



Submission to the National Transport Authority

Draft Guidelines for the Licensing of Public Bus Passenger Services

Submission S/10/003

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The Competition Authority
An tÚdarás Iomaíochta

Table of Contents

1.	Summary.....	1
2.	Restrictions on Competition when Considering a Licence Application.....	4
	<i>Introduction</i>	4
	<i>Adverse Competition</i>	4
	<i>Geographic Separation and Time Separation</i>	6
	<i>Licence Renewal</i>	7
3.	Transparency	9
4.	Barriers to Entry	11
	<i>Duration of the Licence</i>	11
	<i>Insurance Requirements</i>	11
	<i>PSV Licence</i>	12
	<i>Amendment of a Licence</i>	13
A.	Schedule A of the Contract between the NTA and Dublin Bus.....	14

1. SUMMARY

The Competition Authority appreciates the opportunity to comment on the National Transport Authority's ("NTA") Draft Guidelines for the Licensing of Public Bus Passenger Services ("the Draft Guidelines"), which were sent to us and published for public consultation on 29th July 2010.

The Competition Authority has welcomed the reform of the legislation governing the licensing of bus passenger traffic and the creation of the NTA, through the enactment of the Public Transport Regulation Act 2009 ("the PTR Act"). In legislative and institutional terms, this creates a solid platform for the development of a vibrant and competitive public transport system. The Competition Authority also welcomes the priority which the NTA has clearly given to updating the regulatory regime for public bus passenger transport services, as represented by the publication of the Draft Guidelines. This is clearly in line with the objectives of better public transport and improved transport regulation, as set out in the Department of Transport's Strategy Statement for 2008 – 2010. Improved public transport regulation can also make an important contribution to the Government's key priorities, including economic and financial stability and accelerating the return to economic growth.

While generally welcoming the Guidelines, the Competition Authority has a number of concerns about the current draft, which it feels would, if implemented as they stand, result in a failure to reap the full benefits of a reformed bus licensing system. These concerns are in three main areas:

- The general approach to competition;
- The lack of transparency in certain key areas; and
- Barriers to entry which are possibly higher than they need to be in order to achieve public policy objectives.

General approach to competition

The Competition Authority is concerned that the Draft Guidelines do not reflect the positive benefits which competition can bring to consumers, to taxpayers and to the economy as a whole. Competition has a significant role to play in developing a well-functioning, attractive, competitive, integrated and safe public transport system. Both the reality of competition and the threat of new entry ensure that operators are focused on really meeting the needs of their customers, and doing so in an efficient and cost-effective way.

However, the references to competition in the Draft Guidelines tend to be negative – for example, a reference to "adverse competition" (p.8) undermining subsidised services to the extent that additional subsidies become necessary; a provision for the NTA to reject all or part of an application if it would result in "head-to-head" competition with an existing licence holder (also p.8). On the other hand, no indication is given of how the Authority intends to achieve the objective set out in Section 10(e) of the Dublin Transport Authority Act 2008 ("the DTA Act"): "Regulated competition in the provision of licensed public bus passenger services in the public interest". The importance of competition has also been recognised by the

Oireachtas in the provision (Section 23(4)(c)) of the PTR Act which requires the NTA to consult the Authority on a draft of the Guidelines.

Also, in general, the Guidelines do not provide a much detail on how the NTA proposes to assess licence applications against the factors listed in Section 10 of the PTR Act. The Guidelines list these factors, but only elaborate to some degree on factors (i) to (iv), and in fact say little about factor (i), which includes a reference to a competitive public transport system. Crucially, there is little or no guidance on how the NTA will balance potentially conflicting factors, such as the impact on existing services versus the benefits to consumers of a new service.

Lack of transparency on key issues

The Draft Guidelines point out (page (i)) that services entered into under Section 48 of the DTA Act (which covers services provided and funded under the Public Service Obligation¹ ("the PSO") and governed by Public Transport Service Contracts²) are not covered by the Draft Guidelines.

However, neither the Draft Guidelines nor the Public Transport Contracts provide any level of detail as to the exact routes covered by the PSO, where the stops are, the frequency of services or the extent to which each and every service is covered by the PSO. The only information provided is a map in PDF format, of very poor resolution. The Draft Guidelines refer (p.5) to "Services provided by Bus Éireann and Dublin Bus ... which are not subject to a Public Service Obligation contract will continue to operate ...", which implies that at least some Dublin Bus services are not covered by the Public Transport Contract.

It is clear from the Draft Guidelines that the NTA intends to take into account the potential for a proposed new public bus service to impact on an existing bus service in the vicinity (p.7). It is therefore vitally important that the potential bus licence applicants have full transparency of information on the PSO status, timetables and precise routes of the existing services.

Unnecessarily high barriers to entry

There are a number of aspects of the Draft Guidelines which could make it more difficult than is necessary for applicants to secure a licence and thus, reduce the availability of bus services to consumers. These include a lack of clarity around what constitutes "adequate" insurance, whether or not a Public Service Vehicle³ ("PSV") licence is required at the time the application is made, the duration of the licence and the fact that any amendment sought to a licence is treated administratively as a new licence application.

¹ The DTA Act defines the PSO as "a requirement specified by the NTA in order to ensure public passenger transport services in the general economic interest which a public transport operator, if it were considering its own commercial interests, would not assume or would not assume to the same extent or under the same conditions without reward".

² According to the DTA Act, a public transport service contract means a contract, including a public service contract (i.e. direct award by the NTA without competitive tendering), between the NTA and a public transport operator for the provision of public transport service.

³ Any vehicle providing a public passenger service on a pre-defined route must get a PSV licence.

In summary, these are the three areas where the Competition Authority, in accordance with its responsibilities under Section 23(4)(c) of the Passenger Transport Regulation Act 2009, is of the opinion that aspects of the Draft Guidelines would, if given effect, be likely to result in competition being prevented, restricted or distorted.

The Competition Authority is aware that, in drawing up its Guidelines, the NTA faces a difficult and complex task, involving the balancing of many important public policy considerations, including safety, traffic congestion, sustainability etc. Nevertheless, it feels that a greater emphasis on the needs of the consumer, and on the capacity of competitive to meet those needs, is achievable without compromising other goals.

The Competition Authority would welcome the opportunity to meet the NTA to discuss this submission in greater detail.

2. RESTRICTIONS ON COMPETITION WHEN CONSIDERING A LICENCE APPLICATION

Introduction

- 2.1 The purpose of the Guidelines is to provide new and existing bus service providers with a clear understanding of how licence applications and licence renewals will be assessed by the NTA. This is vital to ensure that potential entrants who want to provide new and/or improved bus services know exactly what they need to consider before making a licence application.
- 2.2 Section 10 of the PTR Act and the Draft Guidelines set out 11 factors that the NTA will consider when assessing a licence application. However, the Draft Guidelines do not provide much detail on how the NTA proposes to assess licence applications against these. The Draft Guidelines only elaborate to some degree on factors (i) to (iv), and in fact say little about factor (i), which includes a reference to a competitive public transport system. Crucially, there is little or no guidance on how the NTA will balance potentially conflicting factors, such as the impact on existing services versus the benefits to consumers of a new service.
- 2.3 In these circumstances, it would be difficult for potential entrants to assess the likelihood that their application will be successful. This may result in a system whereby potential new entrants rely on trial and error to have their applications approved. As a result, these provisions in the Draft Guidelines may restrict competition. It may also be wasteful of the NTA's limited resources.
- 2.4 Overall, the Draft Guidelines appear to regard competition as a negative factor for consideration. The potential benefits of competition to the consumer are not addressed adequately. Crucially, there are no provisions made for the **replacement** of an existing service provider with a new provider willing to offer **a better service**. The following sub-headings outline our concerns in more detail.

Adverse Competition

- 2.5 The NTA is required to have regard to the potential impact of licensed services on services contracted by the NTA to meet a public service obligation. The Draft Guidelines (p.8) state that the NTA will balance the need to ensure that transport services that it has contracted for, and for which public subsidies are paid, are allowed to operate "*free of adverse competition*". "Adverse competition" refers to competition against a subsidised public transport services that would undermine the subsidised services to the extent that additional subsidisation would become necessary. The Draft Guidelines do not state what this consideration should be balanced against.
- 2.6 The Competition Authority is concerned that if all contracted PSO routes are allowed to operate free of "adverse competition", **all** new applications in the Greater Dublin Area and other cities could potentially be rejected and thus restrict competition.

- 2.7 The inclusion of this provision in the Draft Guidelines appears to be inconsistent with provisions made in Section 10 of the PTR Act 2009. There is no provision in Section 10 of the PTR Act which states that PSO routes are automatically allowed to operate “*free of adverse competition*”. On the contrary, according to Section 10 (b), if the NTA considers that a proposed bus passenger service would have an impact on a PSO service, they must balance this impact against “*the need to provide a well-functioning, attractive, competitive, integrated and safe public transport system of service and networks for all users*”.
- 2.8 In addition, it is not clear from the Draft Guidelines what the NTA will make of a proposed bus service that would result in “head-to-head” competition with only **part** of a PSO service, and what level of impact is considered acceptable in considering the new service to be approved.
- 2.9 The Draft Guidelines state that the NTA may reject all or part of an application if the proposed service would result in “head-to-head” competition with an existing licence holder, jeopardising public order and safety”. The Competition Authority appreciates, that in certain circumstances, competition may lead to service providers racing for customers on the same route, and jeopardise public safety. However, in other circumstances, “head-to-head” competition may increase service quality and reduce fares on the service. For example, there are two private sector operators competing with Bus Éireann on the Dublin-Galway route which has a total of 26 services daily. Research in this area indicates that Bus Éireann’s fare on this route, in terms of cents per mile, is lower than on the Dublin-Cork route, where it is the only operator.⁴

Proposal 1: The Guidelines should clarify (a) the circumstances in which a licence is likely to be granted, and (b) how they intend to balance potentially conflicting objectives. In particular, they should show how the NTA intends to balance the impact a proposed public bus passenger service would have on a PSO service and other existing services, against the benefits to consumers of competition and new services.

Consideration of potential demand

- 2.10 When considering a licence application, section 10(1)(a) of the PTR Act requires that the NTA should take into account the “demand or potential demand” that exists for the public bus passenger service. The Draft Guidelines outlines the type of information that may be considered when assessing demand and potential demand, but they do not state the criteria that will be applied. Service providers will naturally wish to operate where there is potential demand; nevertheless, the precise extent of demand and potential demand are not obvious in some cases. While they can be assessed through surveys and other forecasting methods, no forecasting is entirely

⁴ Barrett, S. (2004), “Bus Competition in Ireland – The Case for Market Forces”. Special article in ESRI Quarterly Economic Commentary, Autumn, 2004. Available online at: http://www.esri.ie/UserFiles/publications/20070725110234/QEC2004Aut_SA_Barrett.pdf.

accurate and until the services are actually in place, demand cannot be known precisely. For example, before the arrival of Aircoach, Dublin Bus did not foresee the demand for operating a bus service to and from Dublin Airport to various destinations in Dublin.

- 2.11 The Guidelines should recognise that, in the absence of a trial period, it may be difficult for the NTA or the licence applicant to accurately gauge demand and there will always be some level of risk associated with opening up a new route.
- 2.12 Existing service providers have considerable amounts of information on demand for existing services, which may lead to asymmetric information between existing service providers and new entrants. For example, the recent introduction of smart card technology would provide a wealth of information on public transport demand to CIE. This may put a new entrant at a competitive disadvantage when designing its services in competition with CIE.

Proposal 2: When considering demand and potential demand, the NTA should be open-minded regarding new services, and not over-rely on assessments of potential demand. The Guidelines should recognise that risk is a normal part of launching a new service, and recognise the limitations of any estimates of demand or potential demand.

Geographic Separation and Time Separation

- 2.13 The Draft Guidelines outline the geographic separation between bus stops and time separation between buses which the NTA considers necessary to avoid head-to-head competition. The geographic separation is given as 10 minutes' walk between bus stops, and time separations are generally between 15 and 30 minutes for different types of bus services.
- 2.14 On average, five minutes walking distance is a quarter mile and ten minutes walking distance is a half mile. Studies on how far people are willing to walk to get to a bus or light rail stop show that the distance varies from a quarter mile to a half mile. However, factors such as safety, sidewalk quality and attractiveness of the routes also affect on how far people are willing to walk to get to a bus stop.⁵
- 2.15 It is not clear from the Draft Guidelines how the NTA will treat routes as they converge in congested areas. The Draft Guidelines could potentially be interpreted as meaning that any service with stops in the city centres of Dublin, Galway or Cork could be regarded as creating head-to-head competition and could therefore be rejected, which would eliminate many possible new services of benefit to consumers.
- 2.16 The geographic separation proposed by the Draft Guidelines is at the edge of the furthest distance that people are willing to walk to get to a

⁵ Dittmar and Ohland (2003), "The New transit Town: Best Practices in Transit-oriented Development", Island Press, USA.

bus stop. The geographic and time separations are important for some situations such as traffic congested areas, but unnecessary for suburban areas.

Proposal 3: The NTA should reduce the geographic and time separation for less congested suburban areas and should clarify that these separations do not apply to the whole route. In particular, the Guidelines should provide more information on how the NTA will assess buses passing through or terminating in city centres.

Licence renewal

- 2.17 Under the DTA Act and the PTR Act, every bus service already in existence in Ireland is either exempt from the NTA's licensing system or will automatically receive a licence from the NTA. This "grandfathering" of all existing bus services (whether provided by CIE or private operators) into the new licensing regime means that companies will continue to enjoy protection from competition for the next few years. However, it was not intended by the legislators that existing service providers should enjoy local monopoly rights or shelter from competition forever.
- 2.18 Therefore, the NTA's approach to the licence renewal is key to ensuring that bus services are competitive in the future.
- 2.19 Licence renewal provides the opportunity for existing service providers to face real competition. It can be used to encourage existing service providers to keep their costs and prices low and service quality high.
- 2.20 The Draft Guidelines indicate that licence renewal will be automatic unless there have been repeated minor breaches, one or more serious breaches of the conditions of the licence, or if the licence holder has been convicted of an offence related to the provision of bus services under the PTR Act or other relevant legislation. No provisions have been made to allow for an incumbent service provider to be replaced by a new entrant who feels he can provide an existing service at a lower price and/or better quality to replace the incumbent. If the NTA will not consider applications to replace existing bus services with better bus services, then Ireland's bus services will not be competitive.
- 2.21 Secondly, the Draft Guidelines indicate that an official licence renewal application form must be accompanied by a completed "compliance form" which will confirm that the licence holder has complied with all the conditions attached to the licence. These conditions indicate the frequency, price and quality of service to be provided.
- 2.22 It is important that the actual quality of services being provided is considered when assessing whether to grant the renewal of an existing licence. It is thus problematic to ask the existing licence holder to self-assess whether he/she has complied with the conditions of the licence.

Proposal 4: An independent performance assessment of existing services should be carried out periodically by the NTA or a third party, and this assessment should be made publicly available and be used in considering the renewal of the existing licence or issuing of a new licence.

Proposal 5: Where an existing service can be provided at a lower price and/or better quality by a different provider, a licence should be granted to the new provider.

3. TRANSPARENCY

- 3.1 Under the DTA Act and the PTR Act, every bus service already in existence in Ireland is either exempted from the NTA's licensing system or will automatically receive a licence from the NTA.⁶ Thus the Draft Guidelines relate to renewal of those licences and application for new bus services under the PTR Act.
- 3.2 The Draft Guidelines state that applications for new bus services must be assessed against their impact on existing services.⁷ It further indicates that applications are less likely to be granted a licence if they overlap with a PSO route already provided by Dublin Bus or Bus Éireann. While each application will be examined on its own merits, the Draft Guidelines set out both geographic and time separation against existing services to avoid overlap.
- 3.3 However, there is little information available to potential licence applicants about these existing services.
- 3.4 The NTA publishes the public transport services contracts entered into with Dublin Bus and Bus Éireann under section 48 of the DTA Act on its website. However, from the diagrams provided which are PDF files of poor resolution, it is not visually clear what services are covered by these contracts and the timetables for these routes are not linked to the document. This makes it difficult for a new licence applicant to be clear about the status of the existing service they will be assessed against. Information on non-PSO services is similarly lacking.
- 3.5 New operators need information on existing services in order to assess the viability of potential new services. For example, they need to know what routes are PSO services and the frequency of those services. In the absence of such information, new operators might be reluctant to apply for licences.
- 3.6 In the United Kingdom, each Traffic Area Office publishes details of local bus services that have been registered in a booklet called "Notices and Proceedings" every fortnight. Changes to and cancellations of services are also published in this way. This works well for all service providers as they can identify who the existing service providers are and the services they are operating. Transparency regarding existing services is critical for promoting competition and driving service providers to achieve higher quality of services at a lower cost.

⁶ Section 20 of the PTR Act 2009:

(1) "Public Bus passenger services being provided by Bus Éireann and Dublin Bus on the day of the commencement of this section, that are not subject to a contract under Part 3, Chapter 2 of the Act of 2008, may continue to operate until such time, not being longer than 2 years after that day, as the Authority grants a licence.

(2) The Authority shall grant a licence in respect of the public bus passenger services referred to in subsection (1), notwithstanding section 9, and such initial licences shall be of not more than one year in duration and may be subsequently renewed under section 16.

(3) All licences granted under the Act of 1932 which are in force on the day of the commencement of this section, shall continue in force to a date to be determined by the Authority, which shall not be more than 2 years after the day of the next anniversary of the date of the grant or renewal of the licence under the Act of 1932, and may be renewed under section 16.

⁷ In the Draft Guidelines, the NTA proposes to apply different rules to PSO and non-PSO services, in accordance with Section 10(1) (b) (iii) of the Public Transport Regulation Act 2009.

Proposal 6: The NTA should publish the details of bus services and schedules, entered into under section 48 of the DTA Act, whether each service is subject to a PSO contract, details of bus routes, schedules, and expiry dates for licences granted under the Act of 1932. Such information should be attached to the Guidelines or published on the NTA's website. It should be updated frequently.

4. BARRIERS TO ENTRY

- 4.1 In general, the requirements to obtain a licence must be clear and proportionate to the public policy objectives being served - otherwise they can create barriers to entry and restrict competition.

Duration of the licence

- 4.2 The Draft Guidelines outline that all licences, unless otherwise stated, will be valid for three years. The Competition Authority notes that the current contracts for the funding of PSO bus services are for five years. The Draft Guidelines do not explain the unequal treatment regarding duration of the licences between services entered into under section 48 of the DTA Act and other services. For competition to be most effective, the Draft Guidelines should aim to treat all bus operators in a similar fashion.
- 4.3 The rationale for the three year licence period is unclear generally. Service providers need a sufficient period of operation to get a return on their investment. The initial investment can be a considerable financial constraint. A new entrant may be less likely to invest in a new service if the duration of the licence is not long enough to yield an expected financial return. It is not clear from the Draft Guidelines whether a three year period is proportionate to the policy objectives.

Proposal 7: Licence duration should be the same for all public bus operators as for Dublin Bus and Bus Éireann

Insurance Requirements

- 4.4 The Draft Guidelines require applicants to have “adequate insurance” for the provision of the licensed services (p.3). While the Competition Authority appreciates that it is essential that service providers should have adequate insurance, it is not clear from the Draft Guidelines what types and levels of insurance are required. This creates uncertainty for applicants and makes it difficult for new entrants to assess entry costs.
- 4.5 The Draft Guidelines should provide more specific guidance to potential applicants on what the NTA considers to be “adequate”. This guidance is essential to avoid unnecessary application failures and subsequent delays in the provision of services to consumers.
- 4.6 In providing more detailed guidance, the NTA should be careful to require “adequate insurance” in a manner that is proportionate to the bus service to be provided. The requirements should not be excessive, otherwise they will impose an unnecessary cost on new entrants and act as a barrier to entry.
- 4.7 The Competition Authority frequently receives complaints from small and medium businesses, regarding the level of insurance requirements set by public bodies. These costs can be substantial for service providers. The Department of Finance recently released a circular

(10/10) which draws public procurers' attention to the fact that pre-qualification criteria for public contracts should be proportionate to contract size and should not prohibit small and medium businesses from tendering.

Proposal 8: The Guidelines should clarify the NTA's requirements for "adequate insurance" in more detail. The requirements should be proportionate to the bus services to be provided and the public policy objectives.

PSV Licence

- 4.8 The Draft Guidelines (at p.6) require applicants to have valid PSV certificate "*at all times*". To obtain a PSV certificate, the service provider has to make the vehicles they wish to use available for inspection. This requirement appears to contradict the preamble (second paragraph, p (iii)) of the Draft Guidelines which states:

"the Authority may make an offer to grant a licence to avoid applications unnecessarily pursuing all of the requirements necessary to obtain a licence (e.g. the purchase of appropriate vehicles) until they have received an indication from the NTA that it is proposed to grant a licence".

- 4.9 It is our understanding that it is necessary to produce the relevant vehicle in order to obtain a PSV licence. The Draft Guidelines are therefore unclear as to whether applicants must have the proposed vehicles at the time of the application or after the NTA makes an offer to grant a licence.
- 4.10 The financial risk of purchasing PSV vehicles without knowing whether the NTA is likely to grant a licence can be huge. Service providers have to spend resources on vehicles and may end up being refused a licence to operate. This creates a barrier to entry for service providers. It discourages service providers who are interested in providing new bus services to apply for licences.
- 4.11 The Competition Authority very much welcomes the provision in the Draft Guidelines whereby the NTA would not require applicants to purchase vehicles before applying for a licence. However, the Draft Guidelines need to be amended to make it clear that PSV certificates are required when a licence is granted but not at the time of application.

Proposal 9: Applicants should not be required to have PSV certificates when the applications are made. PSV certificates should only be required once the NTA has made an offer to grant a licence or as a condition of the licence.

Amendment of a licence

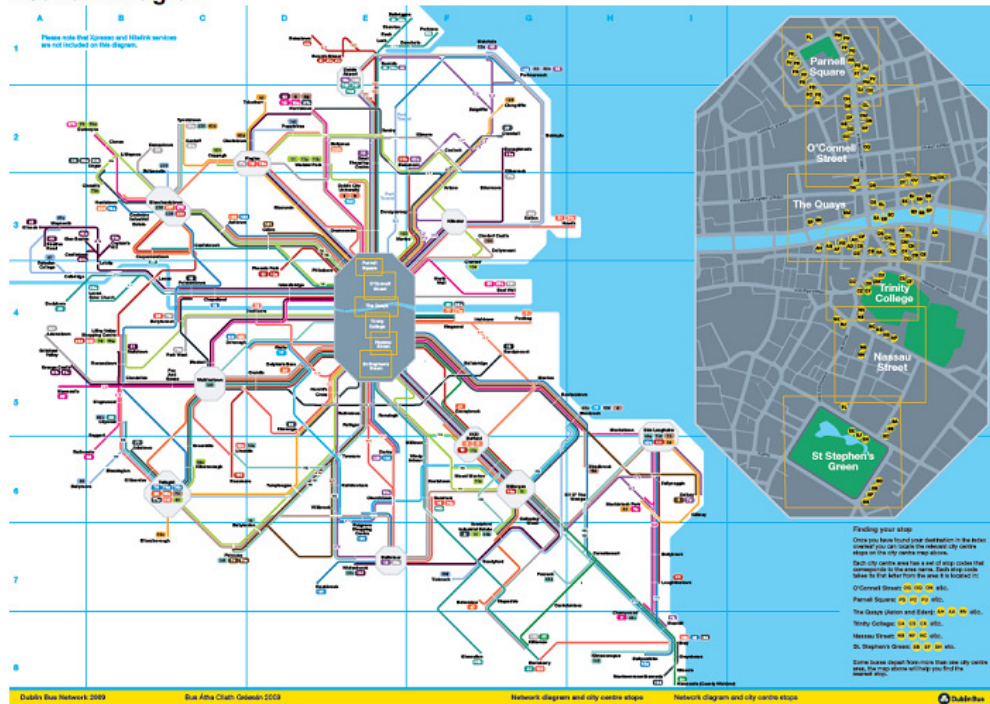
- 4.12 The Draft Guidelines indicate that any amendment to an existing licence will be treated administratively as a new licence application and as such will be subject to full consideration.
- 4.13 Submitting a form to the NTA and providing sufficient notice is a typical requirement should service providers wish to make a change to their licence. These changes may include minor changes to the timetable or increasing the number of vehicles authorised under the licence.
- 4.14 However, if every minor amendment is treated as a whole new application, it is likely to increase the administrative burden for both the service provider and the NTA. More importantly, it is also likely to result in the actual bus services available to consumers being less effective than they could be if service providers face delays or costs when adjusting a new service to the actual demand and needs of consumers.

Proposal 10: The Guidelines should provide for a fast-track procedure for certain types of minor amendments of licences to facilitate service providers to adjust the provision of **new** services to meet the travelling public's needs.

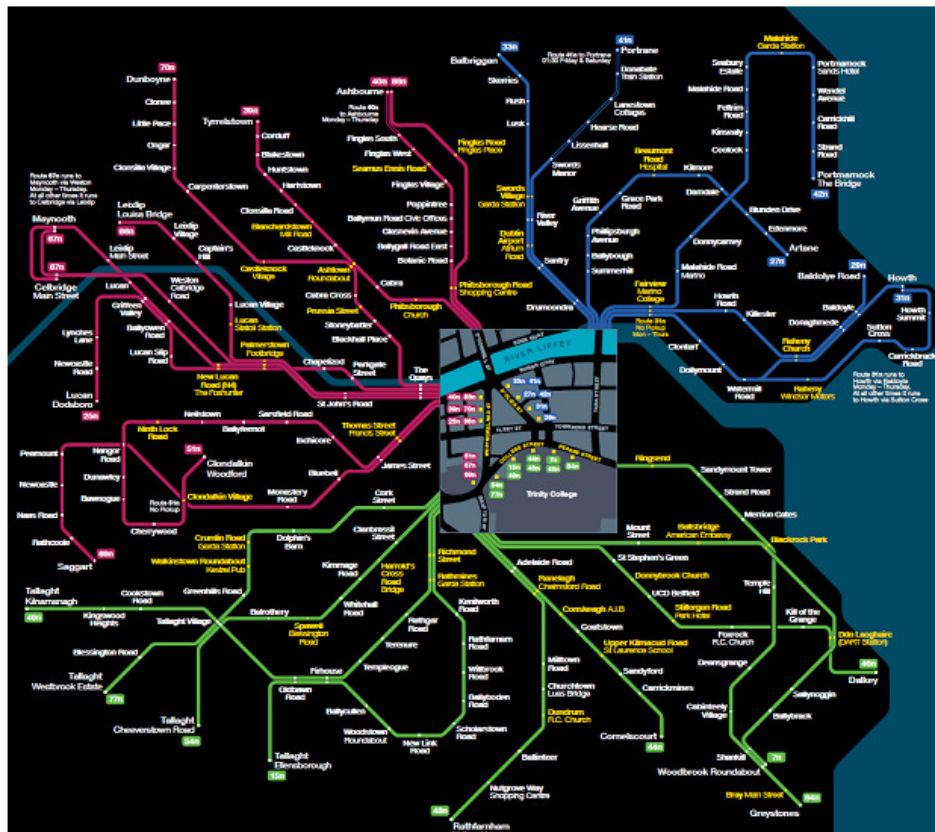
A. SCHEDULE A OF THE CONTRACT BETWEEN THE NTA AND DUBLIN BUS

Network Maps

Network Diagram



Network Diagram - Nitelink.



Network – Xpresso Services to/from Central Dublin

