SPT Regional Bus Strategy: A consultation on the recommended options for improving our future bus network

Response for [redacted]

Question 11 (a) – Explain why you support or oppose SPT's recommendation to rule out business as usual

SPT recommendation rating: Strongly oppose

1 Response

1.1 We oppose the recommendation to rule out business as usual for a number of practical reasons.

1.2 In short, business as usual will be a necessary comparator for other options, in particular because a number of necessary investments, in particular in respect of bus priority, need to be made urgently, whatever the model uses for delivering bus services.

1.3 Without continuing to consider what the current baseline will continue to look like, it will be difficult to assess the benefits that different models drive (and for what marginal cost), and also to understand what benefits are actually driven by the different delivery models, and which benefits would be driven by other investment which is neutral as to service delivery option.

1.4 In particular, to the extent that the options considered take into account the benefits of investment in infrastructure such as bus priority, it is important that consideration is given to the extent that those benefits would be driven by that same investment in the context of business as usual, given that these are benefits that could be delivered far sooner than the timelines proposed for franchising, if the public sector was willing and able to deliver, at much lower risk overall to the public sector.

2 Introduction

2.1 Business as usual represents the current state of the bus market. The Case for Change that formed part of the consultation documents sets out a high level review of the current bus network and services, commenting on the network across the whole of Strathclyde on a generic basis, highlighting the current issues that SPT have identified:

(a) Markets not being served at all or served poorly;

(b) Limited competition in terms of services and fares; and

(c) Increasing network delay and congestion impacting on attractiveness of the network.

2.2 This leads to three core policy areas being considered by the case for change:

(a) **Level of service:** including hours of operation, service frequencies and connectivity;

(b) **Affordability:** including structure, legibility and integration of fares

(c) **Service quality:** including interchanges and bus stops, information, ticketing, vehicle and driver standards and service reliability and punctuality.

2.3 However, the analysis that follows shows that these issues (and therefore the solutions that may be required) are not consistent across all areas of Strathclyde, showing the variability in accessibility, hours of operation, service frequencies and other matters that varies dependent upon the bus operators providing commercial services in the area, and ultimately, whether SPT as a commissioning body is willing to fund services that cannot be provided commercially. This goes to the root of the issue with the business as usual scenario. As commercial bus operators, we believe we are already doing much to try and manage the issues that SPT have identified. For example:

(a) We continue to invest in our routes e.g. our [redacted] that connects [redacted] in [redacted] with [redacted], was the first bus route in Scotland to have Euro VI emission buses. In spite of being a rural small [redacted], the service is a frequent 4 buses per hour in each direction. We believe that in terms of buses per head of population, [redacted] compare very well with anywhere in the UK, even more densely populated areas.

(b) We provide the network commercially with a low percentage of revenue coming from routes supported by SPT. We cross subsidise routes that would otherwise not operate in order to give areas a cohesive network of services, helping contribute to the high level of accessibility that can be seen in the areas we operate in.

(c) We have invested to keep fares low, although this has become increasingly difficult with the continued pressure on costs in the bus industry.

(d) We have been at the forefront of delivering better ticketing. We implemented contactless payments across our fleet, we have a full commercial smart card system for season tickets, and we have the UK's leading mobile ticketing application. It is worth noting that we participate in two interoperable ticketing schemes:

(i) 'Tripper' - a bus only smart & mobile multi operator scheme within Strathclyde. We drove the formation of this scheme.

(ii) Zonecard - the multi modal season ticketing platform which is about to relaunch in Smart card format. We have also successfully trialled the implementation of fares capping.

(e) We have sought to implement more customer friendly information provision, including: display of sequential departure times at busy bus stops, alongside individual timetables, to ensure customers know which buses are departing next at stops served by multiple bus routes; and use of e-ink timetables providing live information, up-to-date timetables and other useful, and up-to-date passenger information, as well as accessibility features to assist the visually impaired at stops. Whilst both of these features benefit passengers, and should therefore help patronage to bus, SPT have often been unwilling to co-operate with the roll-out of these features.

2.4 This highlights that, in the areas in which we operate, business as usual sets a good baseline for building partnerships, and many of the elements which SPT want to achieve in the core policy areas are ones which we have helped drive forward, and could drive forward further with greater partnership working from SPT.

2.5 However, we agree that more progress can be made, and that this needs partnership between industry parties. The Case for Change and Appraisal both rightly highlight issues such as bus priority and integration and cost of ticketing.

2.6 We agree that investment in bus priority compared to the current position needs greater focus. The impact of congestion on service consistency and stability, and also the cost of operating those services is key. Bus priority enables bus operations to be more efficient and more attractive to passengers, both lowering cost of provision and increasing revenue opportunities. As the Case for Change and Appraisal make clear, the levels of investment in priority has been limited. For example, in the areas that [redacted] operate, [redacted] has absolutely zero bus priority and [redacted], has only one stretch which is 20 metres long. [redacted] also doesn't have a bus station.

2.7 These are significant factors in terms of operators running a quality and consistently reliable bus network. They also fall outside the control of [redacted] and other operators. KPMG reported[1] in 2017 that the majority of factors affecting bus footfall and cost escalation are outside the control of the bus operator. They are also matters which impact on all of the options considered by the consultation, as without these bus priority measures being implemented, any means of providing bus services will have increased costs due to the inefficiencies introduced by congestion. Increases in costs in turn will impact on the cost of ticketing and/or the need for subsidy support.

2.8 We have seen the impact of this with recent investment. [redacted] in Strathclyde operate a very high percentage of zero emission vehicles. The business is in the top three in the UK and exceeds all London bus companies for percentage of zero emission vehicles in the fleet. The fleet average age is below 4 years when the Scottish average is between 7 and 8 years. This has required heavy investment by [redacted] at our own cost, but that reflected a commitment from SPT and Transport Scotland to deliver bus priority as part of the £500m Bus Partnership Fund. The suspension of the Bus Partnership Fund by Transport Scotland, and therefore the non-delivery of the expected bus priority is a risk that, in the current environment, [redacted] are currently bearing. Therefore, one of the key areas that the Case for Change and Appraisal rightly recognises as needing to be fixed, is wholly within the control of local government, and is not being fixed. Increasing the cost of the status quo through not fixing this then impacts many of the other issues identified, as it makes bus services less profitable, and leads to the need to increase fares or cut services. This lack of certainty then impacts the ability of operators to make a business case for future improvements (and should similarly impact any party taking risk on service provision). It also reduces the competitiveness of the market, as the poor operating environment, and consequent high cost base means that there is less stable operation, low returns and limited incentives or capacity to compete.

2.9 Similar concerns apply in respect of ticketing arrangements. As we have noted above, [redacted] have invested heavily in ticketing technology, and tried to continue to maintain affordable pricing. We also participate in multi-operator ticketing, recognising the benefits, but these arrangements need public sector support to implement, in particular where like ZoneCard they cover modes of transport other than bus, and they also require consistent investment in technology. However, technology is not a solution to ensuring that ticketing is low cost and attractive, as this requires such ticketing to cover the cost of operation. This makes bus priority and therefore efficiency of operation key to achieving this aim – which again means that public investment in that priority will be key. For example, as noted above, we have trialled fares capping and the technology has been shown to work, but to be able to launch this for customers we need the benefit of the efficiencies that improved bus priority would provide. Changing the

[1] Trends in Scottish bus patronage, KPMG Report to the Confederation of Passenger Transport (Scotland), November 2017

model of implementation to franchising will not materially affect the underlying costs and risks of operation, it will just transfer that risk to the public sector – therefore the priority should be fixing the underlying issues which will affect delivery of bus services under all models, rather than seeking to change the model first, as this will simply delay delivering benefits to passengers.

2.10 For these reasons we think it is key that SPT continues to understand what the baseline of business as usual will be. The variability of service provision across Strathclyde means that the benefits of different models are likely to differ, depending upon current provision, and the ability to make interventions that improve Business as Usual will uplift the benefits from all options. Furthermore, if it is not possible to make the investments in infrastructure that will improve current service provision, and lower operating costs, then the high levels of subsidy considered necessary to deliver other options will increase further, as costs increase further and efficiency decreases.

Question 11 (b) – Explain why you support or oppose SPT's recommendation to rule out voluntary partnerships

SPT recommendation rating: Strongly oppose

1 Response

1.1 [redacted] oppose the ruling out of the use of voluntary partnerships, as they form part of the toolkit of delivery structures available to transport authorities and operators to deliver improvements in bus services. By ruling out their use, SPT is effectively closing its mind to delivery structures that may allow it to deliver improvements to bus services sooner than franchising.

1.2 This reflects a general concern that we have that SPT through its appraisal is ignoring how it can deliver benefits to passengers now in return for the promise of potential benefits in 7 – 10 years' time, but those future services improvements are not certain, but instead dependent upon funding which is not secured.

2 Issue: Description of voluntary partnerships

2.1 [redacted] would expect any evaluation of what can be achieved through voluntary partnerships to consider the range of potential partnerships that can be entered into between bus operators, local transport authorities and other stakeholders, including the ability for those arrangements to be agreed either at a regional level [redacted]) or at a far more local level, depending upon what is appropriate and what can be agreed between the relevant parties.

2.2 Paragraph 2.3.4 of the Appraisal states that "*There are no formal obligations on parties to deliver bus service improvements, infrastructure or service standards, and it is dependent on the will of the individual parties involved to commit to deliver changes that are incentivised by changes made by others.*"

2.3 This is not the case – the point of such a partnership is for parties to commit to deliver appropriate investment and support in order to maximise the benefits of bus improvements for all parties. This may well include express commitments by the parties, which can, of course, be contractually binding. The voluntary nature of a voluntary partnership is that there is no pre-existing obligation on operators, transport authorities or others to enter into the agreement, not that it cannot then impose obligations upon them, where those obligations are required to provide the benefits of the partnership.

2.4 This is a benefit of voluntary partnerships: they can reflect the local operating conditions and capacity of operators and authorities to deliver.

2.5 The Appraisal refers to a "competition review" or "competition check" being carried out (see paragraphs 2.3.2 and 2.3.3), but the reference to what this competition review is (in paragraph 2.3.2) is incorrect as it is to a paragraph 6.3.1 that does not exist.

2.6 On further review, we determined that this cross reference was copied from the SPT & [redacted] Options Assessment Study from 28 January 2022[2], where paragraph 6.3.1 in turn referenced the Scottish Government competition guidance from July 2010. The reference in paragraph 6.3.1 to *"Because the agreement is made in the context of an open and competitive market for bus services, it must be demonstrably delivering wider Government bus improvement objectives in order to be permissible"* is, we think, therefore referencing the position set out in section 2 of that Guidance that for voluntary agreements, whilst in Scotland there is not an express statutory test for voluntary partnership agreements, unlike in England and Wales, where the test in Part 2 of Schedule 10 Transport Act 2000 would apply, the expectation is that a consistent approach would be taken in Scotland to satisfying the test in section 9(1) Competition Act 1998, hence the reference to *"bus improvement objectives"*. In Scotland those bus improvement objectives are set out in section 37 Transport (Scotland) Act 2001, and include:

> "*(a) securing improvements in the quality of vehicles or facilities used for or in connection with the provision of local services;*
>
> *(b) securing other improvements in local services of substantial benefit to users of local services; and*
>
> *(c) reducing or limiting traffic congestion, noise or air pollution.*"

2.7 These are, of course, precisely the things that SPT (and operators) might be looking to achieve through partnership arrangements and therefore are not a bar to implementation of voluntary partnerships, but instead act as a protection for operators and authorities to give comfort that the negotiation of such arrangements will be legally compliant, notwithstanding wider competition law constraints. Indeed, as other improvements in local services need to provide substantial benefits to users, this encourages parties to implement partnership arrangements that will deliver benefits, as minor improvements would not have the same protection.

[2] bus-scoping-study-final-report-january-2022.pdf (spt.co.uk)

2.8 Paragraph 2.3.7 of the Appraisal states that operators had expressed a desire to establish a more ambitious and transformational voluntary partnership. In paragraph 2.3.8 it is noted that "*ultimately [the above would] be subject to a discussion between all parties and the commitments required from all sides to deliver on the agreed outcomes.*", which acknowledges that SPT have not yet actually explored whether these benefits could be delivered. This is correct, as whilst there is a significant offer from key bus operators in the [redacted] area[3], there has not yet been formal response or engagement to this offer, which requires engagement from the public sector. Partnership obviously requires all partners to come to the table to deliver, and therefore sadly, if public sector partners will not engage, it will be difficult for operators to commit to invest to deliver the required outcomes. This is clearly disappointing, given the potential for this to materially de-risk delivery for the public sector, through experienced bus operators taking many of the commercial risks in delivering material passenger benefits.

2.9 The table at Figure 2 summarising the overall responsibilities for voluntary partnerships then fails to consider responsibility for bus priority measures, notwithstanding that the operator offer at paragraph 2.3.7 makes clear that this could then drive service enhancements. Figure 2 similarly does not consider how responsibility would be allocated for other elements of the operator proposal set out at paragraph 2.3.7. We think that this is because this is the same diagram included at paragraph 6.3.7 of the SPT & [redacted] 28 January 2022[4], but in that case it set out the role and responsibilities of the current voluntary partnership in [redacted], not the position more widely on voluntary partnerships. The summary set out at Figure 2 is therefore purely what SPT have previously achieved with voluntary partnerships, rather than looking to see what can be achieved with them, notwithstanding an existing offer from operators. Before discounting use of voluntary partnerships SPT should therefore consider what has been achieved with them elsewhere, rather than confining itself to what it has achieved.

2.10 This is particularly concerning as the Appraisal notes that there is an existing offer from operators, which could be explored to start delivering benefits either directly through a voluntary partnership or through a BSIP or a combination of the two, but which has expressly not been considered in making a decision not to proceed with partnership, nor does it appear that such an offer has been taken up by SPT. SPT are therefore effectively closing their mind to the options already available, not properly considering the options.

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[3] [redacted]

[4] bus-scoping-study-final-report-january-2022.pdf (spt.co.uk)

2.11 One of the key points proposed in the partnership proposal mentioned is operators investing in service improvements with the savings from implementation of bus priority measures.

2.12 The slowing of journey times is a key issue with the commercial viability of the bus network, which will affect all options. Partnership should provide an opportunity to draw on the shared interests of commercial operators and local transport authorities to improve journey times and therefore make the bus experience more attractive. If such measures are not introduced now then journey times will continue their current lengthening, making the situation worse, and all options poorer. It is clear from the commentary that the issue with delivering improved priorities through partnership is not operator commitment, but public sector commitment.

2.13 For example, [redacted] invested in zero emission buses in Strathclyde under what we had understood were partnership commitments supporting the Bus Partnership Fund, on the understanding that this would then be supported by bus priority improvements funded through the Bus Partnership Fund.

2.14 The Bus Partnership Fund was then suspended meaning that the public do not get the full benefit of that investment, as the public sector has failed to deliver their part of the bargain. Under a binding voluntary partnership, public sector parties could have been placed under commitments to deliver these arrangements providing more confidence for bus operators to invest in advance of full delivery of infrastructure. If the public sector is unwilling to commit to bind themselves to such commitments where private operators are retaining many of the key risks around service improvements and whether they deliver the level of uplifted revenue expected, then the Appraisal fails to make the case as to why such benefits would be delivered more effectively under franchising, and in particular the opportunities that are being lost now.

2.15 The Appraisal also treats voluntary partnerships as a wholly separate option to use of BSIPs whereas this is not the case. Contractually binding commitments between operators and local transport authorities can be supportive of commitments under statutory partnerships, and this can be seen in BSIPs across England, where use has been made of qualifying agreements (between operators) and voluntary partnership agreements (between operators and authorities) to support BSIP commitments. By treating these options as wholly separate SPT has effectively closed its mind to a range of delivery options that could provide benefits to passengers. Voluntary partnerships have also previously been used effectively in Strathclyde to deliver benefits, and therefore it is disappointing to see the delivery method discounted, in particular as it provides a complementary route to the BSIP to deliver benefits, where, for example, some operators are unwilling to accept obligations within a BSIP, which could have the sanction of loss of registration of services, but may be willing to accept contractual enforcement.

Question 11 (c) – Explain why you support or oppose SPT's recommendation to take forward local services franchising

SPT recommendation rating: Strongly oppose

1 Response

1.1 [redacted] oppose the proposal to take forward local services franchising at this stage, without the range of options being properly considered.

1.2 This is not because [redacted] are opposed to the concept of bus service franchising. It is because the proposed approach to, and understanding of how to deliver, franchising set out in the Appraisal and consultation document fails to properly consider how to implement a bus franchising structure that would deliver long term benefits to passengers, and which would not unfairly adversely affect bus operators who currently deliver services in the market, and whose support would be required to effectively transition to franchising.

1.3 If introduced, the Appraisal also acknowledges that there would be a need for substantial public funding, the source of which has not been identified. Any assessment of franchising should therefore start from a perspective of identifying fundable and deliverable routes to improving bus services and compare those options fairly. As the Appraisal does not currently do that, we cannot support a recommendation to take forward local services franchising on that basis.

1.4 This section considers the following issues arising with the proposal to take forward franchising:

(a) Financial assessment for franchising is flawed;

(b) Risks / flaws in current legislative framework that are not reflected in SPT current assessment;

(c) Risks with franchising (market transition);

(d) Types of Contract under a Franchising Delivery Model;

(e) There would be a disproportionate impact of franchising on [redacted] and

(f) Exclude areas of operation by [redacted]

2 Financial assessment for franchising is flawed

2.1 Affordability and financial assessment

(a) As paragraphs 6.1.24 (in respect of Feasibility) and 6.2.18 of the Appraisal (in respect of Affordability) both state: "*Given the challenging current situation regarding public sector finances, and specifically support for local bus initiatives, it is uncertain that funding will be maintained at current levels in real terms*." Paragraph 6.1.24 goes on to say: "*Thus, the feasibility of using franchising to deliver the desired improvements is also uncertain*", and paragraph 6.2.18 notes: "*Thus, the affordability of delivering on franchise commitments is also uncertain, and the level of risk transferred to the public sector will require securing a contingency to allow for fluctuations in the market place (e.g. unforeseen reductions in passenger volumes)*".

(b) The Appraisal therefore clearly recognises that the current funding provided to the bus sector does not make a franchised solution that delivers the proposed benefits either feasible or affordable within current funding. This is reflected to a lesser extent across other options, with a similar recognition that the proposed position on BSIPs is not affordable within current budgets, but with the figures described as "relatively modest".

(c) Table 41 in the Appraisal sets out the comparative revenue and costs modelled for each Option. Whilst the detail provided is insufficient to understand precisely how SYSTRA and SPT have modelled the different options, it is noticeable that an additional annual subsidy requirement of £58 million is required for franchising (which differs from the £55m figure used in paragraph 6.2.21 above Table 41). Even within those figures compared to BSIP there is a lower assumed profit margin (3.9% compared to 4.3%), and a £15m higher level of undefined non-farebox income (£156m compared to £141m). Without the detail behind this table it is not possible to understand the reasonableness of the modelling. However, what is clear is that there is not a fair comparison between the options – franchising appears to be "better" because more funding has been provided in order to provide a more comprehensive network. The comparison also appears to exclude the £15m cost to develop and procure the franchise model (as set out in paragraph 6.2.20) and the £300m capital investment fund that is proposed.

(d) The financial model therefore appears to suffer from two fundamental problems:

(i) It is not fairly comparing different models – by making additional investment "available" for franchising, the model not unsurprisingly finds that franchising delivers more benefits; and

(ii) If the significant funding required is not made available then the modelled options are also not actually available, making comparison pointless.

(e) It is worth considering in this context the scale of this additional budget compared to SPT's current funding. SPT's revenue budget in 2023/24[5] was £36,975,923, of which bus operations was £18,927,856. The proposal from the Appraisal therefore is for SPT to obtain c. £50m more bus funding on a sustained basis in order to fund bus franchising, more than the entire existing revenue budget. Similarly, the capital grant received from Scottish Government was annually c. £15m, but has now been cut to under £13m, which would be dwarfed by the requirement for £300m of capital funding.

(f) Given the limited budget available, and the clear statements to this effect set out in the Appraisal, it seems clear that the wrong approach to modelling has been taken. Given the constraints described above, to properly appraise available options, SYSTRA and SPT should have sought to consider what can be delivered within available budgets, and/or fairly compared what could be delivered through a range of different options with differing budgets.

(g) Without such a fair comparison between options, all that the current appraisal clearly shows is that providing more subsidy into bus services should provide better services, with the text making clear that to switch to franchising a large capital investment would be required.

2.2 Treatment of NCTS

(a) [redacted] note that at paragraph 6.2.21 of the Appraisal it is also stated that there would be a need for SPT to retain £21m of NCTS revenue in order for this option to reflect the modelling. As payments are made under NCTS for each eligible journey on an eligible service made by an eligible person, and the definition of eligible service should be wide enough to catch franchised services (as they will run regularly and be available to the general public)[6] then we assume that this means that there will be a drop in NCTS revenue as a result of a reduction in the adult fare from the proposed fare assumptions. If this is the reason for the reduction, then we would query the reason for assuming that

[5] a5-budget-book-2023-24.pdf (spt.co.uk)

[6] Paragraph 5(2) National Bus Travel Concession Scheme for Older and Disabled Persons (Eligible Persons and Eligible Services) (Scotland) Order 2006

this could be retained under the franchising model and not under other routes – the current NCTS arrangements make it difficult for operators to discount their adult fares for exactly this reason – assuming that SPT would be able to retain this revenue in these circumstances seems an unreasonable assumption. NCTS operates on the basis of a consistent reimbursement rate for all operators, in order to seek to achieve a no better no worse objective – we see no reason that different treatment should be given to SPT as a franchising authority to existing operators in the market. This would potentially raise subsidy issues and require modification to NCTS by Scottish Government. If the approach to NCTS was changed this would obviously also allow operators under a BSIP to reduce adult fares on a similar basis without the risk of loss of NCTS funding, and therefore those benefits would apply across multiple options. Given that if this assumption is not correct there would be a further £21m impact on the validity of the franchising option, we would expect SPT to confirm that this assumption is correct before proceeding to consider this option in more detail, or alternatively ensure that the alternative scenario of this funding not being available is also modelled and that the assumption is applied equally across all options fairly.

2.3 Changing balance of risk and reward

(a) Figure 21 includes a set of high level graphs which raise further questions as to the assumptions made to support franchising:

(i) The graph in respect of Bus Service Improvement Plan sets out an arrested decline until 2030, with stabilisation then leading to a slow recovery of services. No explanation is given as to why the arrested decline is expected to continue until 2030, with no stabilisation before that date, given the BSIP is introduced from 2023 onwards.

(ii) The graph in respect of franchising only shows a steeper continued decline until 2030 when franchising appears to start to be introduced, with an immediate reversal of that decline on a far steeper basis than the recovery for BSIP. No explanation is given as to why a straight line recovery of patronage can be expected even though franchising is shown as being introduced over that period. This seems unrealistic with the gradient of recovery suggesting a sudden and total reversal in patronage decline overnight, but with no accompanying explanation of why this is possible.

(iii) The graph in respect of combining BSIP with franchising shows the same decline during the period of the BSIP up until 2030, with a steeper increase in patronage when franchising is introduced than the equivalent position for BSIP. The graph initially appears to be even steeper than for the franchising only option. No explanation is given here as to why it is expected that operators would make the same BSIP commitments (or agree to commitments that provided that same arrest in decline in patronage in this scenario as in a BSIP only scenario). This seems highly unrealistic to us, as this implies that operators would agree the same BSIP commitments both where they were expecting to gain the benefit of a reverse in patronage decline (and therefore a potential return on investment that they had made) and where at the end of an initial seven year period they could potentially lose their business, with the key benefits of the BSIP being realised by SPT and not the operator.

(b) This final option is described on page 189 of the Appraisal. It is unclear which of the two franchising options has been considered in other modelling, but in either case any stemming of long term decline in bus patronage between now and 2030 appears to be dependent upon BSIP, and not franchising. The graphs show clearly that there will be a significant adverse impact on patronage up to 2030 unless a BSIP is implemented. Whilst paragraph 9.3.3 of the Appraisal concludes that the benefit of franchising is a "significant transfer of risk to the public sector" but with the benefits accruing rather than in the form of operating surplus through the form of economic growth, enhanced mobility, alleviation of deprivation and contributions to environmental stability, then necessarily it should also take into account the fact that the higher patronage in the BSIP scenario must mean that many of those benefits are better provided by BSIP than franchising up to 2030 and beyond, especially given the lack of explanation as to why the "hybrid option" of a BSIP[7] followed by franchising is likely to occur, given the limited incentives for operators to agree to such a BSIP when it is known that franchising will then be introduced.

(c) The final graph in Figure 21 is equally concerning as to what it represents. The graph purports to show a direct straight line relationship between the level of benefits, and the level of risk, time and funding. It shows each of the four options considered sat on this line, with no explanation as to how the two axes relate, and why the options are all placed equally on that line. The graph has no explanation in the text, and does not reflect any position set out in the text, in particular, as it is clear from the graphs directly

[7] Paragraph 9.3.4 of the Appraisal.

above, and the remainder of the Appraisal that BSIP could be implemented quickly, whilst delivering many more benefits than voluntary partnership or business as usual, with limited risk for the public sector and modest cost, whilst franchising will only deliver benefits much later, with those benefits being significantly worse if BSIP cannot be delivered in the interim.

(d) For this position in the Appraisal to in any way be realistic, it therefore needs to be clear that the approach to franchising is one that the full range of operators across Strathclyde will be comfortable with, so that they are incentivised to agree BSIP proposals with SPT in the interim. Without such an approach to franchising there is no justification for why an interim BSIP would be implemented on the basis shown, and therefore the benefits of franchising will come later, and not provide greater patronage than BSIP until the mid-2030s on the basis of Figure 21, whilst placing considerable risk on the public sector.

2.4 Unclear whether transition costs and risks taken into account in assessing implementation of franchising

(a) Whilst the Appraisal notes the high costs associated with the implementation of franchising, there is limited mention of the actual risks and costs associated with implementing franchising, and therefore there remains a risk that the high costs estimated for franchising are actually an under-estimate and/or franchising will not deliver all expected benefits immediately due to a more protracted transition. For example, whilst we think that the costings in Table 41 are intended to take into account the introduction of more affordable fares it is not clear that costings take into account other aspects of introducing a consistent franchising regime, for example re-painting of buses to common liveries, provision of common uniforms for staff. It is also not clear that the cost or risk associated with the transition has been considered, e.g. cost of interim service contracts if incumbent operators de-register services before franchise services commence, costs associated with transition from operator ticketing to common "franchise" ticketing, managing disbenefits to passengers as networks transition (potentially reducing value in their current tickets or requiring them to incur costs on multi-operator ticketing during transition). Managing this transition smoothly will be essential to providing the benefits assumed for franchising, but it is unclear that the risks of failure have been factored in, nor the costs of mitigating such risks.

2.5 Deliverability and Risk Assessment

(a) An initial deliverability and risk assessment is set out in Table 42 of the Appraisal, and a further risk matrix set out in Table 43, with Figure 20 then setting out a summary of financial risk. These tables use red and green colouring to provide a simple view of key risks between different options, and therefore provide a clear visual tool for decision makers to understand allocation of risk across different options. This is, however, dependent upon the assessment being accurate and presented in a consistent fashion. Unfortunately, this does not appear to be the case with these tables, which contain a number of inaccuracies or misrepresentations of risk allocation, which skew the representation of risk in favour of franchising.

2.6 Table 42: deliverability risk

(a) Under assessment for deliverability and acceptability risks, Option 1 (BAU), Option 2 (VP), Option 3 (BSIP) all have low deliverability risk, with only one risk assessed as medium risk (being the funding risk for BSIP). In contrast, Franchising, which is assessed as an overall medium risk for deliverability has two medium sub-risks (complexity of deliver and consent risk) and two high sub-risks (stakeholder acceptability and funding risks), with the only low risks being engineering feasibility and public acceptability risk. It is unclear, other than on a simple averaging basis, why this gives an overall deliverability risk of medium, given the high risk of franchising not being funded, or acceptable to stakeholders, both of which seem fundamental risks to overall deliverability.

2.7 Table 42: Affordability

(a) **Capex:** the capex figures for Option 2 (Voluntary Partnership), Option 3 (BSIP) and Option 4 (Franchising) are all set at £10m<£50m. This seems inconsistent with other parts of the Appraisal which suggest a £300m initial capital cost for franchising.

(b) **Opex per annum:** whilst the costs for all other options are specified as a range the operating costs for Option 4 (Franchising) are specified solely as a minimum figure, with no upper range (>£50m) meaning that the figures are not comparable in the table.

(c) **Timescale: program risk:** the risk of slippage in timescales is not RAG rated. If it was this would highlight that Option 4 (Franchising) was high risk, whilst other options (other than municipals) were much lower risk.

2.8 Table 42: Overall

(a) As a result of the above, Table 42 does not make as clear, visually, how high risk introduction of franchising is, as many cells which should be shaded red, have been left unshaded, failing to clearly highlight the level of deliverability and affordability risk.

2.9 Table 43: BSIPs

(a) **BSIPs are voluntary schemes which operators would have the right to withdraw from (page 165).** This is an incorrect description of BSIPs, as the Appraisal describes elsewhere once BSIPs are implemented operators cannot simply withdraw, so once they are committed the BSIP does provide an enforceable mechanism (other than as a result of operator withdrawal from the market). This row is therefore incorrect.

(b) **Promoting integrated ticketing as an additional option undermines convenience by adding complexity, it also often incurs a premium charge.** The BSIP legislation specifically allows for specification of multi-operator ticket pricing[8] and price capping for journeys[9], so provided that funding is available (which is a problem across all options), and the competition test is satisfied, then this assessment of risk under a BSIP is incorrect.

(c) **Ticketing incentives (especially involving single fares) carry the risk of undermining revenue from concessionary reimbursement rates:** whilst this is not clearly explained anywhere in the Appraisal, we assume this to mean that as NCTS rates are driven by the fares that would be charged in the absence of such scheme, there is a risk that lowering of fares will also lead to a reduction in Scottish Government funding for concessionary fares which will further reduce revenue. If this is the case, then this would be a common risk for franchising, or any other approach which discounted fares. Whilst this is recognised in paragraph 6.2.21 in respect of franchising, it is not recognised in Table 43 as a risk for franchising, effectively meaning that the assessments of different options are not comparable with risks being identified solely for BSIP even though they apply equally to franchising).

2.10 Table 43: Franchising

(a) The first risk identified is that "SPT would assume the commercial risks associated with running local bus services in [redacted], including the same need to balance

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[8] Section 3C(3)(b) Transport (Scotland) Act 2001 (as amended)

[9] Section 3C(3)(d) Transport (Scotland) Act 2001 (as amended)

the books; pre-COIVD profitability has all-but evaporated due to depressed demand and higher costs”. This is shown as both having a high probability and high impact, so is clearly a material concern with progressing franchising. The mitigation proposed is, however, unrealistic. This is stated as "Assemble a competent franchise authority team (likely comprising former staff from legacy operators whose functions transfer from operators to authority with franchising) to take decisions like a business would in a commercial context, and involve operators in a continuous feedback/improvement process." This proposed mitigation does not take into account the fact that functions relating to operation of bus services will only be able to transfer practically to SPT once franchised services have commenced, and therefore the proposed staff (assuming that SPT were able to attract them, rather than seeing staff remain with bus operators or move to commercial bus operation elsewhere) would not be in a position to transfer until after the initial wave of franchising had been implemented. This risk is therefore likely to be greater than the (already identified as red) position in Table 43. We note that the eleventh risk in this table highlights exactly this risk that not all management functions will transfer, and that maximising talent is difficult given the size and nature of the industry.

(a) The third risk identified *"long lead-in times (and high costs) associated with tendering and mobilisation processes"* is identified as "green" for probability and "amber" for impact. The mitigation measure for this is "studying and adopting best practice" from other regions that have franchised, to maximise efficiency and effectiveness. The two regions identified are London and Manchester, being the two franchised areas of the UK. However, of these, only one, Manchester, has recently moved to franchising, and this was progressed under different legislation and had different market dynamics before franchising, so an assumption that SPT can simply rely upon reflecting best practice from a limited set of markets is, at best, naïve. Further the implications of section 13Q Transport (Scotland) Act 2001 mean that material delay in implementation of franchise agreements following making of a scheme could lead to the franchising framework being terminated (please see Section 3 below, *Risks / flaws in current legislative framework that are not reflected in SPT current assessment*). This means that any issues with the tendering process for a framework could lead to the framework being terminated. This materially impacts the franchising process, as long lead times could lead to non-implementation, suggesting that the current risk assessment is overly optimistic (and this specific risk does not appear to have been considered at all).

(b) The fourth risk identified, is that the process of developing franchise proposals, undertaking statutory procedures and then transitioning creates considerable uncertainty for existing operators who may scale back investments. Again this is identified as "green" for probability and "amber" for impact, notwithstanding that Figure 21 of the Appraisal (for example) identifies the material risks of operators scaling back investment during this period leading to more significant decline in patronage. We note that the mitigations referred to regarding offering stability during the planning and transition period, including how assurances can be given on matters such as asset transfer to support continued investment. It is welcomed if the intent is to ensure that, if SPT implement franchising, that process is developed to mitigate risk so that incumbent operators are not prejudiced, but this is not apparent from the remainder of the Appraisal. As a failure to achieve this would mean that the risk was considerably higher than that currently identified, if SPT were to proceed to assess franchising, we would expect this specific recommendation to be taken forward to ensure that there was sufficient certainty and confidence given to incumbent operators on how the impact on their businesses would be mitigated and future investment supported, but also that the costs of this support were appropriately taken into account in comparing franchising against other options such as BSIP.

(c) The fifth risk identified notes that the use of an independent panel has only been tested in practice once (where the equivalent provisions under the English Transport Act 2000 quality contract legislation led to referral to an equivalent traffic commissioner panel). The risk notifies that in this instance there was a rejection by the panel of that process. It is further noted that the Scottish legislation is different from even that example, so SPT would be progressing a wholly new process (and one which guidance has yet to be published on). Please see response to Question 19, at Section 6, *Statutory guidance and regulations for the franchising process have not been issued*. It is also noted that if the panel does not approve the franchising framework, then SPT would have to restart the process (presumably taking into account the grounds for rejection) Notwithstanding all these factors both probability and impact have been stated as green, implying that this is a low risk (even though the only previous experience is that this is a material risk), and will have low impact (even though if there is a rejection the impact will be to require SPT to restart the process if they want to), so will therefore, at best, materially delay introduction of franchising, but could simply mean that it is unworkable. We note that in England the failure of the QC process ultimately led to the Bus Services Act 2017 in England, which removed the traffic commissioner panel from the process, and which is the basis upon which Manchester has progressed franchising, and other authorities are expected to do so.

(d) The sixth risk identified is that currently there is only one precedent in the UK of introducing franchising in a deregulated environment, and that this is still a work in progress. This again has not been treated as a material risk, notwithstanding that the Scottish legislation creates additional challenges over the English legislation, and nonetheless TfGM faced legal challenge from two operators in the market. The ranking of both the probability and impact of this risk as "green" is clearly wrong and under-estimates the risk associated with what would be a novel scheme for Scotland.

(e) The seventh risk identified is that "changing the model of ownership/operation will not immediately address challenges such as congestion, priority, recruitment, and concessionary reimbursement". This is rightly identified as both a "red" probability and "red" impact. However, the mitigation measures proposed are inadequate. Firstly, it is assumed, without evidence, that SPT control will incentivise authorities to prioritise local spending, ignoring that other factors (including availability of funding, and impacts on other road users) affect decisions on spending on bus priority and congestion – if SPT are relying upon franchising to deliver improved priority compared to the current environment and a BSIP, then they would presumably need to have binding commitments from their authorities in this regard to support any case for franchising. Similarly it is noted that SPT could lobby Scottish Government to unlock BPF funding. This is obviously something that is already available to SPT, but the current impact on the market has been withdrawal of the current limited BPF funding – it is clear from the Appraisal that there will be a need for more funding from Scottish government for franchising to proceed.

(f) The ninth risk around whether contractual mechanisms will allow penalisation of operators for poor performance that arises from matters outside their control, is a strategic choice that SPT would need to make. We would note that if they chose to leave operators with this risk, competent bidders would be expected to risk price for this, increasing the cost of franchising, or leaving those risks sat with the public sector. Whilst the mitigation (spending more money on infrastructure) is appropriate, this should apply across all options (as the transport issues are the same whether the bus model is franchising or BSIP), and there is a clear benefit in providing these processes through BSIP where SPT would not also be trying to manage the significant transition risks identified at the same time as resolve commercial bus operation risks.

(g) The tenth risk, that the public sector does not traditionally have the same appetite for risk or commercial experimentation as the private sector identifies that there is a risk of network ossification as a result of franchising. The proposed solution of "rapid prototyping" whilst a potential way of leveraging private sector knowledge suffers from the fact that this would require operators to retain staff to provide this input, and there would need to be some form of incentive mechanism built into the contracts, to incentivise this kind of support, which will in turn have a cost. This clearly needs more thought from SPT, and may be a materially higher risk than currently appraised.

(h) The twelfth risk of the potential risks of transition in franchising and the impact that this may have is a significant risk that could lead to poorer performance following introduction of franchising, even if SPT's long term aspirations are later met. The mitigation itself theoretically may be sensible in that it suggests a transition period for franchising where incumbent operators carry on their operation as normal, albeit we would suggest that a longer period than 4-5 years would be more effective. However, we also note that at section 2.5 of the Appraisal concerns are raised as to whether direct award is available for such an approach. We think that exploring such opportunities are key to SPT having an approach to franchising which can be implemented under the Act, but note that until a clear legal route to achieve this transition structure is identified, this highlights that the actual risks with introducing franchising are currently higher than assessed.

(i) Overall, therefore, Table 43 appears to repeatedly underestimate the risks associated with implementation of franchising, and therefore a decision based upon the risk assessment set out in Table 43 would be fundamentally flawed. The table needs to be revised to properly reflect the actual risks associated with the options, and then shared with consultees again, to allow informed comment on your proposals.

3 Risks / flaws in current legislative framework that are not reflected in SPT current assessment

3.1 Under sections 13A – 13T of the 2001 Act, a local transport authority may create and operate local bus services under a franchising model. The model involves putting in place an overarching franchising framework for the area, and then entering into franchise agreements with bus operators in respect of the provision of local bus services. There is, therefore, broadly two stages to the franchising process to be undertaken by a local transport authority:

(a) Putting forward a proposed franchising framework (which will contain detail of the services to be provided) and obtaining approval from the Traffic Commissioner; and, thereafter,

(b) Entering into franchise agreements with bus operators for delivery of the services under the framework.

3.2 Focus is often placed on the first stage of the process, concerning the assessment of the suitability and viability of the proposed franchising framework. However, the second stage of the process gives rise to significant concerns concerning the ability of SPT to implement, in practice, a franchising framework in the way that is compliant with the statute and consistent with the approach outlined in the Appraisal.

3.3 Once approval of the Traffic Commissioner panel has been granted for a franchising framework, the local transport authority has a period of 6 months to make the franchising framework (Section 13K (2)). This period may be postponed by a maximum period of 12 months (Section 13M (2)). The Scottish Ministers may issue regulations with provisions regarding postponements, including provision reducing or extending the maximum period of postponement (Section 13M (5)). These regulations have not yet been issued.

3.4 Thereafter, the local transport authority has a period of 12 months in which to enter into all franchise agreements necessary to implement the franchising framework. Section 13Q (1) provides that a franchising framework will *"<u>cease to have effect</u>"* 12 months after the framework was made unless: (a) the local transport authority has entered into *"a franchise agreement in respect of each local service included in the framework"*; or (b) a variation has been approved by the Traffic Commissioner panel.

3.5 Looking at these provisions in turn:

(a) ***Enter into a franchise agreement in respect of each local service included in the framework***

(i) In terms of Section 13Q (1) of the 2001 Act, <u>all</u> franchising agreements must be entered into within 12 months of the framework being made. Failing which, and unless a variation is approved (see below), the whole franchising framework will cease to have effect.

(ii) The operation of this provision is confirmed in the Explanatory Notes to the 2019 Act, which state (at paragraph 228): *"Section 13Q (1) acts as a long-stop provision to prevent franchising frameworks being made and left* *unimplemented for more than 12 months by providing for them to cease to have effect at that point. This also provides a means of extinguishing frameworks (short of formal revocation) where it transpires that franchise agreements cannot be entered into in respect of* *__all__* *the services in the framework (for whatever reason)"* (emphasis added).

(iii) Whilst the Scottish Ministers may issue regulations to amend this timescale by providing a different time period (Section 13Q (4)), once again, these regulations have not yet been issued.

(b) ***Variation to be approved by the Traffic Commissioner panel***

(i) Where a local transport authority has failed to enter into a franchise agreement in respect of each local service included in the framework, to proceed with the framework the local transport authority must make an application to the Traffic Commissioner within the period of 12 months (above) for approval to vary the framework (Section 13Q (1)).

(ii) The 2001 Act does not prescribe the form of variation (e.g. timescale or scope of the framework). In any event, it cannot be presumed that a variation would be granted so as to spare the framework from falling and ceasing to have effect at the end of the 12 month period.

(iii) Further, the assessment and approval of the franchising framework would have been made on the basis of assumptions regarding when services would be implemented under franchising and the scope of those services. A variation may be sufficiently material to require a new assessment to be carried out (Section 13N). That new assessment would need to be made within the original 12 month period, and the steps of auditing and consultation etc. would also require to be completed within that period before the new application could be made. At best, this would lead to further cost and delay being incurred. At worst, the whole framework could fall.

(iv) Critically, a local transport authority cannot predicate the framework on the basis that it will obtain a variation to extend the timescale for implementation or amend the scope. Therefore, the proposal must be capable of implementation (in full) within 12 months of the framework being made.

3.6 The 12 month timescale would present a significant logistical challenge to SPT and give rise to a number of issues. In summary, and without limitation:

(i) The process for entering into franchise agreements would be governed by procurement laws (EU and Scots law). Individual tender processes would need to be run for the franchising of bus services in all geographical areas covered by the framework. However, due to the short timescales in the 2001 Act (above), it is anticipated that the tender processes would need to be run concurrently.

(ii) As a consequence of all tender processes being run concurrently, there would not be an opportunity for learnings and best practice to be applied to the next tender process. In this context, it should also be noted that there is no precedent for franchising of bus services under the 2001 Act in Scotland.

(iii) To conclude the tender processes within the timescale, there would require to be sufficient staffing levels within SPT with procurement expertise – which it is understood is not available at present.

(iv) There would be an overhaul of all bus services within the area covered by the franchising framework. All services would be tendered and the franchising of services commenced at the same time. There would be no "soft launch" of the process, with a period for adjustment and refinement.

(v) Entering into franchising agreements within this timescale would not allow franchising to be implemented as outlined in the Appraisal. For example, at 6.1.27 it is stated: *"Experience with similar (but not identical) processes in England points to a development and governance process taking a number of years to fulfil the statutory requirements set out in the 2019 Act, followed by the final specification of the franchise requirements and a procurement exercise which itself will take some time to plan and complete before the franchised network takes effect"*. This approach is not consistent with the statutory requirement that all franchising agreements be entered into within a 12 month period. Indeed, no area in England which has franchised delivery of its bus service has entered into all franchise agreements within a 12 month period – no area had intended to do so. It cannot be presumed that a similar approach to franchising can be followed in Scotland due to the terms of the legislation (which differs in some material aspects to the legislation in England). By way of example:

(A) In Manchester, the scheme was made on 30 March 2021, and the earliest date for a contract to be entered into was 30 April 2022. However, the drafting assumed that it would take 3 years to enter into all of the franchising agreements[10].

(B) The West Yorkshire scheme was made on 27 March 2024, and the earliest date for a contract to be entered into is 28 June 2026[11]; and

(C) Liverpool's scheme was made on 6 October 2023, and the earliest date that contracts could be entered into was 7 April 2024. However, to date, no contracts have been entered into[12].

(vi) Aside from these practical issues, it must also be noted that there is a risk of legal challenges to be procurement process being raised. Such challenges could prevent all franchising agreements being entered into within the period allowed by the 2001 Act (including any extension).

(vii) Therefore, there are considerable practical issues concerning the implementation of a franchising framework within the 12 month period for entering into franchising agreements with operators. This must be addressed in any plans for the franchising of bus services. As outlined above, this timescale does not appear to have been taken into consideration in the Appraisal.

4 Risks with franchising

4.1 The current appraisal is light touch on the details of how a franchising framework would work in key respects. Whilst it is understood that the detailed design of such a scheme would occur at the stage that SPT developed an assessment, the value of the Appraisal to decision making is significantly diminished where it is unclear that the model proposed is based upon what stakeholders would support SPT in implementing, and whether the proposals are actually capable of implementation within the legal framework. We have a number of concerns in this respect, as set out below.

[10] democracy.greatermanchester-ca.gov.uk/documents/g4469/Public reports pack 30th-Mar-2021 Bus Reform Documents.pdf?T=10

[11] the-west-yorkshire-bus-franchising-scheme-march-2024.pdf (westyorks-ca.gov.uk)

[12] Appendix 2 - Liverpool City Region Bus Franchising Scheme.pdf (moderngov.co.uk)

4.2 As raised elsewhere in this response, a proposal which appears to be materially based on significant additional funding being provided by Scottish Government, where there is no commitment to such funding being provided (but recent experience of a lower amount of bus funding being withdrawn by government before it was spent) is high risk. Any approach to appraising delivery of bus reform options should assess those options by reference to affordable levels of funding, and if the available funding levels are not known, then the assessment should consider a range of funding options, and understand how the different delivery options deliver within that context, so that decision making is based upon what is actually deliverable with available funding and/or SPT has a robust case to make for funding, and knows that it cannot proceed without a level of funding being provided.

4.3 Little thought appears to have been given to the practical ability to transition from the current situation or BSIP to franchising, in particular there is very limited consideration of how the whole market will be transitioned in a way which does not create significant issues for drivers and other employees (in terms of whether TUPE provisions under the Transport (Scotland) Act 2019 (Consequential Provisions and Modifications) Order 2023 will apply to transfer them effectively to new employers), for passengers (for example by ensuring that the approach to ticketing works throughout transition, and that there is clarity as services transfer into franchising), for incumbent operators (in terms of whether they will be able to continue to viably run non-franchised services during any transition period), and also for operators who run cross-boundary into the franchised areas, and how they will continue to run services.

4.4 Each of the franchising schemes that has been progressed in England has included significant consideration as to how this transitional process will be managed, including making use of exceptions from the scheme, and use of service permits to allow continued operation of some services (for example cross-boundary services and services which were exempted from the scheme to aid transition), combined with clear plans for acquisition of depots, and approaches to vehicles to mitigate the impacts on operators, as well as proposals for how issues such as ticketing will be managed during transition. The proposition in the Appraisal is not as clear as this, and indeed some of the mitigations of risk set out in the Appraisal suggest a different approach to franchising (for example transitional franchises) than elsewhere in the Appraisal. It is important that any proposed assessment of franchising is clear as to what is being assessed, and may practically speaking need to compare alternative franchising frameworks to determine which best meets SPT's objectives.

4.5 In considering different options, given the reliance placed on use of BSIP as an interim measure, consideration must be given by SPT to the impact on existing operators of the proposed franchising framework. A franchising framework which does not appropriately mitigate the adverse impacts on existing operators from introduction of franchising will discourage any investment during the period of assessment, consultation and traffic commissioner panel, as well as during the actual transition period, and therefore is not only unlikely to deliver the slowing of patronage decline assumed by the Appraisal (which assumes the use of an interim BSIP, but could lead to further patronage decline and/or material additional cost for SPT, as there will be less incentive on existing operators to retain services which currently form part of the commercial network but which are less profitable, if there is only a limited period of time remaining before those services are transitioned to franchising. At the moment the Appraisal fails to consider in any detail:

(a) How franchising will be rolled out across Strathclyde by SPT, or even whether it is appropriate for the whole of Strathclyde;

(b) Whether all local services within Strathclyde will be made subject to franchising, or whether there will be exceptions. For example, in all English authorities that have come to a decision on franchising so far, their schemes exclude closed schools' services (i.e. ones which general members of the public do not travel upon). It is not clear from the Appraisal how SPT intends to treat such services, but decisions to exclude such services will affect the impact of franchising on operators who typically run such services, and therefore becomes important in considering the overall impact of the franchising framework.

(c) How SPT will deal with the impact of franchising on services which cross the boundary of the franchised area, and therefore will not wholly be caught by any proposed franchising framework. Our understanding is that these services will either need to be exempt from the franchising framework or will no longer be able to operate. This could therefore impact a wide range of services, ranging from longer distance bus services which operate as local services, through to short distance services that operate.

(d) How SPT will transition from the current commercial ticketing arrangements that are in place to the proposed single, simplified ticketing arrangements, and how they will ensure that this does not prejudice existing passengers who may not need tickets with a scope beyond their existing single operator tickets for most, if not all, journeys that they make by bus. How SPT will ensure in doing that that there is not greater complexity and/or cost for passengers either during the transition period or following that period (i.e. that simplified ticketing does not increase cost for some passengers, or if it does that this impact is recognised).

(e) The approach that SPT intends to take to existing fleet and depots, in order to manage its delivery risk of franchised services, and also ensure that the proposed franchise framework does not leave existing operators with material stranded assets following introduction of franchising.

4.6 The Appraisal also makes various comments about how a franchising model *could* work, but does not commit to what model would be used. Clearly the contractual model used, including how risk is allocated, and how services are defined (e.g. whether contracts are route- or depot-based) will have an impact on what can be effectively incentivised through the contract, what needs to be incentivised through the contract itself, and the extent to which different operators (including incumbents, and in particular SMEs) will be able to tender for those contracts. This in turn will impact the effect that the contract structure has on the existing market, and the range of bidders that SPT may attract, including the extent to which those are operators already in the Strathclyde and Scottish market.

4.7 The contract model will also impact the effect that franchising has on employees. Whilst the legislation includes provision for employees to transfer under TUPE even where there is transition from commercial services to new contracted services (where TUPE would not usually apply), this will only be the case if the model for franchising actually ensures that the services that drivers and other staff are allocated to transfer to a single operator under the procurement structure. If this is not the case, then even with the special TUPE regime introduced by the Transport (Scotland) Act 2019 (Consequential Provisions and Modifications) Order 2023 there is a risk that TUPE will not expressly apply to all staff, with the risk of redundancies or imposition of worse terms and conditions by incoming franchised operators. The lack of detail or consistency in the proposed approach to franchising in the Appraisal means that it is unclear how this would apply. This is a particular concern given the potential adverse impact this could have on both existing staff and operators, if SPT's detailed approach does not ensure a clean transfer of employment for existing staff.

4.8 As a result of the above, we have material concerns that whilst the Appraisal ostensibly considers how franchising would be introduced into Strathclyde, it does not fully engage with how this would legally and practicably be introduced. This means that at this stage we have material concerns as to how any decisions can be made whether to proceed with a detailed assessment of franchising, as SPT have not done the work to understand what precisely they would be progressing, and therefore the assumed benefits are not based upon a realistic understanding of what could be delivered. To make a decision as to whether to proceed to an assessment we would expect SPT to have understood what franchising might look like, and whether it is practicably deliverable under the legislation currently in place. As this differs from the legislation in England, simply relying upon the position in Greater Manchester as an example of how franchising could be introduced is not appropriate, as a number of the legislative elements that are relied upon by Greater Manchester (for example service permits) are not available under the Scottish legislation.

5 Types of Contract under a Franchising Delivery Model

5.1 Sections 2.5.7 to 2.5.17 of the Appraisal consider the procurement model for delivery of franchising. Paragraph 2.5.10 states that "*There has been a general presumption towards PSCs being let through a process of competitive tendering*", but then goes on to discuss the use of direct award models, concluding that the use of direct award has limited scope for use in the current legal frameworks, due to limited grounds upon which it could be used, other than to award to a public sector operator. [redacted] would note two key points on this:

(a) Firstly, as noted at paragraph 2.5.11 of the Appraisal, there are examples from other countries where direct award of contracts to private-sector providers has been used, in particular to enable an effective transition between different models of service provision. To the extent that this was legally possible, [redacted] are of the view that this would mitigate a number of the key risks identified in respect of transition to franchising, as it would allow for an effective "in-contract" transition of key risks from current private sector delivery, mitigating risk on the introduction of franchising for both SPT and operators. We would welcome the opportunity to discuss this approach further, if SPT believe that they can, and wish to, progress it.

(b) Secondly, however, the analysis carried out in section 2.5 (which pointedly notes that it is not legal advice on the options) is not legally correct in the context of how franchise agreements would be procured. Section 12(2) of SI 1369 states that "*This Part does not apply to the award of a public service contract for public passenger transport services by bus or tram except where such a contract takes the form of a service concession contract.*" A "service concession contract" is defined in section 12(4) of SI 1369 as "*a contract in writing for the supply, for pecuniary interest, of public passenger transport services to a competent authority where: a) at least part of the consideration for that supply is a right for the supplier to exploit the services; and b) under the contract the public service operator is exposed to a real operating risk."* Whilst the remainder of the Appraisal suggests that operators will be exposed to the cost of operation, it also suggests that revenue risk will be retained by SPT, and therefore the contracts will not be service concession contracts (they will, in procurement terms, be service contracts). Paragraph 2.5.13 to 2.5.16 of the Appraisal have therefore misinterpreted what this means. It means that the form of contract proposed would not be subject to the direct award routes under SI 1369 at all, as the provisions on procurement under SI 1369 will not apply. Instead, procurement would be under the Utilities Contracts (Scotland) Regulations 2016 (SI 2016/49) (**UCSR**). The UCSR apply to activities relating to the provision or operation of networks providing a service to the public in the field of transport by [bus][13], which will apply to a franchised network as the service will be provided under operating conditions laid down by SPT[14]. The ability to direct award would in most cases therefore be governed by section 48 UCSR, not SI 1369, and award to a municipal operator owned by SPT governed by the exclusion in section 28 UCSR. This analysis overall as set out in the Appraisal is incorrect, and potentially misleading for consultees. We would also note that whilst award to an internal (municipal) operator may be compliant from a procurement perspective with the UCSR, there will also be a need to ensure that any investment in a municipal operator which is competing in the bus market, including having contracts awarded to it on a non-competitive basis which would otherwise be awarded competitively, comply with the subsidy control principles set out in the Subsidy Control Act 2022. This is referenced at paragraph 4.3.27 of the Appraisal (which refers to state aid rule compliance), but not considered elsewhere in the Appraisal. See comments the comments in response to Question 11 (e) below regarding the approach taken to Municipals in the Appraisal more generally.

5.2 If a service concession was direct awarded to a commercial operator then outside of the emergency measures under regulation 16 of SI 1369 (which are unlikely to apply) we agree that the only grounds for direct award of bus services is under the "de minimis" exception in regulation 15 of SI 1369, which is limited to a concession value of £875,000 per annum (for operators over 23 vehicles) This is unfortunate, as the ability to let such contracts to existing operators would allow for an effective transition from the current deregulated environment to franchising, with many of SPT's risks mitigated. As an option, this appears to be expressly suggested on page 168 of the Appraisal which suggests an "expedited assessment" and "transitional franchise" under which incumbent operators carry on as normal for a period of time, to allow for network re-design and implementation of changes before "full" franchising is introduced in a second round. [redacted] agree that, if such a route were permitted under SI 1369 or otherwise, then this would be a more effective route to take. As this is expressly set out in the risk assessment under the Appraisal, we would be interested to know whether SPT have considered this route in detail, including engaging with Scottish Government (given that

[13] Regulation 11(1)(e) UCSR

[14] Regulation 11(2) UCSR

procurement is a devolved matter) to understand whether this route could be facilitated. If this has not been explored then the Appraisal is clearly misleading, as under the analysis in section 2.5 the mitigation on page 168 is not achievable. If it is intended to be explored, then [redacted] would be happy to engage with SPT on this in terms of the benefit of an approach which enabled medium term direct awards to transition the market on a lower risk basis for both SPT and existing operators.

6 There would be a disproportionate adverse impact of franchising on [redacted]

6.1 [redacted] is an independent bus operator in Scotland, [redacted] main operations in Strathclyde are in [redacted]. However, [redacted] also operate in [redacted].

6.2 If a franchising framework were to be approved for the Strathclyde region, [redacted] would be the incumbent. As such, it would require to bid for all of its current routes in the region. However, due to the size of the company and the routes operated, [redacted] would be affected differently (and more adversely) than other operators.

6.3 Firstly, due to its size and geographical areas of operation, [redacted] would be less able to mitigate the impact of loss of business in the event that it were to be unsuccessful in its bid to deliver franchised services in its current areas of operation. As noted above, [redacted] business is carried out in the Strathclyde region. [redacted] has its head office at its depot in [redacted] It is less able than other, larger, operators (operating in a larger variety of areas) to move its operations to other areas in Strathclyde, or out of the Strathclyde region.

6.4 Secondly, [redacted] have also invested heavily in new vehicles, with the average age of vehicles in its fleet being just 4 years (in comparison to the average age of buses in Scotland of 7 – 8 years). This level of investment enhances the passenger experience, but has come at significant cost to the business. Financial investment has been made on the basis that [redacted] would continue to operate its routes. There has not been forewarning by SPT of a proposal to change the current model of delivery of bus services in the Strathclyde region. The result of this investment, is that [redacted] would be disproportionately impacted if it were to be unsuccessful in tendering for its current routes under a franchising agreement and, as noted above, less able to simply move its operations to another geographical area.

6.5 Thirdly, at present, [redacted] operate a very high percentage (51%) of zero emission vehicles in Strathclyde (i.e. zero emission battery electric vehicles (**BEVs**)). [redacted] is in the top 3 bus operators in the UK (and exceeds all London bus companies) for its percentage of zero emission vehicles in its fleet. Investment decisions on such vehicles have been made by [redacted] on the basis of a 15 year plan. There are added issues in respect of BEVs. [redacted] have entered into contractual agreements for the batteries on those vehicles – the bus is owned by [redacted] but the battery is leased. The contracts for the batteries cannot simply be transferred to another operator. Further, there is a large cost involved in electrifying a depot. Therefore, in the event that [redacted] were to be unsuccessful in its bid to deliver franchised services in its current area of operations, two issues would therefore arise:

(a) [redacted] are bound by contractual agreements for the lease of batteries for the BEVs, and the consent of the lessor would be required to transfer the agreements to another operator. It cannot be presumed that this consent would be provided, or that another operator would wish to take on the liability of legacy vehicles. [redacted] may therefore be unable to transfer the agreements or be penalised; and

(b) Redeployment of BEVs to another depot would come at considerable cost due to the need to provide a depot charging infrastructure. Therefore, it would not be easy or low cost to redeploy BEVs to another depot and operating company.

6.6 Fourthly, [redacted] would be at a competitive disadvantage in a tendering process to deliver franchised services. [redacted] is an independent, commercial company with very limited tendered services. At present, only 2% of its services delivered are tendered. Further, unlike some other operators, [redacted] has not participated in franchising competitions elsewhere, and it does not have a commercial bidding (procurement) team. [redacted] would therefore be at a commercial disadvantage in the procurement process for awarding franchising agreements.

6.7 For the foregoing reasons, in the event that [redacted] were to be unsuccessful in its bid to deliver franchised services in its current area of operations, it is likely that [redacted] would lose 45% of its business. This would result in a significant financial loss to [redacted] In addition to the loss of future revenue, there would be a loss of value to the business (goodwill), and [redacted] would also be left with assets (depot and buses) that it would be unable to use. [redacted] may also be left with financial commitments for the lease of batteries for its BEVs. [redacted] its right to make a claim in respect of losses suffered. In making any decision, SPT should consider (and take into account in any financial assessment) such losses to [redacted] (and other operators), and what steps can be taken to mitigate such losses being suffered.

7 Exclude areas of operation by [redacted]

7.1 Section 13A of Transport (Scotland) Act 2001, as amended allows a local transport authority to make a franchising framework covering the whole or any part of their area.

7.2 The Appraisal currently proposes single option solutions for the whole of Strathclyde, but Strathclyde is not a homogenous area in terms of bus operation. There are many variations within Strathclyde and each area differs. [redacted] main operations in Strathclyde are [redacted] This means that we operate dense urban routes as well as rural routes. We have always invested in our routes. For example, our [redacted], was the first bus route in Scotland to have Euro VI emission buses. In spite of being a rural small coastal town, the service is a frequent 4 buses per hour in each direction. We believe that in terms of buses per head of population, [redacted] compare very well with anywhere in the UK, even more densely populated areas. Comparing these areas of operation to other areas of Strathclyde that have poorer bus provision will lead to the Appraisal overall failing to consider the most appropriate interventions in different areas.

7.3 Despite this, the Appraisal does not fully consider the use of different regulatory structures for provision of bus services in different parts of Strathclyde, but there is no legislative reason why this could not be the case, and given the differing natures of the bus market across Strathclyde it would be logical to consider this. Paragraph 2.1.3 of the Appraisal makes clear that the options have been considered on a regional basis, but notes that partnership agreements either voluntary or statutory may not be deliverable for the entire Strathclyde region, and may be more likely to be focused on urban areas or key corridors (although no express reason is given for this). It then goes on to say that "*a franchise agreement may be more likely to cover the entire region (save perhaps for some very rural areas that may warrant more bespoke solutions*" (again no reason is given why a bespoke solution might be required for rural areas, nor what such a solution would be). If it is assumed that reference to "franchise agreement" here actually means reference to the franchise framework this implies that the in carrying out the Appraisal it was thought that region wide delivery would work better for franchising than other options. However, this is not explored in more detail. Paragraph 2.5.7 of the Appraisal states that "*The precise model for Franchise delivery would be defined following decisions to proceed at each gateway review and as the Business Case evolves*" effectively acknowledging that the detail of what Franchising actually is, from a commercial delivery perspective, has not been defined.

7.4 However, at paragraph 9.2.9 of the Appraisal it is noted that "*it may be 2030 before Franchising could be introduced at a regional scale in Strathclyde, although a phased implementation might be feasible on an accelerated timescale by initially targeting selected parts of the region*.". The Appraisal recognises the further processes required to implement franchising in Scotland than in England, but fails to note that the legislation does not expressly allow for breaking a franchise scheme into sub-area, as the legislation in England does (and which was used extensively in Manchester to manage transition) nor include the ability to grant service permits to allow services to run in franchised areas (which it was proposed in the Liverpool City Region assessment to use to aid transition). The greater Strathclyde area is arguably more varied in terms of bus provision than Greater Manchester or Merseyside, and therefore SPT would face an even greater challenge in managing transition across the whole area.

7.5 Based on the Appraisal itself, therefore, seeking to proceed to try and implement franchising across the whole of Strathclyde as an initial step appears inadvisable. The Appraisal identifies the high level of budget required to implement in this way across the whole of Strathclyde[15], and the significant risks associated with implementation, which in a worst case scenario could lead SPT at significant cost risk, in particular if passenger demand does not grow to the extent expected[16], and will also require diversion of existing activity in SPT.

7.6 Development of a simpler franchise proposition to cover a smaller area would seem an advisable first step, mitigating the risk of any failures to implement adversely affecting the whole of the Strathclyde bus network. This would also provide valuable opportunity for SPT to learn from its own practical experience of assessing and (if a decision following assessment was made to franchise and this successfully passed through the Traffic Commissioner panel) implementing could then be taken into account in assessing future franchising propositions. The Appraisal already notes that post-2030 a properly invested BSIP will also grow patronage, so provided that SPT invest in this way, this potentially provides a number of benefits over the position set out in the Appraisal, and, if successful, could then provide a baseline for future assessments of franchising.

7.7 [redacted] would suggest that this should be in areas where significant public sector provision is required, and where customer satisfaction is poor, to allow for the maximum benefits to be delivered to the public from any such proposition, as this will maximise the benefits of introducing a franchising model, if it delivers the benefits assumed in the Appraisal. This might therefore in the first instance focus on central Strathclyde. Once rolled out here, SPT could review progress, and use this as an evidence base for any future franchising frameworks.

[15] Paragraph 9.2.9: Affordability

[16] Paragraph 9.2.9: Risk sharing and Uncertainty

Question 11 (d) – Explain why you support or oppose SPT's recommendation to take forward BSIPs

SPT recommendation rating: Somewhat support

1 Response

1.1 [redacted] support SPT's recommendation to take forward BSIPs.

1.2 However it is important that the use of BSIPs is considered on a fair and equal basis to franchising and other options. In particular, the Appraisal already recognises that there is an ability to implement BSIPs in a much shorter timescale than franchising, delivering benefits well before 2030. The use of BSIP must therefore be properly evaluated including the benefits that this provides to passengers between now and the implementation of franchising, and properly taking into account the much lower implementation risk for a BSIP compared to franchising.

1.3 It is also important that SPT recognises that use of BSIP as an interim measure before franchising will only be possible if SPT is proposing to implement franchising in a way which incentivises operators to enter into BSIP commitments, including fairly compensating them to the extent that BSIP investment later benefits the franchised bus network.

1.4 We have set out many of our concerns regarding SPT's consideration of BSIP in our responses above, but would summarise them as follows:

(a) There needs to be a fair assessment of the different options, considering them by reference to what can be delivered with different funding. The current Appraisal assumes that franchising will deliver more ambitious services, and therefore appears to model the benefits of different options on that basis, with a consequential requirement for greater subsidy than under the non-franchising options, including BSIP. The Appraisal does not appear to consider what BSIP would deliver with equivalent funding to franchising. The Appraisal therefore currently appears to draw a false equivalence between franchising and the BSIP that is assessed, and does not provide consultees with a fair comparison between different options.

(b) Assuming a decision to take forward BSIP is made then a partnership proposal should be prepared in a similar way to the franchising assessment, in accordance with Part 1, Schedule A1, Transport (Scotland) Act 2019, as this is the equivalent provision to the franchising assessment that is proposed if franchising is taken forward. This is particularly important given SPT appears to be assuming that a BSIP would help stabilise the market in advance of any franchise scheme. If this is the case, then SPT should look to implement BSIP as soon as possible, otherwise it is limiting the benefits that can be provided under both BSIP and franchising.

(c) The Appraisal assumes that franchising gets the benefit of improvements implemented by BSIP. For this assumption to be made, SPT must progress a BSIP as soon as possible, and must progress proposals for franchising which incentivise acceptance of and performance under that BSIP. For operators to be able to invest in their network they need to be able to have confidence that they will be able to make a return on their investment through the ordinary course of business. BSIPs provide this certainty (see below), whereas the prospect of franchising (which will automatically terminate any BSIP) removes this certainty, and therefore makes investment difficult to justify. It is only therefore reasonable to assume that the benefits of BSIPs are provided as a base for a franchising scheme if the proposed franchising scheme means that there is an investment for operators to continue to invest in the interim, and the BSIP that would support this is progressed. This is not apparent from the Appraisal.

(d) SPT need to consider the ability to deliver different BSIPs in different parts of Strathclyde – the use of BSIP is a fundamentally flexible mechanism that allows appropriate measures to be introduced in different areas. This allows the public and private sectors to match commitments to the willingness and ability of operators to deliver standards. At the moment, the Appraisal implies that if agreement is not reached by operators then the BSIP cannot proceed. In reality, if a specified proportion of operators veto a BSIP it cannot proceed, as set out below, this threshold will not always be the bar to implementation that the Appraisal implies.

(e) The risk assessment of BSIP compared to franchising appears to apply more negative risk ratings to BSIP than franchising without justification (see question 11(c) responses, paragraphs 2.5 to 2.10).

2 Interpretation of Legislation

2.1 Section 2.4 of the Appraisal sets out a description of Bus Service Improvement Partnerships. It starts by referring to the old statutory quality partnership noting the "disappointing level of uptake" of those partnerships, but also noting that there were 5 in Strathclyde[17]. It then correctly sets out the sanctions that apply to operators are traffic commissioner standards, as service

[17] Paragraph 2.4.1 of the Appraisal

standards form part of the particulars of services[18]. It does not note the equivalent remedy against local authorities who fail to comply with their duties, but this would appear to be that they are in breach of statutory duty, providing bus operators with an enforceable remedy if local authorities fail to comply. This is important as it means that obligations assumed by local authorities can be enforced.

2.2 Paragraph 2.4.4 then states that the process of establishing a BSIP is well defined in the 2019 Act. However, unfortunately the remainder of paragraph 2.4.4 does not reflect the process set out in the Transport (Scotland) Act 2001 (as amended by the Transport (Scotland) Act 2019) in a number of key respects:

(a) The process of informal discussion referred to is not referred to in the legislation. However, we agree that this is a reasonable step that it would be assumed would be taken before the formal process was triggered by the statutory preliminary notice[19].

(b) When the preliminary notice has been served then there is an obligation on the local transport authority to invite all operators of qualifying services (effectively operators who take revenue risk on their services, whether under contract or commercially) in the area to participate in the preparation of the partnership proposal and places the transport authority under an obligation to collaborate with such invited operators as wish to participate to prepare the partnership proposal for consultation[20]. This differs from the process set out in the Appraisal which states that "*This is followed by notification of intent to create a BSIP and drafting of the BSIP by the local transport authorities involved. Operators and stakeholders then have an opportunity to engage before an agreement is reached to adopt the BSIP….*" The position under the legislation is clear that operators (but not other stakeholders) prepare the proposals with the local transport authorities i.e. this is a joint proposal by operators and local transport authorities. This position is better represented in Figure 3, but it needs to be clear that this is a collaborative process, under which the local transport authority therefore benefits from the operational knowledge of the operators in the area, to ensure that measures and standards are appropriate for the market and funding available.

(c) There is then a formal consultation with qualifying operators having a right to object. Paragraph 6.1.11 of the Appraisal sets out the rights of objection, stating that the bar for objections is relatively low, quoting the second objection right, which is at least 50% of operators object **and** they operate over 10% of the registered distance in the

[18] Section 6(2ZA) Transport Act 1985
[19] Paragraph 2, Part 1 Schedule A1 Transport (Scotland) Act 2001
[20] Paragraph 3, Part 1 Schedule A1 Transport (Scotland) Act 2001

area. The example is then given as to why, with 40 operators, and 80% of bus mileage operated by the three main operators, there is a risk that small operators will block any proposal "in its tracks". This might be the case if there was a requirement to make a plan and scheme that covered the whole of Strathclyde, but there is not. There is the ability to make partnership plans for the whole or part of an area[21], and the ability to make schemes that cover the whole or part of the area to which the plan relates[22], and the statutory objection rights for additional schemes being made only relates to qualifying operators in the area of the scheme being made, not the whole area of the plan.[23] Given that there has to be negotiation with interested operators before the objection commences, that schemes can be made on a more local basis than the plan, and that multiple plans can be made the risk of operators then objecting to the proposals seems much lower than the Appraisal implies. It remains open to SPT to determine how to make plans and schemes covering different areas of Strathclyde, with more bespoke requirements in those schemes reflective of what is appropriate in those areas, and can be agreed by the operators in those areas. In addition, even within a specific scheme, it remains open for different service standards to apply to different routes, and in making the scheme the local transport authority would have to apply the competition test in section 37, and therefore consider if the proposals had any adverse effect on competition.[24] For all of these reasons, whilst theoretically the number of small operators could reduce the ability to implement certain BSIP proposals, a better way of looking at it is that it is a framework for operators and local transport authorities to determine binding commitments that are appropriately scaled to reflect the capability of both local government and operators to deliver.

2.3 As a result of the above, the Appraisal clearly under-estimates what can be delivered by BSIP, assuming that there are statutory blocks which are not there in practice. The key issue then becomes whether the public sector can provide and bind itself to its commitments, as BSIP requires commitment from both sides to deliver. [redacted] experience with the Bus Partnership Fund is that this may be a greater risk than operator buy-in, with Scottish government's decision to suspend the fund meaning that local authority partners were unable to deliver the priority previously promised. BSIP would solve this issue by placing those bodies under an obligation to deliver (albeit with some right to delay for reasons outside their control for up to a year[25])

[21] Section 3A(1) Transport (Scotland) Act 2019
[22] Section 3B(1) (2) Transport (Scotland) Act 2019
[23] Paragraph 5(1)(b) Part 1 Schedule A1 Transport (Scotland) Act 2001
[24] Section 37 Transport (Scotland) Act 2001.
[25] Section 3H Transport (Scotland) Act 2001

and with the statutory objection rights meaning that such schemes cannot be varied if operators object in sufficient numbers.

3 Lowering fares

3.1 Paragraph 6.1.14 of the Appraisal sets out concerns regarding lowering fares in the current operating environment. These concerns can be summarised as:

(a) A multi-operator ticketing agreement will be required.

(b) A complex reimbursement methodology will need to be agreed, which will generate significant data that requires processing.

(c) Lowering fares would be expensive to implement.

(d) Lowering fares will adversely affect operators' NCTS reimbursement payments.

Taking these points in turn:

3.2 There are already a number of multi-operator ticketing arrangements in place across Strathclyde, including Tripper and ZoneCard. ZoneCard is currently in the process of being upgraded to being smart enabled for the purposes of season tickets. Bus operators are technically ready for this to be expanded to cover smart-capping of tickets, but this is something that neither Scotrail nor Glasgow Subway are in a position to progress. The ability to move to more effective multi-operator ticketing arrangements with ease of use for passengers is therefore constrained by subway and rail, not by bus. It is therefore unclear why franchising would be required to deliver this, as the need for change is in the commitment and support of SPT's own light rail system and Transport Scotland's railway. These are commercial and operational issues which already sit with central and regional government, not with the bus operators, and therefore this could be progressed through BSIP with appropriate commitments from government.

3.3 A number of capped fare schemes have been implemented across England following introduction of enhanced Partnerships, as well as an England wide capped fare scheme that many operators participate in. Whilst reimbursement is complex, it has still been possible to agree that and obtain participation, including where enhanced partnerships have made such schemes mandatory in an area. BSIPs (as is the case with Enhanced Partnerships in England) can specifically deal with the pricing of multi-operator tickets, and therefore this could be progressed through BSIP.

3.4 The key cost of implementation is the subsidy to the passengers of reducing their fares. This will be an issue under every delivery option, so will be an issue in implementing similar lower fares under franchising.

3.5 The impact on NCTS reimbursement is an issue for discussion between SPT and Scottish Government, and will be a similar issue under franchising, as it flows from the way that NCTS works, with a simplified reimbursement mechanism based on adult fare prices, and not taking into account, for example, the generative impact of fare cuts. This therefore requires a discussion with Scottish Government to ensure that their approach to NCTS reimbursement does not disincentivise such approaches to fares. This already has acted as a disincentive for [redacted] to consider flat and discounted fare structures, due to the potential loss of concessionary reimbursement. However, as is recognised in the Appraisal (see paragraph 2.2 of our response to question 11(c)), this will also be an issue with franchising, where that revenue risk sits with SPT so is a common funding issue across options.

3.6 These issues are therefore either ones which are common to franchising as well as BSIP, or ones which whilst complicated have been solved in partnerships in England. We would also note that to the extent that this is an issue, it will be an even more material issue during the period of transition to franchising, where, unless careful thought is given to how multi-operator ticketing will work, on similar principles to this, passengers may suffer during transition, as they lose the benefits of broader single operator tickets, and need to rely upon multi-operator ticketing between franchised and non-franchised operators.

3.7 Before SPT discount the ability to lower fares under BSIP they need to properly assess the options for implementation, otherwise it will be deliberately undervaluing what can be achieved through BSIP and associated plans.

4 Service delivery with public sector financial support

4.1 It is noted at paragraph 6.1.16 of the Appraisal that higher funding levels may make provision of higher levels of service on existing commercial bus routes difficult to do in compliance with the relevant legislation. This point is not explained clearly, making it difficult to understand what appears to be a relatively major argument against BSIP, that the Appraisal does not believe that higher levels of service can be delivered Without a clear explanation of why SYSTRA/SPT believe this is the case, it is difficult to respond to this point in consultation, however, we would note that similar challenges in England have been overcome to allow spending of National Bus Strategy funding to support services, and that some of the specific BSIP powers relating to route service standards may make it easier to design a framework under which it is clear what services operators can provide non-commercially, and how this interacts with non-commercial services and the competition test under section 37 of the Transport (Scotland) Act 2001. This assumption needs to be properly explored with operators, rather than used to discount partnership as an option.

5 Risk ratings compared to franchising

5.1 See the response on the franchising framework above (response to Question 11 (c)).

Question 11 (e) – Explain why you support or oppose SPT's recommendation to further investigate municipal bus operations

SPT recommendation rating: Somewhat oppose

1 Response

1.1 [redacted] have concerns about the justification for recommending further investigation of municipal bus operations, and if SPT are to progress review of this consideration needs to be given to what SPT are seeking to achieve. We have a number of concerns with the model proposed.

2 The assumptions about municipal bus operators in the BAU/voluntary partnership/BSIP market are not correct

2.1 At paragraph 2.6.1 of the Appraisal it is recognised that "*The municipal operator would likely be an arms-length company wholly owned by the local transport authority, providing suitable separation when competing for tendered bus service contracts,*". This recognises therefore that for tendered services the local transport authority will need to treat any municipal separately and fairly compared to other operators. It is acknowledged at paragraph 2.6.3 that the same would apply for franchising "*The municipal operator's ability to compete with the commercial operators in a franchised environment is largely unknown and its success would have to be realised through a proper and fair procurement process for franchising contracts*.". As noted in our response on franchising above, the reference to SI 1369 is not wholly correct, unless a service concession is being let.

2.2 At paragraph 2.6.2 of the Appraisal it is stated that "*Although possible, a municipal operator competing on-the-road with the existing operators to achieve market dominance is not considered feasible*." Although it is not clear why any operator needs to achieve "market dominance", this recognises that there is little benefit in SPT establishing a bus company from scratch, in order to compete with operators who are already delivering services commercially. Paragraph 2.6.4 then acknowledges that it would be unlikely that a municipal could "rapidly take over all operations in a part or all of the region." This does, however, raise the question as to how this would be paid for. It is assumed that public funding will be used to establish the municipal operator, but as the operator would simply be competing in the existing market, no explanation has been given as to the subsidy control justification for public money being spent in this way. Paragraph 2.6.5 seeks to answer this by stating that *"Acquiring commercial operator businesses and assets would also require significant upfront investment that would* *presumably be paid back by the municipal operator's profit margin."* which suggest that the operator would have to include the cost of repaying the debt incurred to purchase other operators from the fares charged to customers. In the case of a scenario where the municipal operator has acquired the whole of the bus network, this potentially means that the whole value of the commercial bus operations in Strathclyde would have been paid to "buy-out" existing operators, and the cost of this would then be repaid by the passenger through fares increases.

2.3 Even this end point is, however, unrealistic, as unless franchising was implemented then there remains no restriction on market entry, so other competing operators could enter the market at any point. This also means that in the non-franchised environment, it cannot be assumed that the municipal is the only operator. This can be seen in Edinburgh, where Lothian, the municipal operator does not have 100% market share. This also potentially limits integration with other modes, as unless those modes are also operated by the same municipal operator (so that integrated ticketing is actually single operator ticketing), there will be competition issues with fares integrating with only one operator (as this would then act as a barrier to entry for other operators into the market). A municipal operator therefore does not provide for the level of integration assumed in Figure 7. This can be seen, for example, in Nottingham, where the City Council both owns the municipal bus company and lets a tram concession, but integration is achieved through a multi-operator ticketing scheme.

3 The assumptions about municipal bus operators in a franchise environment are not correct.

3.1 The analysis at paragraph 2.6.8 of the Appraisal is only correct where a service concession is let. In the case of franchising this would therefore require the municipal operator to bear real operating risk[26] which would mean that the operator has to have a real risk that they would not be able to recover their costs in connection with the provision of the public passenger transport services, for reasons which are reasonably foreseeable and are outside the control of either the operator or SPT.[27] This would mean that if direct award was used, the operator would have to be established in a way that it could manage these risks, and be able to manage those risks itself, which would mean that it would be likely to need to have control over matters such as ticket pricing or service frequencies in order to be able to control its costs and revenues.

3.2 Otherwise regulation 28 of the Utilities Contracts (Scotland) Regulations 2016 would apply to allow award of service contracts on a direct award basis to an affiliated undertaking, so would therefore cover award to an arms-length municipal. However, for the exception to apply

[26] Regulation 12(2) and Regulation 12(4)(b) SI 1369

[27] Regulation 2(1) SI 1369, definition of "operating risk"

regulation 28(2)(a) requires that "*in respect of service contracts, at least 80% of the average total turnover of the affiliated undertaking over the preceding 3 years, taking into account all services provided by that undertaking derives from the provision of services to the utility or one or more of its affiliated undertakings*." This will clearly not be the case if the municipal bus undertaking was created by acquiring existing operator business, as the majority of turnover for those companies will predominantly be commercial revenue, not service contract revenue. This provision cannot therefore be used to direct award franchise agreements to a municipal that is already established in the market. This means that this model would work if SPT established a new operator to either compete for franchise contract, or for them to be direct awarded. However, as paragraph 6.2.28 of the Appraisal states: "*This probably represents the lowest risk option for the municipal bus company shareholder(s) and is likely to be the most affordable, but the timescale for delivering a franchise model is <u>extended and uncertain.</u>"* (emphasis added)

4 Impact if franchise agreements are not awarded

4.1 The Appraisal does not consider in any detail the impact of franchise agreements not being awarded to the municipal. In these circumstances, SPT would have established an operator which would then have limited business in Strathclyde, and which would have been excluded from the market by the operation of the franchising framework. This risk does not appear to have been considered, but save in the case of direct award is a material risk for all operators in the market, including any established by SPT. If SPT did not see this as a material risk, this would call into question the arms-length nature of the franchise competition, whereas if it did view this as a risk, as with any investor, consideration would have to be given as to whether material investment in establishing a new bus company or buying an existing one was justified, given the risk of that investment being lost. It can be seen from the Manchester franchise market that incumbent operators have regularly not won their "own" franchises back, so no assumption could be made in this regard.

4.2 There is a particular risk here, in that large national and multi-national operators (for example, [redacted]) would be able to draw on their wider group resources to support tendering for such opportunities, whereas an SPT owned operator would not have that wider bid team resource available to it and/or would have to commission that resource, at additional cost (as will be the case for other operators, such as [redacted] and smaller operators who do not regularly tender). This places even greater risk on the municipal in that it may not be able to win sufficient business if there is a competition. There are limited examples of public sector bidders competing for operating contracts, but, for example, where Nexus were required to outsource operation of their Metro system in 2010, their in-house bid team lost to DB Regio/Arriva, with operation only returning in-house at the end of that concession.

5 Option is not comparable

5.1 As paragraph 9.2.10 of the Appraisal notes, a municipal bus company would *"still be operating within the restrictions of the ultimate delivery model, whether Business as Usual, some form of Partnership, or through a Franchise."* Use of a municipal is therefore not an option, but rather a delivery model within the option. This is not reflected in the treatment of municipal operation throughout the consultation documents and Appraisal, with it regularly compared directly to actual options.

6 Conclusions are overly positive due to not taking into account risks identified

6.1 Paragraphs 9.2.10 to 9.2.13 of the Appraisal summarise the reasons for recommending taking municipal operation forward. The arguments are already not strong for taking forward municipal operation given the potential costs e.g.:

(a) On partnerships and BSIP: "*it is not clear whether this would be sufficient to deliver significantly better outcomes than through partnership with private sector operators alone*".

(b) On franchising: "*A municipal bus company could also serve a role as an active challenger for contracts under the Franchising delivery model"*. As noted above there are significant risks associated with this, including potentially loss of investment in the municipal if it fails to win contracts. It goes on to state that "*it is not likely to be a critical factor in the success of the Franchising model"* which implies that it would add further complexity to what is already a complex and difficult process for SPT to implement, without providing material benefit.

(c) "*By reinvesting some of the profits generated into more comprehensive services, more affordable fares and/or higher quality standards municipal bus companies are often described as providing a social dividend.*" This fails to take into account how the costs of establishment of the municipal would be recovered. As noted above, the suggestion that they would be recovered by the operator from profits, means that there is unlikely to be more profit available to invest than private sector operators already do. If this was not required, this raises subsidy control issues as to whether or not potentially material public sector investment in one operator in a competitive market was an illegal subsidy. This does not appear to have been considered by the Appraisal at all.

6.2 Overall therefore the assessment of municipals is overly positive, failing to take into account the legal risks involved with the establishment and operation of a municipal from scratch.

Progressing municipals as a parallel option therefore risks expending further public money on options which the current Appraisal recognises are unlikely to make a material difference, where that money could be better spent in improving bus services.

Question 19 – Any further comments related to the consultation on the bus strategy recommendations

1 Response

1.1 There are a number of additional issues that [redacted] wish to raise in respect of the Consultation and SPT's recommendations. Those issues are categorised as follows:

(a) Procedural issues concerning the consultation process:

(i) Timescale for the Consultation is not adequate;

(ii) Consultation response process does not verify individual respondents, and absence of clarity on assessment criteria for responses;

(iii) The outcome of the Consultation is pre-determined; and

(iv) No substantive engagement with operators prior to or during consultation process.

(b) Statutory guidance and regulations for the franchising process have not been issued.

1.2 These issues are outlined in further detail below. In summary:

(a) The procedural issues concerning the consultation process raise significant concerns regarding procedural fairness which undermine the Consultation. The consultation process is fundamentally flawed, and is open to judicial challenge. In light of these issues, [redacted] reserve its right to raise an action for judicial review should it deem it necessary to do so, and reserve the right to raise a formal complaint with the Scottish Public Services Ombudsman.

(b) In the absence of statutory guidance for the process for franchising, the utility of proceeding with a process for reform of the bus network which has franchising as a key component must be questioned. Without the statutory guidance, there is an absence of detail concerning the methods to be used when a local transport authority (such as SPT) carries out an assessment of its proposed franchising framework under the 2001 Act. Further, there is a real (indeed, likely) risk that any process undertaken under the 2001 Act would not be compliant when guidance is later issued, leading to wasted time and cost for all parties.

2 Procedural issue (i): Timescale for the Consultation is not adequate

2.1 The timescale for the Consultation is inadequate and prevents the Consultation meeting the minimum legal standards and government guidance for a consultation. The timescale is not proportionate, having regard to the issues under consideration. As such, the Consultation is flawed and is open to judicial challenge.

2.2 It is confirmed in the consultation document that the Consultation is not a statutory consultation. I.e. it is not a consultation in terms of the Transport (Scotland) Act 2001 (as amended by Section 38 of the Transport (Scotland) Act 2019) (the "**2001 Act**"). As such, the Consultation is a voluntary consultation. It is stated in the consultation document that SPT intends to engage in a further stage of pre-statutory consultation with partners and stakeholders in 2024-2025. Nevertheless, despite being a voluntary consultation, having embarked on a consultation the Consultation must be carried out properly, which includes being undertaken in a responsible and fair manner.

2.3 Further, notwithstanding that SPT has stated its intention to embark upon a further (voluntary) consultation, the purpose and consequence of the Consultation must not be overlooked or misunderstood. When this is considered, it is imperative that the Consultation is carried out properly.

2.4 The Consultation is not an open consultation seeking views on all models of delivery of bus services. Rather, the responses sought are framed by reference to SPT's proposed strategy (its "recommended approach"), as set out in a series of recommendations. SPT has a recommended approach, and feedback is being sought on the level of support for that approach – including "ruling out" certain models of delivery of the bus service. This is clear from the terms of the consultation documents. For example, in the response form, respondents are asked: *To what extent do you support or oppose SPT's recommendation to rule out 'business as usual' and 'voluntary partnerships' for further consideration in the bus strategy?"* (Question 8).

2.5 The consultation document outlines SPT's recommendations to guide the development and implementation of its bus strategy. It is clear that SPT's bus strategy will be informed by the responses to the Consultation. This is demonstrated by the terms of the response form, which states: *"Your feedback is important so that SPT can understand the extent of support for its recommendations and whether they should consider amending their approach before moving into the next stage of the bus strategy process"*, and *"The feedback that you can provide will help SPT to further develop the bus strategy for the region and consider if any changes should be made to the recommendations".*

2.6 Further, in terms of further procedure, the consultation document states (at Section 8, Consultation and next steps): "*Following completion of this consultation period, SPT will work with our consultants to analyse the consultation feedback and consider if any changes should be made to our recommended approach. We will report the outcomes of this work to the SPT Partnership Board later in 2024. Thereafter, we will develop the full bus strategy, working closely with our local authority partners. We will consult with you again on a 'draft' bus strategy prior to reporting a 'final' strategy to the SPT Partnership Board in 2025. Once the 'final' strategy is approved by the SPT Partnership Board, we will commence delivering the bus strategy in line with any relevant guidance and regulations*".

2.7 From the foregoing, it is clear that the responses from the Consultation will be used to assess whether any changes to SPT's "recommended approach" are required. Once again, this demonstrates that certain approaches to (or options for) the delivery of bus services have been (or at least, will be) ruled out in the Consultation.

2.8 Therefore, whilst the Consultation may not be the final stage of the process, the responses to the Consultation will be used to further develop SPT's bus strategy for later stages in the process. That is the usual and logical purpose of a consultation process. However, this is the very crux of [redacted] concern regarding the timescale allowed for responding to the Consultation.

2.9 The Consultation is [redacted] opportunity to respond and comment on SPT's bus strategy at its widest possible scope (albeit, it is already limited to responding to recommendations), and for their views to be taken into consideration when SPT is further devising its bus strategy (including ruling out certain models of delivery). Plainly, the Consultation is of critical importance to [redacted]

2.10 However, the time period allowed for responding to the Consultation does not afford sufficient time in which to review and consider the (substantive) documentation produced, ingather relevant information, and obtain representation and produce comprehensive submissions. The Appraisal comprises 192 pages and contains substantive content. It is understood that the Appraisal is the foundation for SPT's recommended approach. In order to review and respond fully to the Appraisal, it is necessary for [redacted] to instruct an expert economist. It is simply not possible for respondents to review and obtain expert advice on the Appraisal in the timescale that has been afforded to them by SPT. It is clear that the Appraisal has been compiled over an extensive period of time, but respondents to the Consultation have not been afforded that opportunity, or indeed, adequate time to respond. Further, the Consultation was launched without prior notice to the industry, who were therefore unable to carry out any work in advance of the commencement date. The timescale will therefore, necessarily, restricts the extent of the ability of [redacted] to respond to the Consultation. Without full and informed responses to the Consultation, the utility of the Consultation is undermined.

2.11 Whilst the consultation response form offers respondents the opportunity for respondents to respond in abbreviated form – simply confirming their level of support for a recommendation (i.e. strongly agree, agree, etc.) – given the potential impact that a change to the model of delivery of bus services would have on [redacted], it is wholly reasonable that [redacted] would wish to review the consultation documents in detail and obtain expert advice in order to make full submissions in response to the Consultation. [redacted] would wish to make such submissions so that their views are expressed clearly and may be taken into consideration when the bus strategy is being further developed. That opportunity has been denied to [redacted] due to the short timescale for responding to the Consultation afforded to respondents by SPT.

2.12 As outlined above, having embarked on a voluntary consultation process, the Consultation must be carried out properly, which includes being undertaken in a reasonable and fair manner. It is understood that SPT does not have its own published consultation principles. In the absence of such, it is reasonable to have regard to guidance published by the Scottish Government as an appropriate framework against which to measure the process conducted by SPT.

2.13 The Scottish Government published guidance on public consultations (*Consultations in the Scottish Government: guidance*, updated 5 July 2022). Notably, this guidance advises that there are minimum legal standards (the Gunning Principles) that a "fair and worthwhile exercise" must follow – namely:

(a) Consult when proposals are at a formative stage;

(b) Give enough information for intelligent consideration;

(c) Give adequate time for response; and

(d) Explain how consultation results have been taken into account in policy / legislation.

The Gunning Principles were adopted in Scotland in *Buchan v West Lothian Council* 2001 SLT 1452.

2.14 Further, in its 11 principles of consultation, the UK Government requires that consultations last for a *"proportionate amount of time"*. It is stated that the length of the consultation is to be judged on the basis of legal advice and taking into account the nature and impact of the proposal. Notably, it is stated that *"Consulting for too long will unnecessarily delay policy* *development. Consulting too quickly will not give enough time for consideration and will reduce the quality of responses"*. This is the precise issue arising in the Consultation.

2.15 These principles of consultation are endorsed by the Scottish Government in its guidance for conducting public consultations (above). Further, in guidance used by the Scottish Government in conducting public consultations (S*cottish Government Consultation Good Practice Guidance*[28]), in respect of the *"proportionate amount of time"* for a consultation, it is stated that the Scottish Government *"usually advise"* a period of 12 weeks. Subject to the particular circumstances, a longer period of consultation may be justified. There is therefore an obligation for consultations to last for a proportionate amount of time – at a minimum, this period is usually 12 weeks, and it may be longer in the circumstances of the consultation. Indeed, SPT considered 12 weeks to be a reasonable period of time for consultation in 2022, when it carried out a consultation in respect of the Regional Transport Strategy (which ran from 5 August to 28 October 2022). It is not clear why a 12 week period was not allowed in the Consultation.

2.16 In any event, the timescale for the Consultation is inadequate. The timescale prevents the Consultation meeting the minimum legal standards and government guidance for a consultation. The timescale is not proportionate having regard to the issues under consideration, and the nature and quantity of documents produced. It is clear that the responses to the Consultation will be used to further refine SPT's bus strategy, which may have a significant impact on operators such as [redacted]

2.17 The timescale will necessarily reduce the quality of responses that will be received. In all the circumstances, it would be fair and proportionate for a longer period of consultation to have been allowed – at a minimum, a 12 week period. As such, the Consultation is open to challenge. [redacted] reserves the right to raise an action for judicial review should it deem it necessary to do so, and also reserves the right to raise a formal complaint with the Scottish Public Services Ombudsman.

3 Procedural issue (ii): Consultation response process does not verify individual respondents, and absence of clarity on assessment criteria for responses

3.1 Two issues arise concerning the process for responding to the Consultation which fundamentally undermine the process.

[28] Available at Scottish Government consultation and policy-making guidance: FOI release - gov.scot (www.gov.scot)

3.2 Firstly, there is an issue concerning the way in which responses to the Consultation are to be submitted. Critically, it appears that there are no protections in place to ensure that responses to the Consultation are:

(a) Submitted by real people; and / or

(b) Not duplicate or multiple responses from individual respondents.

3.3 To submit a response form, all that is required is for individual respondents to provide their name and email address. There is no requirement for respondents to provide their address, or otherwise verify their identity. When a response form is submitted online, there is no subsequent verification of the respondent (for example, by issuing a link to the email address provided). The process is not adequate to verify the identity of respondents and prevent duplicate responses being submitted by individual persons (or groups). Without verification measures, it is possible for response forms to be submitted using false names and email addresses.

3.4 The consequence of this issue is significant when one considers the nature of the response that may be submitted. In the form of response, there is no necessity for respondents to provide a substantive text response – all that is required is for respondents to "rate" a recommendation (e.g. "strongly agree" etc.). Substantive comment on the recommendations is optional. It is therefore possible (and, indeed, easy) for individuals to submit multiple responses to the Consultation. Technology may also be employed.

3.5 This issue fundamentally undermines the consultation process, and it must be questioned what weight (if any) SPT can reasonably place on the responses received. [redacted] has great concern that individuals or groups may submit multiple responses to seek to influence the support for certain recommendations in the Consultation.

3.6 Secondly, there is no readily available guidance from SPT as to how the responses to the Consultation will be assessed. For example:

(a) Will the rating for a recommendation in a response form ("strongly support" etc.) be given a value, and all responses counted to reach an average overall "score" for a recommendation?

(i) Will a greater weighting be applied to substantive responses compared to responses which only give a rating to a recommendation?

(ii) Will responses from bus operators and other statutory consultees be afforded the same (or an enhanced) weighting as responses from individual bus users?

(iii) How will comments in substantive responses from respondents be assessed?

(iv) Will any steps be taken to identify any instances of duplication or "stock responses" being submitted (i.e. from individuals or groups).

3.7 It is reasonable for respondents to a consultation to have visibility on the assessment criteria, but this has not been provided by SPT.

3.8 This matter is exacerbated by the issue outlined above regarding the lack of verification of respondents to the Consultation. With the potential for multiple (and, potentially, vexatious) responses being submitted, it is essential to understand how responses to the Consultation will be assessed.

3.9 Without sufficient measures in place to verify the identity of respondents, the Consultation is open to challenge. [redacted] has significant concern regarding the manner in which the Consultation is being carried out. [redacted] is producing this substantive response to the Consultation in good faith, and to the best of its ability in the time period allowed. However, it remains gravely concerned about the potential outcome of the Consultation due to the lack of protections in place to verify the identity of respondents, and lack of assurance as to how responses will be assessed. [redacted] reserves the right to raise an action for judicial review should it deem it necessary to do so, and also reserves the right to raise a formal complaint with the Scottish Public Services Ombudsman.

4 Procedural issue (iii): The outcome of the Consultation is pre-determined

4.1 The Consultation is presented as an opportunity for engagement on SPT's recommended approach. It is noted in the consultation document that: *"Following completion of this consultation period, SPT will work with our consultants to analyse the consultation feedback and consider if any changes should be made to our recommended approach"*[29]. However, it is clear from many communications issued by SPT that there is a pre-determined outcome for the whole process – franchising of the bus network in Strathclyde.

4.2 One such example is provided in an article in the Holyrood Magazine by Valerie Davidson, Chief Executive of SPT, titled*: "Reforming Strathclyde's public transport: The franchise*

[29] Consultation document, page 18

model's promise for the region's bus network"[30]. The magazine was published on 16 May 2024, with content to be provided no later than 13 May 2024 (i.e. the very date on which responses were to be submitted to the Consultation). The article is stated to have been sponsored by SPT.

4.3 The article conveys a clear determination by Ms Davidson (and, by extension, SPT) to franchise the bus network. In the article, Ms Davidson states:

> *"We recognise our responsibility to improve bus service delivery in Strathclyde and we know that simply halting the decline in the bus network through BSIPs is insufficient in the longer term. Our aspirations must be higher, towards the realisation of a world-class local bus franchise model the people of the West of Scotland deserve.*
>
> *…*
>
> *"Local services franchising is likely to have major beneficial effects for enhanced service levels. As well as making fares more affordable, it can deliver a regional integrated network that truly supports both multi-modal journeys and future public transport investment, including Clyde Metro".*

4.4 This is a very bold statement to have made, without having concluded the Consultation and (if franchising remains the recommended approach of SPT following all internal processes) any detailed assessment of any franchising model to be taken forward. Ms Davidson is stating, publicly, that franchising will be better and that there will be lower fares, regardless of the model implemented and any detailed consideration of the costs and level of funding available. BSIPs are also discounted as a longer-term solution without any justification or explanation.

4.5 The article goes beyond simply commenting on franchising as a recommended approach, which will be reviewed and any changes made as necessary following review of the responses to the Consultation. The article was written by Ms Davidson and sponsored by SPT, and so there can be no misinterpretation or misstatement of her words.

4.6 Separately, and in a similar vein, in an article in Passenger Transport dated 25 March 2024, Bruce Kiloh, SPT's Head of Policy and Planning, was quoted as stating: *"Franchising is a proven model for delivery of local bus services across Europe and beyond and provides the greatest certainty of making significant improvement to the network to achieve passenger growth and better accessibility for all and deliver on wider public policy outcomes," he said.*

[30] Associate Feature: Reforming Strathclyde's public transport: the franchise model's promise for the region's bus network (holyrood.com)

"Therefore, SPT should initiate the franchise process in line with the requirements of the Transport (Scotland) Act."[31]

4.7 There is real concern as to the process being carried out by SPT. There appears to be a pre-determined outcome for the Consultation and, indeed, devising the SPT bus strategy and potential outcomes from any assessment of a franchising framework in the future. This fundamentally undermines the Consultation process. [redacted] reserves the right to raise an action for judicial review should it deem it necessary to do so, and also reserves the right to raise a formal complaint with the Scottish Public Services Ombudsman.

5 Procedural issue (iv): No substantive engagement with operators prior to or during consultation process

5.1 There was no engagement with industry on SPT's recommendations prior to the Consultation, and the Consultation was launched with just one day's notice.

5.2 On 29 April 2024 (14:30 – 15:30 hours), [redacted] attended an online meeting with a representative from SYSTRA, [redacted] is a market research consultant with SYSTRA.

5.3 During the meeting, attendees (including [redacted]) were not permitted to ask any questions or seek clarification on the Appraisal. Instead, attendees were only permitted to answer questions and provide information. The meeting was recorded, and a recording was to be made available. As at the date of this response, the recording has not been provided. Indeed, [redacted] have been advised by SYSTRA that the recording of the meeting was destroyed after they produced their note of the meeting. [redacted] have been advised that they will not be given sight of the note of the meeting either.

5.4 The meeting with SYSTRA was a wasted opportunity to engage in a meaningful way with the industry. The Appraisal is a fundamental document in the Consultation. It is a lengthy and technical document, and (understandably) [redacted] had questions that it wished to raise and discuss. However, [redacted] were denied the opportunity to ask any questions.

5.5 It therefore remains the position that there has been no meaningful engagement or consultation with the industry during the Consultation. The only engagement that operators can have in the Consultation is by making a written response – which process, for the reason outlined above, is fundamentally flawed.

[31] SPT says franchising is the only game in town (passengertransport.co.uk)

6 Statutory guidance and regulations for the franchising process have not been issued

6.1 A key recommendation of SPT being consulted upon is its recommendation to take forward local services franchising (possibly with the use of BSIPs during a transitional period).

6.2 If SPT's bus strategy ultimately seeks to introduce franchising to the bus network (or any part of it), SPT will be required to comply with the mandatory statutory process for approval of its proposed franchising framework. The statutory process is set out in the Transport (Scotland) Act 2001 (the "**2001 Act**") (as amended by Section 38 of the Transport (Scotland) Act 2019). The process in the 2001 Act is compulsory and forms the framework against which any franchising proposal will be assessed.

6.3 Critically, however, statutory guidance in respect of the franchising process has not yet been published. Commencing the statutory franchising process without that guidance in place would be premature, lack transparency, and be very likely to result in wasted time and cost being incurred by a number of parties.

6.4 The statutory guidance is relevant at several key stages of the process:

(a) In terms of Section 13E (5) of the 2001 Act, the Scottish Ministers <u>must</u> issue guidance in relation to the preparation of an assessment of a proposed franchising framework. It is also stated in Section 13E (5) that the guidance <u>may</u>, "in particular", include guidance to be used when assessing a proposed franchising framework. The Explanatory Notes to the Transport (Scotland) Act 2019 (amending the 2001 Act) state at paragraph 195: *"In preparing the assessment, the local transport authority must have regard to the guidance issued by the Scottish Ministers in relation to such assessments (subsection (5))"*.

(b) In terms of Section 13F (3) of the 2001 Act, the Auditor's report <u>must</u> state whether, in the opinion of the Auditor, the local transport authority had had regard to the guidance issued by the Scottish Ministers under Section 13 (5) in preparing the analysis of financial information relied upon by the local transport authority. Further, in terms of Section 13F (4), when preparing their report, the Auditor <u>must</u> have regard to any guidance issued by the Scottish Ministers in relation to the preparation of their report. The Auditor's report will be a consultation document produced in the statutory consultation (Section 13G (5) and provided to the traffic commissioner panel (Section 13J (2)).

(c) In terms of Section 13H (5) of the 2001 Act, the Scottish Ministers must issue guidance in relation to the circumstances in which a local transport authority must prepare a new assessment of a proposed framework.

(d) In terms of Section 13J (5) of the 2001 Act, when the traffic commissioner panel is assessing a request for approval of the proposed franchising framework, the panel must consider whether the local transport authority had regard to guidance issued by Scottish Ministers under section 13E (5) of the 2001 Act.

6.5 It is clear from the foregoing that the Scottish Parliament intended that statutory guidance to be issued by the Scottish Ministers under section 13E (5) of the 2001 Act would form an important role in the assessment of a franchising framework put forward by a local transport authority. Firstly, it is mandatory that the Scottish Ministers issue statutory guidance. However, having regard to the provisions of the 2001 Act, it is also clear that the statutory guidance will perform a central role in the process – in particular: (a) the assessment to be carried out by the Auditor; (b) the circumstances in which a local transport authority must prepare a new assessment of a proposed framework (i.e. it would not be at the discretion of a local transport authority to re-run a consultation or obtain another report from an Auditor); and (c) the determination by the traffic commissioner panel as to whether to grant approval for a proposed franchising framework.

6.6 No statutory guidance has been issued under Section 13E (5) of the 2001 Act. As such, it would be premature for SPT to commence steps to take forward a proposed franchising framework. Without limitation, the following issues arise:

(a) The absence of the statutory guidance, when preparing its assessment of the proposed franchising framework, SPT would have no way of knowing if the assumptions that it makes regarding franchising are correct. Similarly, the absence of statutory guidance also undermines the current (pre-statutory) process – SPT is consulting on a proposal to take forward local services franchising, but it does not know whether its assumptions are reflective of the statutory guidance that will be issued and how its assumptions will be assessed. This fundamentally undermines the current assessment of the case for franchising.

(b) The Scottish Ministers must issue statutory guidance and so it will be issued. There is therefore a real risk that an assessment undertaken by SPT would be non-compliant with guidance ultimately issued. This could result in SPT's assessment of the proposed franchising framework requiring to be amended, and stages of the statutory process requiring to be repeated. The assessment process undertaken (by the Auditor and / or traffic commissioner panel) could also be non-compliant. All of this would lead to wasted time and cost being incurred by parties.

(c) In proceeding with a process to make a franchising framework without the statutory guidance, there would be real uncertainty and a lack of transparency as to the process being undertaken and criteria being applied by SPT.

6.7 By way of analogy, in England the statutory guidance[32] for franchising of local bus services is prescriptive, and contains guidance regarding how the commercial, financial, economic and management cases for the assessment of a proposed franchising framework will be established. If the statutory guidance to be issued by the Scottish Ministers was to contain a similar level of detail to the guidance in England, it is very likely that any local transport authority which started an assessment based solely on the terms of the 2001 Act would have to re-write its assessment of a proposed franchising framework (and also repeat stages of the statutory process) to ensure that the assessment was compliant with the statutory guidance.

6.8 Similar issues and concerns arise where the Scottish Ministers issue regulations in respect of franchising arrangements. Section 13T (2) of the 2001 Act provides that the regulations may "in particular" make provisions with respect to matters including:

(a) The process to be followed when making, varying or revoking a franchising framework, including:

(i) The assessment and audit of proposed franchising frameworks;

(ii) The processes to be followed; and

(iii) The approval of making proposed franchising frameworks or proposals to vary or revoke franchising frameworks.

(b) The local services, or descriptions of local services that must, or may, be exempted from franchising frameworks and the conditions that must, or may, be attached to such exclusions.

(c) In addition, Section 13T (3) of the 2001 Act provides that the Scottish Ministers may issue regulations which make transitional provisions in connection with the coming into operation of franchising frameworks, the variation of frameworks, and the ending

[32] Setting up a bus franchising scheme - GOV.UK (www.gov.uk)

of frameworks. Further, regulations are to be issued in which the criteria and process for the appointment of the Traffic Commissioner panel are set out. Without these regulations in place, many key aspects of the process are unknown.

(d) Regulations on all of these matters could materially affect both the process that SPT has to carry out in assessing and making a franchise framework, and the content of that franchising framework, which in turn could affect what is being assessed, and how this is compared to other options.

6.9 Accordingly, commencing the statutory process to make a franchising framework (and, indeed, continuing with a pre-statutory assessment and proposal to take forward franchising) prior to the statutory guidance and regulations being issued would be premature, lack transparency, and be very likely to result in wasted time and cost being incurred by a number of parties. [redacted] reserves its right to challenge any process by SPT.