or those persons an opportunity to make representations.

Decisions

11. When the Director makes a decision—

- (a) on an application under article 4, or
- (b) after an investigation under article 6,

the Director must publish that decision, together with the reasons for making it.

12. If the Director has determined an application under article 4 by making a decision that the exercise or proposed exercise of a relevant function meets the competition test, the Director is to take no further action under this Order with respect to it unless—

- (a) the Director has reasonable grounds for believing that there has been a material change of circumstances since the decision was made; or
- (b) the Director has a reasonable suspicion that the information on which the decision was based was incomplete, false or misleading in a material particular.

Enforcement of decisions

13.—(1) If the Director has made a decision that the exercise or proposed exercise of a relevant function does not meet the competition test, the Director may give to the authority or authorities by which it was or was to be exercised such directions as the Director considers appropriate.

(2) A direction under paragraph (1) above may (in particular)—

- (a) in the case of a proposal to exercise a relevant function, include provision prohibiting the exercise of the function in the manner proposed;
- (b) in the case of the exercise of the function of making or varying a quality partnership scheme or a ticketing scheme, include provision requiring the variation or revocation of the scheme;
- (c) in the case of the exercise of the function of inviting tenders under section 89(2) or 91(3) of the Transport Act 1985, include provision requiring the variation or withdrawal of the invitation; and
- (d) in the case of the exercise of the function of accepting or not accepting a tender under section 89 or 91 of that Act, include provision requiring the variation or termination of any agreement entered into by accepting the tender or requiring the acceptance of any tender.

(3) A direction under paragraph (1) above must be given in writing.

(4) If an authority fails, without reasonable excuse, to comply with a direction under paragraph (1) above, the Director may apply to the Court of Session for an order requiring the authority to comply with the direction within a time specified in the order.

(5) An order under paragraph (4) above may provide for all of the costs of, or incidental to, the application for the order to be borne by the authority.

Information

14.—(1) No information which—

(a) has been obtained by the Director in connection with the Director's functions under this Order; and

(b) relates to the affairs of any individual or to any particular business, is to be disclosed during the lifetime of that individual or while that business continues to be carried on, unless the condition mentioned in paragraph (2) below is satisfied.

(2) The condition is that consent to the disclosure has been obtained from—

(a) the person from whom the information was obtained; and

(b) if different, the individual to whose affairs the information relates or the person for the time being carrying on the business to which the information relates.

(3) Paragraph (1) does not apply to a disclosure of information—

(a) made for the purpose of facilitating the performance of any function of the Director or the traffic commissioner or the Regulator;

(b) made for the purpose of facilitating the performance of any function of the European Commission in respect of Community law about competition;

(c) made for the purpose of criminal proceedings in any part of the United Kingdom or in connection with the investigation of a criminal offence triable in any part of the United Kingdom; or

(d) made in compliance with the order of a court or tribunal.

(4) If information is disclosed to the public in circumstances in which the disclosure does not contravene paragraph (1) above, that paragraph does not prevent its further disclosure by any person.

(5) A person who contravenes this article is guilty of an offence and liable on summary conviction to a fine not exceeding level 5 on the standard scale.

15.—(1) If information is provided by a person to the Director in connection with the Director's functions under this Order, the person is guilty of an offence if—

(a) the information is false or misleading in a material particular; and

(b) the person knows that it is or is reckless as to whether it is.

(2) If a person—

(a) provides any information to another person, knowing the information to be false or misleading in a material particular; or

(b) recklessly provides to another person any information which is false or misleading in a material particular,

knowing that the information is to be used for the purpose of providing information to the Director in connection with the Director's functions under this Order, the person is guilty of an offence.

(3) A person guilty of an offence under this article is liable on summary conviction to a fine not exceeding level 5 on the standard scale.

Defamation

16. For the purposes of the law relating to defamation, absolute privilege attaches to any decision made or notice given by the Director in the exercise of any of the Director's functions under this Order.

Fees

17.—(1) The Director may charge fees in connection with the exercise by the Director of any of the Director's functions under this Order.

(2) Different fees may be charged in connection with different functions and in different circumstances.

(3) An application under article 4 is not to be regarded as duly made unless any appropriate fee is paid.

Scotland Office,
Edinburgh
24th July 2001

HELEN LIDDELL
Secretary of State for Scotland

EXPLANATORY NOTE

(This note is not part of the Order)

This Order makes provision consequential on the Transport (Scotland) Act 2001 (“the 2001 Act”).

Article 3 amends section 26(1) of the Transport Act 1985 to provide additional grounds on which the traffic commissioner may attach conditions to a public service vehicle operator’s licence. These additional grounds are: (1) where an operator has operated a local service in contravention of a written undertaking given to the traffic commissioner in terms of a quality partnership scheme (section 8(4) of the 2001 Act); (2) where an operator has provided a local service during a period when a quality contract scheme is in place and that service is not part of that scheme (section 22(1)(b) of the 2001 Act); (3) where an operator has failed to make and implement the arrangements required by a ticketing scheme (section 32(1) of the 2001 Act) and (4) where an operator has failed to provide an authority or authorities with information required by them (section 34(3) of the 2001 Act).

Articles 4 to 18 provide that the Director General of Fair Trading (“the Director”) will exercise the competition test provided for in section 37 of the 2001 Act. Section 37 applies to the functions of making and varying quality partnership schemes, making and varying ticketing schemes and inviting and accepting tenders for subsidised services. Articles 4 and 5 provide that an authority or operator may apply to the Director either before or after the exercise of the function for a decision on whether it will meet or has met the competition test. Articles 6 to 11 provide for the Director to investigate on the Director’s own initiative. For the purpose of an investigation the Director is given powers to obtain information and documents subject to provisions as to confidentiality. Any decision made on such an application or following such investigation must be published with reasons. Article 12 provides that if the Director has already decided that a function meets the competition test that no further action is to be taken unless there are reasonable grounds for believing that there has been a material change of circumstances or that the information on which the decision was based was incomplete, false or misleading. Article 13 provides that the Director may enforce the decisions by giving directions to the authorities or authorities. Article 14 provides that, subject to certain exceptions, information obtained by the Director shall not be disclosed during the lifetime of the individual (where it relates to the affairs of any individual) or while the particular business continues to be carried on. This article also provides that a contravention of this provision is an offence, punishable with a fine up to level 5 on the standard scale (currently £5,000). Article 15 makes it an offence, punishable with a fine up to level 5 on the standard scale to give the Director false or misleading information. Article 16 provides that, for the purposes of the law relating to defamation, the Director has absolute privilege in the exercise of the Director’s functions under this order. Article 17 provides for the Director to charge fees in connection with the Director’s functions under this Order.

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