

# Annex E

## Subsidy Control comment RE ZEBRA2 funding between:

Department For transport (the “DFT”)

City of York Council (the “LTA”)

Transdev (the “Local Bus Company”)

### 1. Summary

1.1 Based on information received, it is the opinion of the LTA that the funding arrangements will not amount to a subsidy under [Subsidy Control Act 2022](#) (“**the Act**”) between either:

(a) DFT and the LTA; or

(b) the LTA and the Local Bus Company

1.2 As required under s79(6) of the Act, the assessment also factors in the [Statutory Guidance For The United Kingdom Subsidy Control Regime](#) (“**the Guidance**”).

### 2. Assessment

2.1 Under s2 of the Act, a “Subsidy” means financial assistance that meets all the following 4-limbs. The LTA considers that not all 4-limbs are met, based on the reasons set out at (a) – (d) below.

(a) **Limb A – Is the financial assistance being given, directly or indirectly, from public resources by a public authority? (s2(1)(a))**

**Yes**

The funding is clearly being granted through public resources by a public authority at each stage.

(b) **Limb B – Does the financial assistance confer an economic advantage on one or more enterprises? (s2(1)(b))**

**No between the DFT and LTA**

**Yes between the LTA and Local Bus Company**

This limb has 2-elements:

(i) **Limb B1 - The recipient of the financial assistance must be an “enterprise”** – The Act defines an enterprise as “*a person who is engaged in an economic activity that entail offering goods or services on a market, to the extent that the person is engaged*” (s7(1)(a)).

(ii) **Limb B2 - The financial assistance must confer an “economic advantage”** - The Act states that “*...Financial assistance is not to be treated as conferring an economic advantage on an enterprise unless the benefit to the enterprise is provided on terms that are more favourable to the enterprise than the terms that might reasonably have been expected to have been available on the market to the enterprise.*” (s3(2)).

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Financial Assistance will therefore not confer an economic advantage if it could reasonably be considered to have been given on the same terms as it could have been obtained on the market. This is known as the Commercial Market Operator Principle (“**CMO**”).

The Statutory Guidance (2.18) also provides examples of financial assistance that may not meet Limb B2 as:

*“...Purchasing goods and services following appropriate public procurement processes at market rate; and*

*A loan, guarantee or equity investment provided on CMO principle terms (i.e., that could reasonably have been provided by a private investor on the market), for example by being given on the same terms at the same time as a significant private sector investment, or evidenced via benchmarking or profitability analysis, or both.”*

### **Funding between the DFT and LTA**

**Limb 1** - It is considered the LTA would not be operating as an enterprise on this occasion, as it is not offering goods or service itself on a market.

**Limb 2** - Further, the financial assistance will not confer any kind of economic advantage on the LTA itself.

Even though this would be a grant from the DFT to the LTA, it appears the LTA would solely be acting as **intermediary** providing funding on to the Local Bus Company.

Paragraph 15.51 of the Statutory Guidance stipulates that an intermediary should not be considered the beneficiary of a subsidy themselves:

*“Where there is an intermediary involved – that is, the public authority initially transfers the financial assistance to an entity which automatically passes on the benefit (apart from reasonable administration costs) and does not receive any selective advantage itself – the intermediary should not be considered the beneficiary of a subsidy.”*

### **Funding between the LTA and The Local Bus Company**

**Limb 1** - It is considered that the Local Bus Company is operating as an enterprise, by the nature of their related services on an existing market.

**Limb 2** - It is considered that the financial assistance provided by the LTA to the Local Bus Company could arguably be viewed as providing the Local Bus Company with an economic advantage, as this is funding that does not appear could be provided by alternative means on the same terms. As such, it is considered the CMO Principle could not arguably apply. The scenario here also does not appear to meet the permissible examples given in the Statutory Guidance.

### **Comment regarding funding passing to any third Parties via the Local Bus Company**

Further, it is considered that third parties could potentially be enterprises, including suppliers and/or manufacturers of vehicles and infrastructure purchased by the Local Bus Company using this funding.

However, with regards to the risk of any unfair advantage being passed on to manufacturers and suppliers, even though the Local Bus Company is **not** a “**contract**

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**authority**” to who the Public Contract Regulations 2015 would apply to, any such risk could arguably be mitigated by the inclusion of suitable provisions (as agreed between the LTA and the DFT) within any local funding documentation between the LTA and the Local Bus Company party to this project. These could require the Local Bus Company to commission and request quotes from suppliers and/or manufacturers on a genuinely fair, open and transparent competition, and allow all eligible suppliers and/or manufacturers to participate in such an exercise, as well as including further provisions, reporting requirements and monitoring in the LTA/Local Bus Company funding agreement to ensure that any ZEBRA objectives required of the LTA with its agreement with the DFT are passed down accordingly and met by the Local Bus Company.

(c) **Limb C – Is the financial assistance specific, that is, is such that it benefits one or more enterprises over one or more other enterprises with respect to the production of goods or the provision of services (s2(1)(c));**

**No between the DFT and LTA, as the LTA is considered to be acting as intermediary (see (b))**

**No between the LTA and Local Bus Company, based on the below**

It is noted the Statutory Guidance contains the below:

*“15.87. In order to determine whether a measure under which a public authority envisages providing financial assistance is specific, public authorities should:*

- identify the policy objectives of the measure used to provide financial assistance;*
- identify which enterprises are in a comparable position with respect to that internal policy objective; and*
- determine whether certain enterprises are treated more advantageously than one or more other enterprises in a comparable position with respect to those internal policy objectives.*

*15.88. If the measure treats certain enterprises more advantageously than one or more other enterprises which are in a comparable position, the measure will be considered specific. Conversely, if the measure does not treat certain enterprises more advantageously than one or more other enterprises which are in a comparable position, the measure will not be considered specific.*

*15.89. Financial assistance should not be considered specific if the distinction in the treatment of enterprises is justified by principles inherent to the design of the arrangements of which that financial assistance is part.”*

There is a clear public policy objective for the funding, which is to reduce carbon emissions, improve air quality and encourage travel across the City of York by means other than private motor vehicles to help the City of York meet its climate change, air quality commitments, and reduce traffic congestion, particularly in the city centre.

The funding being sought is considered both necessary and proportionate to the achievement of the objective. The fund is designed to overcome the cost barrier and

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encourage take up of zero emission buses instead of conventional fossil fuel vehicles.

There could be an argument that the financial assistance measure intended to serve this objective does not treat the Local Bus Company more advantageously than other enterprises in a comparable position. It is understood the LTA made this opportunity available to other local bus operator enterprises in a comparable position, as it previously consulted all possible bus service operators in the same market to invite them to bid with the LTA. Despite interest, no other operator however had resources to participate at this time. As such, it is understood only the Local Bus Company was able to bid with the LTA.

In terms of other possible competing markets, one could argue that there will be no unfair advantage given to bus service providers generally (of which the Local Bus Company is part of) over any such other competing markets. For example, local taxi firms have access to separate grant funding schemes to upgrade their fleet vehicles with electric vehicles; further, it can be argued that local cab firms, rail services and bus services cater to slightly different customers, so any funding granted to local bus service providers is unlikely to give these undertakings any unfair advantage over local taxi firms and rail services.

- (d) Limb D – Does the financial assistance have, or is capable of having, an effect on (i) competition or investment within the United Kingdom, (ii) trade between the United Kingdom and a country or territory outside the United Kingdom, or (iii) investment as between the United Kingdom and a country or territory outside the United Kingdom (s2(1)(d)(1)-(iii)).**

**No between the DFT and LTA, as the LTA is acting as intermediary (see (b))**

**No between the LTA and Local Bus Company, for the reasons below**

As per limb C, it is understood this funding will not place the Local Bus Company in any enhanced position with regard to future competition in York.

The LTA is of the opinion that the project is highly unlikely to have an impact on trade, competition, or investment within the UK or between the UK or a country or territory outside the UK due to the specific and localised nature of the project.

It is also understood that although the Local Bus Company's existing services to the LTA are due for re-tender in September 2024 (alongside other LTA local routes) neither the proposed funding nor any resulting electrification will benefit the Local Bus Company over other potential providers, in the event the Local Bus Company were to tender. The LTA will be unable to specify electric operation as a prerequisite part of the tender. Providing the LTA re-tender on the basis that ensure the Local Bus Company is not put in any preferential position this financial assistance would therefore not appear to distort competition in York. It is also understood that, depending on the outcome of any future tender, the LTA intend to offer a successful operator the option of a share of ZEBRA2 funding to electrify the route (subject to the DFT's approval).

It is therefore reasonably anticipated that there will not be any significant material change to the market in which the Local Bus Company that were to receive funding and those other local bus service providers who do not.

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Regarding third party manufacturers and suppliers, as per Limb B, it is recommend it be sought risk of effect on competition could be mitigated by the inclusion of suitable provisions (as agreed between the LTA and the DFT) within any local funding documentation between the LTA and the Local Bus Company, which require the Local Bus Company to commission and request quotes from suppliers and/or manufacturers on a genuinely fair, open and transparent competition, and allow all eligible suppliers and/or manufacturers to participate in such an exercise, as well as including further provisions, reporting requirements and monitoring in the LTA/the Local Bus Company funding agreement to ensure that any ZEBRA objectives required of the LTA with its agreement with the DFT are passed down accordingly and met by the Local Bus Company

## **3. Other considerations**

- 3.1 Based on information received at this date, it is considered it is arguable that the grant does not meet all limbs of the definition of a Subsidy under the Act, and therefore would fall outside of the UK Subsidy Control Regime entirely.
- 3.2 The grant in question is also highly unlikely to have any impact on trade or investment between the UK and the EU given its highly localised nature. Furthermore, it is highly unlikely the grant will be subject to WTO Agreement on Subsidies and Countervailing Measures ("**WTO ASCM**"), the provisions of the Northern Ireland Protocol, and any other free trade agreements with any of the UK's other international trade partners, again due to the fact that its primary focus being restricted to the immediate York area.