

Forward Plan reference number: FP900/12/20

Report title: Concessionary Fares Settlement 2021/22	
Report to: Councillor Ray Gooding Cabinet Member for Education and Skills	
Report author: Andrew Cook - Director, Highways and Transportation	
Date: 20 January 2021	For: Decision
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County Divisions affected: All Essex	

Confidential Appendix

This report has a confidential appendix which is not for publication as it includes exempt information falling within paragraph 3 of Part 1 of Schedule 12A of the Local Government Act 1972, as amended.

1. Purpose of Report

- 1.1. The English National Concessionary Travel Scheme (ENCTS) legislation requires each Travel Concession Authority (TCA) to have a concessionary bus pass scheme in place by 1 March before the start of each financial year. Decision paper FP/835/10/20 authorised the publication of a default calculator schedule on 1 December 2020 and delegated authority to the Cabinet Member for Education and Skills to consider the options following Department for Transport (DfT) guidance with the final decision following negotiations with operators to be returned to Cabinet or the Leader for approval.
- 1.2 This second decision paper authorises officers to enter into negotiations with commercial bus operators over the settlement of the 2021/2022 concessionary fare scheme, sets out the options open to the County Council in pursuing the negotiations and (in the confidential appendix) the parameters within which such negotiations will take place, including the impact of COVID-19.

2. Recommendations

- 2.1 Authorise the Director for Highways and Transportation on behalf of Essex County Council to undertake negotiations with commercial bus service operators to try and reach an agreed settlement for the ENCTS in Essex for the financial year 2021/2022 within the parameters set out in **Option 3** of the Confidential Appendix
- 2.2 That any communications with operators relating to the negotiations include a statement making it clear that any negotiations are subject to a requirement

that the regulations relating to reimbursement being published before 1 March 2021 which come into force on or before 1 April 2021.

- 2.3 That it is agreed to keep the same discretionary elements of concessionary fares in 2021/22 as set out at 4.1.
- 2.4 That following the negotiations, a further report to Cabinet or the Leader is made asking for approval for the final scheme to be published on or before 1 March 2021.

3. Summary of issue

Background

- 3.1. Operating the National Concessionary Fare Scheme is a statutory duty placed on the County Council by the Transport Acts 1985 and 2000 and the Concessionary Bus Travel Act 2007.
- 3.2. The legislation for the Scheme requires that each responsible local authority (known as a Travel Concession Authority or TCA) must compensate bus operators who carry Concessionary Pass Holders (the customers) with a level of reimbursement such that they are 'neither better or worse off' than they would have been had the scheme not existed. If bus operators are dissatisfied with the reimbursement arrangements, they can appeal to the Secretary of State for Transport who will issue a binding decision on the level of reimbursement to be paid.
- 3.3. Guidance from the DfT sets out methodologies for determining the level of reimbursement to be paid to bus operators. There are two main methods for doing so. The first is the use of a variable payment scheme (varying according to the level of use) using a spreadsheet calculator developed by DfT for this purpose. This is commonly referred to as a '**Calculator Scheme**'. The second is to negotiate an agreed fixed payment to bus operators, for the whole year, which does not vary according to use. This is commonly referred to as a '**Fixed Pot Scheme**'. Each methodology has its own advantages and risks.
- 3.4. The Council has historically set the reimbursement arrangements through 'Fixed Pot' agreements negotiated annually with the bus operators. This has managed risks for the Council and for operators. For 2020/21 the value of the agreed fixed pot scheme was £17.649m.
- 3.5. The COVID-19 outbreak resulted in significant financial instability across the bus market. Concessionary fare reimbursement normally amounts to an estimated 40% of operators' revenue. There was a fall of between 0% and 80% in overall bus passenger numbers at different times during the outbreak and this was reflected amongst concession pass holders. Capacity restrictions - introduced to protect service users and which operators would likely have had to introduce under the Health and Safety at Work etc Act 1974 – significantly reduce how many people can be carried on a bus. Additionally, at various

stages during the pandemic passengers have been advised to avoid public transport entirely or to make only essential journeys.

- 3.6. Together these factors have created a national crisis in the bus industry which could have led to its widespread collapse. To address this risk the Government sent out guidance asking local authorities to maintain payments at pre-COVID levels for contracts and concessionary fares, has maintained its own 'Bus Service Operators Grant' (BSOG) at pre COVID levels and has introduced the COVID Bus Service Support Grant Restart' package that compensates bus operators for on-bus (but not concessionary fare) revenue during the crisis. This is specifically stated to have been shaped around the continued reimbursement of bus operators for concessionary fares at pre COVID levels. These measures have stopped the immediate collapse of the industry but have left operators reliant on public funding and as a condition of the COVID Bus Service Support Grant (CBSSG) unable to make profits while claiming it.
- 3.7. The DfT and the Cabinet Office issued several guidance notes to cover these requests. The latest was on 20 November 2020, when the DfT issued guidance notes for the calculation of Concessionary Fare Payments, including how to approach the impact of COVID 19 for financial year 2021/22 (See 'Background Papers' below). This reiterates their request that local authorities continue to reimburse bus operators at pre COVID 19 rates and stated that Cabinet Office advice, originally set out in Advice note PPN04, should still be considered as valid, even though it had an expiry date of 31 October 2020, however this was caveated with the recommendation that local transport authorities seek their own legal advice.
- 3.8. The law currently requires the Council to set reimbursement arrangements for concessionary fares having regard to the principle that operators are no better or worse off as a result of the scheme. The Government is consequently reviewing legislation to change the law so that TCAs can comply with the Government's request to pay at pre-COVID levels. On 8 January 2021, the DfT issued a new statement informing local authorities that they had completed a review of the law and that DfT is, subject to legal assessment, working with the Government to lay a Statutory Instrument to allow local authorities to pay concessionary fares funding to operators at a higher level than due through actual journeys by pass-holders. This change in law would provide a lawful basis for local authorities to reimburse operators in line with the request by DfT to pay at pre-COVID levels. DfT have informed local authorities that they are working to do this as quickly as possible, however no date has yet been provided.
- 3.9. From 4 January 2021, England entered a new period of lockdown, with non-essential shops closing and schools only being open for vulnerable children and the children of key workers. Clinically very vulnerable people were once again advised to shield and further advice against travel was introduced. The government indicates that this situation is unlikely to change until mid-February at the earliest. While this will clearly reduce the 2020/21 passenger numbers, it is unclear at this time how long the renewed lockdown will last or what the impact of measures that last into 2021/22 would be.

- 3.10. It is clear that the 'fixed pot' reimbursement arrangement for 2020/21, (that was legally binding on the Council), resulted in the operators being better off as a result of participation in the scheme but that was not knowable at the time it was set and should be regarded as a 'windfall' to the industry helping them offset the loss of income elsewhere. Having lawfully set the arrangements the Council was entitled to maintain at this level. It also would have been supported by central government policy because of the unprecedented circumstances created by COVID-19 and, at the time, was in line with applicable guidance and state aid measures that were approved following notification to the EU Commission. Other councils which use a 'calculator' scheme will have seen their concessionary fare payments reduce significantly. The extra money paid by Essex will help national operators stabilise their operations everywhere, not just in Essex. It will also have helped local operators.
- 3.11. The Council has decided to publish a calculator scheme as a draft, but it now needs to decide how to set reimbursement for 2021/22. The way it does this will be severely constrained if the law is not changed in time. Given the above the County Council faces a difficult set of choices. The very large fall in concessionary bus passenger use in 2020/21, is likely to continue for much of 2021/22 meaning that revenue foregone by the bus operators is very difficult to predict. It is clear however that adopting a 'Calculator Scheme' based on actual passenger use offers an opportunity to make a significant saving on the 2020/21 reimbursement cost at a point in time when local government expenditure is itself under very heavy pressure due to the exigencies of COVID 19.
- 3.12. However, not continuing to reimburse bus operators at pre-COVID levels would result in a very significant reduction in their revenue, which they cannot make up from other sources, in a period when the existence of some operators is fragile. There is a risk that operators may choose to make widespread service withdrawals. There is also a risk of business failures across the county, leading to a significant reduction in the local bus network and large-scale redundancies.
- 3.13. At the same time, the overall trend for passenger numbers in Essex has been downward for a number of years prior to COVID 19 and it could be argued that the Council could expect the level of reimbursement to fall to a certain extent, even if the COVID 19 outbreak had not intervened.
- 3.14. There is also the question of how the scheme will cope with the conditions surrounding the emergence of the industry from the COVID 19 emergency. For example, it is unlikely that concessionary passenger numbers will revert to pre-COVID levels for some significant time. Other authorities that do already operate calculator schemes have faced problems managing the process of dealing with the impact of COVID, although, they have found a way to manage the impact without formally switching to a fixed pot scheme.
- 3.15. These factors are examined in more detail in the **Confidential Appendix**

4. Basis of the Concessionary Fares Scheme and the impact of COVID 19.

- 4.1 The mandatory scheme requires provision of free travel for eligible older and disabled people between the hours of 09:30 and 23:00 Monday to Friday and all day at weekends and on bank holidays. The current Essex County Council scheme covers the mandatory scheme but also provides:
- Concessionary travel between 09:00 and 09:30 Monday to Friday
 - Concessionary travel between 23:00 and 00:00 Monday to Friday
 - Provision of a companion pass for those disabled pass holders who require additional support when travelling.
- 4.2 There is no proposal to change the discretionary elements of the scheme. Changing the start time of the concession fares scheme to 09:30 for example could lead to a sharp increase in passengers at 09:30 which could result in valid additional claims from operators for the cost of introducing extra capacity at that time.
- 4.3 The 2020/21 agreement has a negotiated fixed cost of £17.649m. There is no allowance for additional funding relating to increased passenger patronage within this scheme. Similarly, there is no possibility of reducing funding if passenger use reduced.

5. Reimbursement arrangements

- 5.1 It is for the Council to determine the scheme and how reimbursement arrangements will operate, but in doing so it must work within statutory parameters and follow the statutory process.
- 5.2 Operators have a statutory right to appeal to the Secretary of State for Transport if they feel that the scheme does not adequately reimburse them. Normally the basis of the appeal would be if that the reimbursement does not achieve the statutory duty to leave them no worse and no better off than if the scheme had not existed. However, it is unclear whether that will apply if the law is changed for 2021/22. They can also seek a judicial review directly through the high court if they feel that the Council has acted unlawfully in setting the reimbursement arrangements if an appeal could not remedy this. Operators can also agree the scheme with the Council. Essex County Council has managed to reach successful agreement with operators every year since assuming responsibility for concessionary fares in 2011.
- 5.3 In principle operators are entitled to receive payments calculated according to the following formula:

$$\text{Payment} = \text{Gross revenue foregone} - (\text{generated revenue} + \text{additional costs})$$

- 5.4 There are two main variables which affect the cost of the scheme:

1. The number of additional passenger journeys generated by the scheme (because passenger numbers are larger when people do not have to pay) and operators should not be better off because of the scheme. This factor affects the 'revenue foregone' element of the formula; and
2. The additional network capacity costs resulting from the scheme – in effect how many additional buses and how much other infrastructure (depot space etc.) is required to cope with the increased passenger numbers.

5.5 Any reimbursement scheme is complex and must make allowances for:

- The number of additional journeys which are generated by the scheme (i.e. people travelling by bus just because they can travel for free)
- Current passenger journey figures
- Current pass holder numbers
- Operators' cost pressures and fares increases
- Anticipated weather for the year
- Anticipated passenger growth
- Possible changes to the network
- Any major schemes to promote the use of public transport
- Large scale developments in the County proposed for the period of the agreement.

5.6 The Secretary of State issues guidance on reimbursement schemes on an annual basis. An operator who disagrees with the Council's scheme can appeal to the Secretary of State. Appeals are in general decided in accordance with the guidance. The guidance that has been published in previous years principally refers to a 'calculator' scheme whereby the level of reimbursement reflects actual activity levels. This involves an element of risk for the local authority and for bus operators, although in 2021/22 it is clear that the reduction of passenger numbers represent a saving over the cost of the scheme in previous years.

6 Benchmarking

- 6.1 In 2018/19 ECC undertook an in-depth review of the scheme in comparison with similar schemes (geographical and socio-economic) in which we identified that there are similar trends and behaviours contributing across the country. It is considered that this review is still relevant when looking at the pre-COVID-19 situation. Discussion at Transport East (a forum for the East of England Transport Authorities to meet with DfT) has indicated a broad intention by authorities to make payments to bus operators in line with government guidance on paying at pre Covid levels, but this will be subject to decisions as part of each authority's budget setting process and also subject to lawfulness.
- 6.2 ECC has recognised that there is an impact on fares in Essex because of the high cost of service provision created by a London 'halo' effect on driver and engineer wages and the general cost of running business. Essex also has historically high concessionary passenger journey numbers compared to the

national average. This means that Essex has had a relatively high rate of reimbursement nationally, however looked at on a regional basis the Essex level of both passengers and reimbursement it is near average.

- 6.3 As noted above passenger numbers have fallen steeply due to the outbreak of COVID-19, which would normally argue to push the future level of reimbursement down. The fall in passenger numbers has been in line with drops elsewhere in non-metropolitan England. It has been the result of Government travel advice; Government advice on working from home; the various points at which non-essential retail has closed; school closures; social distancing requirements on buses; and passengers' individual choices in travelling.
- 6.4 The Government's clear expectation, as set out above, is that local authorities will maintain the level of payments made for concessionary fares during 2020/21 to help preserve the industry and prevent a general commercial failure across the network, however this must be in line with the law. The DfT have confirmed that following a review of the legislation, as noted in 3.8 above, it is planning on changing the law to allow local transport authorities to make payments in line with the Government's expectation. DfT have not yet confirmed when the law will be changed, however they have informed local authorities that they are working as quickly as possible. The aim is to support the industry through the crisis so that when guidance on travel and working from home changes, there is still a functioning bus network. The latest guidance on reimbursing operators at pre-COVID-19 levels (see Background Papers below) would, as the law stands, be likely to result in the scheme not meeting the 'no better or no worse off' requirement set out in legislation, which would result in the scheme being unlawful. The recommendation, as set out in this report is therefore to negotiate with bus operators but only on the understanding that any settlement beyond a calculator-based scheme can only be agreed subject to a change in law to allow TCAs to pay at pre-COVID-19 levels. Operators will be made aware of this. If a change in law is not made, the uncertainty relating to the recovery of passenger numbers means that the Council will have no real choice other than to set a calculator scheme for 2021/22.

7 Process

- 7.1 The Council published a default 'calculator' based scheme on **1 December 2020** and will need to publish a final scheme, preferably one agreed with bus operators, by **1 March 2021**.

8 Options

- 8.1 Based on the above there are therefore three options for the reimbursement arrangements:
- **Option 1:** - Adopt a calculator-based scheme from 1 March 2021 with the potential benefits as set out in the confidential appendix and the accompanying service, and economic risks.

The County Council would negotiate at an individual level with bus operators over the value of the marginal cost, generation, and other factors. This approach would risk appeals, although the basis of appeals is yet unclear and in previous years any successful appeals have resulted in the imposition of a calculator scheme. The risk of successful appeals is currently considered to be low. Should this option be implemented, the authority would still need to continue to negotiate with bus operators individually to agree elements that can be adjusted within the calculator, such as Marginal Operating Costs and Fare Calculation (national or local values). This option represents the lowest cost and lowest legal costs. It is also likely to be the only option if the government does not change the law before 1 March.

- **Option 2:** Wait until the Government have clarified their position over the legislation (i.e. changes to the 'no better/no worse off' requirement in the various legislative provisions) and then enter into negotiation with bus operators over a potential fixed pot settlement that meets Government's request for local authorities to maintain pre-COVID levels of reimbursement to a maximum as set out in the confidential appendix, adjusted for trends as set out in the DfT guidance. The scope for savings under its position would be significantly reduced. There is an additional risk in that if the Government does not issue new legislation almost immediately the Council would, by default have to go with Option 1 even if the legislation is changed to allow pre-COVID levels of payment to be adopted and a negotiated settlement was otherwise acceptable.

If legislative changes were made following 1 March 2021, a report would be required to be brought to Cabinet or the Leader following the change in legislation to agree to negotiate with operators on the basis of the change in law and for approval of the varied scheme.

- **Option 3 (recommended option):** Enter into negotiations as soon as possible with bus operators over a potential fixed pot scheme with the aim of maintaining the level of reimbursement payment at the pre Covid level to a maximum value as set out in the confidential appendix, adjusted for trends as set out in the DfT guidance. Negotiations would be undertaken with a clear caveat that any agreement is subject to a change in law and can only be approved if the Government changes the 2007 Act so that the legal issues surrounding the no better/no worse off requirement and fixed pot schemes are resolved. Any proposed agreement would be brought back to Cabinet or the Leader of the Council for final approval. Should it not be possible to negotiate an agreement at an acceptable rate of reimbursement, allowing for any DfT guidance, the default calculator scheme (which is the minimum ECC can offer) will come into effect on 1 March 2021. There could be a relatively small financial saving achievable dependent on the outcome of any negotiations.

9. Links to Essex Vision

10.1 This report links to the following aims in the Essex Vision

- Enjoy life into old age
- Develop our County sustainably
- Connect us to each other and the world

For more information visit www.essexfuture.org.uk

10.2 This links to the following strategic aims in the Organisational Plan:

- Enable inclusive economic growth
- Help people get the best start and age well
- Help create great places to grow up, live and work
- Transform the council to achieve more with less

10.3 The decision contributes to the Local Bus Service Priority Policy 2015 to 2020 (and as subsequently extended) by supporting the following outcomes:

- Providing access to schools, colleges, and training, work, health and leisure services
- Providing access to health services, shopping, leisure activities, employment, reducing isolation and increasing independence.
- Providing access to learning and training opportunities, supplier workforce training and apprenticeships.
- Providing access to care services and providing safe transport for access to health, education, work and leisure services, reducing the number of people killed or seriously injured (KSIs).
- Attracting inward investment by offering improved connectivity, access to work and leisure opportunities and reducing congestion
- Reducing congestion, air quality and CO2 emissions.
- Enabling access to key services, improving community involvement

11.0 Issues for consideration

11.1 Financial implications

11.1.1 The organisation is statutorily required to negotiate and provide a scheme each year. The 2020/21 agreement has a negotiated fixed cost of £17.649m.

11.1.2 The recommended scheme and the estimated budgetary requirement are detailed in the Confidential Appendix to this report.

11.2. Legal implications

- 11.2.1 Essex County Council as the Travel Concession Authority was required to issue a proposed scheme by 1 December 2020. The Council published a calculator scheme as its draft. The proposed scheme can be amended – but only in a way which is more favourable to operators - no later than 1 March 2021, when the scheme takes effect. The operators can appeal to the Secretary of State no later than 27 May 2021, 56 days after the commencement date. Operators will not, however, appeal if a scheme is agreed with them.
- 11.2.2 Under the law as it currently stands, the Council is required by law to make reimbursement arrangements which ensure that every operator:
- (a) is financially no better and no worse off as a result of providing a concession; and
 - (b) receives appropriate reimbursement for providing concessions to the persons eligible.
- 11.2.3 The DfT has published supplementary guidance requesting that TCAs pay concessionary fares at pre-COVID levels, however this recommendation is not in line with the current law so any payment by TCAs must be lawful. The DfT has agreed to review the legislative position to allow TCAs to reimburse operators at the pre-COVID levels as requested and has advised it will provide an update following this review. Any negotiation must be undertaken in line with the applicable law.
- 11.2.4 Failure to negotiate a scheme means that the operators can appeal to the Secretary of State, who can then impose a scheme. This would result in significant legal costs being incurred and, if the operators were successful, would result in a scheme which is more expensive. However, to date, the Secretary of State has decided appeals in line with the calculator scheme.
- 11.3 An agreed scheme, if it can be achieved at acceptable cost, reduces the likelihood of any legal challenges.
- 11.4 It is important to note that by paying more than the revenue foregone the Council will be allowing operators to receive more money from carrying concessionary fare passengers than the money they are losing. This potentially amounts to a subsidy to the bus operators falling within the European Union (Future Relationship) Act 2020. The aim of maintaining payments broadly in line with historical levels of payment seeks to do no more than limiting the damage caused by the pandemic, provided that we do so in a way which reflects, so far as possible, other changes to the passenger transport market in Essex. It is acceptable to compensate for passengers lost as a result of the pandemic, but not for passengers they would likely have lost anyway because of major route changes or a decline in bus usage anyway. This will need to be considered during any negotiations. The Council is likely to have to publish the final scheme as a potential subsidy. Such publication is likely to have to be placed on the website of the Department for Business Energy and Industrial Strategy.

12 Equality and Diversity implications

- 12.1 The Public Sector Equality Duty applies to the Council when it makes decisions. The duty requires us to have regard to the need to:
- (a) Eliminate unlawful discrimination, harassment and victimisation and other behaviour prohibited by the Act. In summary, the Act makes discrimination etc. on the grounds of a protected characteristic unlawful
 - (b) Advance equality of opportunity between people who share a protected characteristic and those who do not.
 - (c) Foster good relations between people who share a protected characteristic and those who do not including tackling prejudice and promoting understanding.
- 12.2 The PSED is a relevant factor in making this decision but does not impose a duty to achieve the outcomes in s.149, is only one factor that needs to be considered, and may be balanced against other relevant factors.
- 12.3 By providing the English National Concessionary Travel Scheme, the County Council meets its requirements under legislation to provide a concessionary travel scheme.
- 12.4 In addition to this, the County Council also provides discretionary elements to the scheme including extended start and finish times and companion passes for disabled people who require assistance with their journey due to their disability.
- 12.5 An equality impact assessment has been undertaken. No adverse impact has been identified on any protected group by the current scheme which is similar to that which has been in force since 2010. It is proposed to continue with a concessionary travel scheme for a further year.

13 List of Appendices

Equality Impact Assessment
Confidential Appendix

14 List of Background papers

- Decision Paper **FP/835/10/20**
- DfT letter Supplementary Concessionary Travel Reimbursement Guidance 20 November 2021
- Cabinet office Note PPN20/02
- Cabinet Office Note PPN20/0

I approve the above recommendations set out above for the reasons set out in the report.	Date
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Councillor Ray Gooding, Cabinet Member for Education and Skills	02 February 2021
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In consultation with:

Role	Date
Director for Highways and Transportation, Andrew Cook	02 February 2021
Executive Director for Finance and Technology (S151 Officer) Stephanie Mitchener on behalf of Nicole Wood	20 January 2021
Director, Legal and Assurance (Monitoring Officer) Paul Turner	21 January 2021