

# Extract from DfT web guidance<sup>1</sup> – released 31 December 2020

## 3. Guidance on EU Regulation 1071/2009 for permit users in GB

### 3.1 Introduction

EU Regulation 1071/2009 ('the EU Regulation') sets out requirements for organisations operating vehicles that can carry nine or more passengers in return for payment, unless they satisfy one of its exemptions. The EU Regulation is directly applicable within the United Kingdom. 'Not-for-profit' organisations might fall under one of the following exemptions as set out in Article 1(4)(b) of the EU Regulation:

- "undertakings engaged in road passenger transport services exclusively for non-commercial purposes" (the "exclusively non-commercial purposes exemption")

or

- "undertakings...which have a main occupation other than that of road passenger transport operator" (the "main occupation exemption")

Additionally, Article 1(5) of the EU Regulation states that:

- "Member States may exempt from the application of all or some of the provisions of this regulation only those road transport operators engaged exclusively in national transport operations having only a minor impact on the transport market because of...the short distances involved" (the "short distance exemption")

The government has given effect to the short distance exemption through The Transport Act 1985 (Amendment) Regulations 2019 which came into force on 1 October 2019.

In Great Britain, the default legal position is that all operators to whom the EU Regulation applies [must hold a Public Service Vehicle \(PSV\) operator's licence \('O' licence\) and comply with the associated requirements](#).

Section 18 of the Transport Act 1985, as amended ('the 1985 Act') exempts any vehicle used under a permit granted under section 19 or section 22 of the 1985 Act, from the requirement to hold a PSV 'O' licence. Section 19 and section 22 permits can be granted by traffic commissioners whilst other designated bodies can issue section 19 permits, apart from those for large buses.

In order to be eligible for a section 19 or 22 permit, an applicant must first demonstrate to the permit issuer that it satisfies one of the exemptions set out in the EU Regulation. It must also satisfy all the criteria set out in the 1985 Act.

### 3.2 Exclusively non-commercial purposes exemption

In December 2018, solicitors acting on behalf of the Bus and Coach Association applied to the High Court for permission to judicially review the Department's approach to the

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<sup>1</sup> <https://www.gov.uk/government/publications/section-19-and-22-permits-not-for-profit-passenger-transport/section-19-and-22-permits-not-for-profit-passenger-transport>

'exclusively non-commercial purposes' exemption. The High Court heard the case on 19 November 2019 and handed down their [judgment on 6 December 2019](#).

This guidance has been amended in line with the outcome of the judicial review.

### **Use of the non-commercial purposes exemption**

Existing permit holders must satisfy themselves that they fall within the non-commercial exemption and must be able to provide sufficient evidence to the permit issuer if required. The permit holder must consider whether or not each and every one of its services fits within their non-commercial purposes.

Those seeking to obtain a permit must satisfy themselves that they will fall within the non-commercial exemption before applying for a permit.

In interpreting the meaning of the exclusively non-commercial purposes exemption, the judgment focused on requiring an operator to ascertain all of its purposes in providing road passenger transport services, i.e. why an operator provides its services, and whether all those purposes are exclusively non-commercial.

Whether the exemption is satisfied will be determined on the basis of a multi-factor assessment by a permit issuer having regard to all of the principles and considerations set out in the judgment as well as any other relevant considerations and should be decided on a case by case basis.

The factors listed in the judgment can be considered in reaching a decision about whether the operator in question falls within the non-commercial exemption. The judgment makes it clear that those factors are non-exhaustive and that not all of the factors need to be present in order to reach a decision that a permit holder falls within the scope of the exemption.

If an operator satisfies the exclusively non-commercial exemption, they do not need to satisfy any of the EU Regulation's other exemptions.

Should an existing permit holder consider that it no longer satisfies the non-commercial purposes exemption, it should immediately notify the permit issuer and the permit should be revoked. The operator would then have to comply with the 'O' licence regime unless it can evidence that it falls within one of the other exemptions to the EU Regulation.

### **Charitable status**

It is not sufficient for an operator to claim that they are a charitable organisation and therefore that they automatically have exclusively non-commercial purposes. Some charities may undertake certain activities which will have commercial purposes and therefore an operator needs to consider each and every one of the purposes for which it is providing road passenger transport services to ensure that it satisfies the exclusively non-commercial purposes requirement.

### **Operator surpluses**

The fact that an operator may make a surplus does not, in and of itself, prevent the operator from falling within the scope of the non-commercial purposes exemption. However, if any surplus is made, permit holders must retain evidence about when and how that surplus has or will be reinvested into their organisation.

## **Competitive procurement or tendering for contracts**

The judgment clarifies that operators engaging in competitive tendering may still fall within the non-commercial purposes exemption provided their purposes for engaging in such contracts are purely non-commercial. However, the overall extent of competitively tendered contracts which a permit holder operates can be indicative of its purposes and therefore should be taken into account in assessing whether an organisation comes within the exemption. The judgment clarifies that the amount of competitive tendering is not in itself sufficient to prevent an operator being able to fall within the non-commercial exemption. All the factual circumstances need to be taken into account on a case-by-case basis.

## **Operator size and scale**

The judgment refers to the size and scale of the operator's involvement in the road passenger transport market as being a potentially relevant factor when assessing the purposes for which it engages in road passenger transport. For example, where an operator is a large community transport operator in an area where it competes with other large commercial operators, then this factor may make it more difficult to conclude that the purposes for which the operator is engaging in road passenger transport are 'exclusively non-commercial'. Even if some of its purposes are non-commercial the exemption requires each and every purpose to be non-commercial. However, size and scale of the operator is not in itself sufficient to prevent an operator falling within the scope of the exemption provided they can demonstrate that all their purposes are non-commercial. In doing so, all the factual circumstances need to be taken into account.

## **Cross subsidy**

The judgment makes clear that where an operator provides road passenger transport services simply for the purpose of generating surpluses to fund other transport or non-transport activities, the operator does not fall within the exclusively non-commercial exemption.

However, the judgment does not completely preclude cross-subsidies. For example, if an operator providing rural bus services is doing so for the sole purpose of social welfare, then the fact that some routes are profitable whilst others are not does not prevent it from falling within the non-commercial purposes exemption, despite an element of cross-subsidisation between different routes.

## **Operators not permitted to hold an 'O' licence and a Section 19 or 22 permit**

The same legal entity cannot hold both an 'O' licence and a section 19 or 22 permit under the 1985 Act. This is regardless of whether an organisation is carrying out all services for exclusively non-commercial purposes.

## **3.3 Main occupation exemption**

Current guidance in respect of the meaning of the term 'main occupation' (for the purpose of the granting of a restricted PSV 'O' licence) is set out in paragraphs 27 to 29 of the [Traffic Commissioners statutory document no. 13 \(small PSV operations\)](#).

In order for a 'not-for-profit' organisation to satisfy the main occupation exemption their engagement in road passenger transport must be ancillary or complementary to another activity which must demonstrably be their main occupation.

A permit applicant must identify its main occupation and demonstrate that performing this consumes the majority of its time and resources, and generates the majority of its income. The evidence must demonstrate that the total of that other income is reasonably expected to continue to exceed that from the operation of its passenger transport services.

‘Main occupation’ is a question of fact not purpose. Bare assertion is not sufficient. Some applicants may see their provision of transport as integral to a wider social service and believe that the transport services they provide are ancillary to the provision of social welfare. However, if an applicant’s main role is providing transport, even if it is provided in a particularly sensitive or adapted way to meet the specific needs of users (for example the older or disabled), then the organisation’s main occupation is that of a road transport operator.

An organisation’s main occupation cannot be simply inferred by reference to their constitutional documents, though these may be relevant alongside other evidence.

In cases where it is not clear whether an applicant meets the requirements, the following information should be considered by the permit issuer. An applicant for a permit should provide a complete statement of all sources of income and amounts received. These should be consistent with and supported by annual accounts, tax returns and bank account statements (as applicable) in the name of the applicant to demonstrate how the total of such income received is reasonably expected to continue to exceed that from the operation of the vehicle(s) if a permit is granted. The applicant ought to supply similar evidence for the time spent operating the relevant vehicle(s). The permit issuing body can then assess this evidence and make findings of fact.

If an operator satisfies this exemption they do not need to satisfy any of the regulation’s other exemptions.

### **‘Main occupation’ exemption: worked examples**

Whether an organisation meets this exemption should be decided on a case-by-case basis.

The following examples demonstrate some of the considerations involved in meeting the criteria for the ‘main occupation’ exemption, example:

- 1: applicant A is a Scout Group which wishes to use a minibus under a permit as part of their activities. Membership of the Scout Association demonstrates that scouting is the main occupation of the organisation, which evidently consumes substantially all of its time and resources
- 2: applicant B is a school set up as a registered charity which wishes to run a number of minibuses using permits to transport the pupils to events. A check of the organisation’s constitutional documents confirms that the organisation’s primary purpose is that of a school, and their accounts show that the activities generating turnover are almost entirely educational in nature and not transport-related
- 3: applicant C is a small community centre which carries out a range of activities including using minibuses under permits to provide trips out to their members. They are a registered charity and demonstrate that non-transport activities (principally, the provision of accommodation for public meetings, local clubs and social functions) consume most of their time and resources, and generate most of their income

- 4: applicant D is a district council which intends to run bus services using permits. The council is able to show that their main occupation is not transport, because most of their time and resources are consumed by the provision of local services other than transport

The last example (Example 5) shows evidence of an organisation not meeting the criteria for the 'main occupation' exemption:

- example 5: Applicant E is a company limited by guarantee and registered as a charity that has been set up with a view to alleviating social isolation for older people in their community. The evidence they provide shows that the majority of their time and resources are consumed by transport activities using vehicles operated under permits; this generates the majority of its income.

### **3.4 Short distance exemption**

[Further guidance on the operation of the short distance exemption was released on 27 September 2019](#), it is to be read in conjunction with this material.

#### **The national market**

Only operators operating exclusively within the UK can satisfy this exemption.

The relevant market is that for vehicles that can carry nine or more passengers.

#### **Determining 'minor impact'**

Any determination of impact must have a geographical basis. However, the existence of a degree of competition in a local market with operators holding PSV 'O' licences should not preclude reliance on this exemption, provided that the impact on the wider market is small.

All services within the automatic 'short distance' (see second paragraph below under 'Determining a "short distance"') are judged to have minor impact on the transport market but the exemption will only be available to 'not-for-profit' operators applying for permits under the 1985 Act.

#### **Determining a 'short distance'**

The [Transport Act 1985 \(Amendment\) Regulations 2019](#) automatically recognises a specified distance as a 'short distance', however a longer distance may be justifiable in less densely populated rural areas.

The legislation automatically recognises as a 'short distance', save for occasional special services (for example day-trips), either:

- any service within a radius of 10 miles, with the radius being measured from a specified central point

or

- a distance of 10 miles measured in a straight line from the first point at which passengers are able to embark to the last point at which passengers are able to disembark

In this context 'occasional' means the frequency with which services in excess of the automatic short distance occur, rather than that the service does not have fixed stopping places.

This applies for both section 19 and 22 permit users who can select their preferred method. The definition of 'short distance' however is non-exhaustive. This means that those operating in less densely populated areas can make the case to the permit issuer of extenuating circumstance and that, in view of the nature of the area in which they operate, a 'short distance' is longer than the automatic distance set in the legislation. This would be because the distance is, in the context of the relevant local circumstances, so short that the impact on the transport market is small.

This dual approach of allowing an operator to choose between a radius and a straight line distance will enable it to select the option which best suits its operating practices. For example, a radius might better suit an operator whose start and end points change constantly throughout the day, whereas the route based approach allows an operator to flex its services depending on who its passengers are and where they want to go. The route based approach might also be favoured by section 22 permit holders whose services have fixed start and end points. In determining whether this exemption is satisfied, permit issuers may consider a range of evidence about journeys and passengers.

If an operator satisfies this exemption they do not need to satisfy any of the regulation's other exemptions.