

To Traffic Penalty Tribunal

Appeal to Traffic Penalty Tribunal on grounds of Procedural impropriety
Doc 4 - No power to make an Order on Gateway Crossing for Road user charges under
Transport Act 2000, and ways in which the Council do not comply with the Regulations

This is one of a series of documents prepared by Scrap Mersey Tolls (SMT). They are intended for use by anyone who has made a representation to Merseyflow, and then received a Notice of Rejection who now wishes to appeal to the Traffic Penalty Tribunal on the grounds of 'procedural impropriety'.

Note that these documents include clickable web links.

1. Set out below are various points showing why Halton Borough Council (HBC) can not use the Transport Act 2000 Road User Charging powers to enforce tolls on the Mersey Gateway. The points partly draw on Doc 2 (Orders prior to the April 2018 Charging Order). The points also cover various ways in which HBC are either not complying with the [2013 Enforcement Regulations](#) or are acting in such a way to be unreasonable and invalidate their use of the enforcement powers.

2. Any PCNs for alleged non-payment of tolls on the Mersey Gateway are invalid.

Road User Charging as set out in Transport Act 2000 can not be used if tolls are already in place

3. Subsection 4 of [section 172 of the Transport Act 2000 Act](#) says -

'A road shall not be subject to charges under a charging scheme under this Part if tolls are charged in respect of the use of the road.'

4. The power to have tolls on the Gateway was given by the Secretary of State in [The River Mersey \(Mersey Gateway Bridge\) Order 2011](#) made on 11th January 2011, which came into force on 1st February 2011. The preamble to the order says it was made using powers in [the Transport and Works Act 1992](#). The Order has not been revoked though it was amended by [The River Mersey \(Mersey Gateway Bridge\) \(Amendment\) Order 2016](#). The 2016 Order claims to override some of the provisions that Parliament made in the 2000 Act, but that is not possible.

The [Mersey Gateway Bridge Byelaws 2016](#), gives the Byelaws as being made "in pursuance of the Transport and Works Act 1992 and the River Mersey (Mersey Gateway Bridge) Order 2011".

5. When the Mersey Gateway opened in October 2017, the PCNs issued indicated that Halton Borough Council were pursuing "payment of the required toll" under the 2017 Order. Some time after the 19 April 2018 Order was allegedly made, the PCNs were changed and now refer to the 2018 Order. But according to Section 172 (4) of the 2000 Act, neither Order can apply as tolls had already been prescribed by the 2011 Order using other legislation. A tolling scheme was legally put in place -authorized by the Secretary of State- and was in force under the 2016 Byelaws. This precludes the making of any charging order 2017, 2018 or for that matter 2019 etc..

6. One person who made a representation at the end of December 2017 against a PCN, said- "a road cannot be subject to charges under a charging scheme if tolls apply (s172 (4) Transport Act 2000). That case did not go to the Tribunal, but the Tribunal somehow became aware of this issue and the review decision dated 17 May 2018 by Mr Solomons refers to section 172 (4).

a) In paragraph 64 on the signs issue, Mr Solomons says "Tolls and road user charges are legally separate and cannot co-exist – see section 172(4) of the Transport Act 2000."

b) In paragraph 115 on the byelaws, he says "....it gives rise to a further potential ground for challenge" and he cites section 172 (4) of the Transport Act 2000-

'A road shall not be subject to charges under a charging scheme under this Part if tolls are charged in respect of the use of the road.'

c) In paragraph 117 he says "I conclude that the making and continued operation of the MGRUSCO without revocation of the byelaw was inconsistent with the requirement imposed by section 172(4) of the Transport Act in relation to the imposition of road user and penalty charges."

d) And in the conclusion at paragraph 125 Mr Solomons says -

"....Had it been necessary to the decision I would further have found:

.....v. There was procedural impropriety on the part of the charging authority in that the Transport Act 2000 precluded the making of a charging scheme when tolls were payable under the byelaws."

7. What was said in the Review decision about the 2017 Order applies just as much to the 2018 Order. The 2018 Order is not valid for use on the Gateway.

Use of Transport and Works Act 1992

8. Various Gateway Orders have relied on powers in [the Transport and Works Act 1992](#). As pointed out at paras 14 to 16 of Doc 2, Parliament did not intend that Act to be used to toll road bridges. Any Orders which in part rely on powers in the 1992 Act are not valid

Road User Charging as set out in Transport Act 2000 can not be used if the purpose of the charges is to finance a new bridge

9. It should be obvious from the general knowledge of the Tribunal and what was set out in Doc 1, that the tolls on the Mersey Gateway are primarily there to help cover the costs that are due to the consortium that in 2014 was given a 30 year contract to design, build and operate the crossing. This raises the crucial question of whether road user charges as per the TA 2000 can be used by HBC to cover the costs of the Mersey Gateway crossing. They can not.

10. The power to have tolls on a particular crossing is usually in a Private Act that applies solely to that crossing. But there are also general powers in the [New Roads and Street Works Act 1991](#).

11. As stated at paragraph 6 of Doc 2, Road User charges under the Transport Act 2000 were not intended to be a substitute for tolls on a new crossing. And [section 164 of the Transport Act 2000](#) and [Section 8 of Schedule 12 of the TA2000](#) say that charging schemes may only be made if they are for the purpose of local transport plans and policies. The Gateway tolls are not for that purpose.

12. The only time in the 2000 Act that use is made of the word 'toll' is in the negative. Subsection 4 of [section 172 of the Transport Act 2000 Act](#) says -

'A road shall not be subject to charges under a charging scheme under this Part if tolls are

charged in respect of the use of the road.'

13. The Act otherwise uses the phrase "road user charges" and in [Section 163 at the start of Part III 'Road User Charging And Workplace Parking Levy'](#) says that "'charging scheme" means a scheme for imposing charges in respect of the use or keeping of motor vehicles on roads". Parliament were distinguishing the new charges from tolls, that still existed on some roads and crossings, the purpose of which was to cover the cost of providing the road or crossing.

14. Section 2 (3) of [Schedule 12 of the TA2000](#) does envisage that the proceeds of a road user charging scheme might be used for the purpose of meeting the "costs of constructing, improving or maintaining roads". It gives the Secretary of State the power to make regulations to authorise this but it indicates that any such power would only be for "roads in respect of which charges are imposed by trunk road charging schemes". But the Mersey Gateway is not part of a trunk road charging scheme and so Section 2 (3) does not apply. And as it happens there is no other road or crossing in the UK whose construction has or is being financed from a road user charge.

15. There is of course another crossing where there are Road User Charges, this is at the Dartford Crossing. But the situation there is different from the Mersey Gateway. Various legislation, the last of which was the Dartford-Thurrock Crossing Act 1988, authorised the construction of the tunnels and bridge and their financing from tolls. But there was [a time limit for levy of tolls](#). The limit was based on how long it took to recover the cost of construction and to set up a small reserve fund. The Secretary of State deemed that this point was reached on 31st March 2003. The tolling powers then ended but were immediately replaced, from 1st April by Road User Charges under '[The A282 Trunk Road \(Dartford– Thurrock Crossing Charging Scheme\) Order 2002](#)'.

16. HBC and the Government must have known that a TA 2000 Road Charging Order could not be used to finance the Gateway scheme, because as set out in Doc 2 they initially only had a TA 2000 Road Charging Order on the Silver Jubilee bridge. The decision to completely ignore what the TA 2000 could properly be used for mainly seems to be because HBC realised that once they had decided (in late 2011) to go cashless, it might be too difficult to enforce the tolls unless they could say that the tolls were road user charges under the TA 2000. So in 2017 a Road User Charging Order that covered both bridges was born. But there was no power to override what Parliament had enacted and the Road User Charging Orders that claim to include the Gateway are null and void.

Contradiction in the Gateway Orders

17. As pointed out in paragraph 18 of document 2, [The River Mersey \(Mersey Gateway Bridge\) Order 2011](#) which is still in force at Section 11 says-

(1) Subject to the provisions of article 45 (application of section 2 of the 1991 Act) the bridge roads shall be a public highway and shall be maintained by and at the expense of the highway authority from the opening day.

18. This section totally contradicts the bridge being tolled and fatally flaws the use of this or any other Order to toll the Gateway bridge.

Lack of Review and Sunset clauses in the Regulations.

19. [The Explanatory Memorandum To The Road User Charging Schemes \(PENALTY Charges, Adjudication And Enforcement\) \(ENGLAND\) Regulations 2013](#) which was "prepared by the Department for Transport and is laid before Parliament by Command of Her Majesty" states at section 12.1 that "Any road user charging scheme that draws on these regulations will contain a review and sunset clause."

20. In the case of the Dartford Crossing [The A282 Trunk Road \(Dartford-Thurrock Crossing Charging Scheme\) Order 2013](#) the appropriate clause is number 16.

21. In the case of the Mersey Gateway Crossing there is no such clause in the Orders.

22. This is particularly relevant to the Mersey Gateway Crossing as the purpose of such a clause seems to be that road user charges under the 2000 Act should not usually be regarded as perpetual and that there should be opportunities for the charging to be reviewed in a public way. In the case of the Mersey Gateway Crossing it has been a case of 'Nacht und Nebel' with most aspects of this scheme hidden and instead we have had a mammoth ongoing PR exercise to obscure the facts. It is also relevant in that when the bridge opened in October 2017, HBC said that they expected that there would be no costs falling on the authorities for at least sixty years, which seems to either anticipate that there would be no reviews or that the authority knew what the outcome of any reviews would be.

23. Halton Borough Council have not complied with section 12.1 and the tolls on the Mersey Gateway can not be enforced using the 2013 regulations.

Lack of real notice of the start of tolling. Wrong Order quoted in Public Notice of August 2017

24. Section 1 of the 2017 Order required that HBC councillors should pass a resolution setting an appointed day for the tolls to come into effect, and that notice of the resolution should be published no later than three months before the appointed day. This requirement meant that people and businesses could plan well ahead knowing exactly when the tolling would start. In the event HBC circumvented this requirement by publishing a Notice on 20 March 2017 that the appointed day would be 1 July 2017 and simultaneously suspending "the charging of tolls under the Order" using a power in Section 7(2) which was obviously only meant to possibly apply some time after charges had taken effect. This device meant that HBC did not, as required, give proper notice of the real tolling day.

25. HBC then issued [another notice on the 31 August 2017](#) saying that "the suspension of charging tolls" would be lifted and that "the Mersey Gateway Bridge and the A533 (Silver Jubilee Bridge) Roads User Charging Scheme Order 2016" would take effect from 14th September. The date was not a realistic one as there was very little chance that the bridge would have been able to open on that date. More importantly there was no such Order (there was a 2016 Order but it had a different name and purpose). The Order quoted should have been 2017.

26. Then on the afternoon of Wednesday the 11th October, HBC announced that the old bridge would close at midnight on Friday the 13th October 2017 and that the Mersey Gateway would open shortly after. The contractors were still working on the bridge and opening at 55 hours notice may have been because a demonstration had been announced by Scrap Mersey Tolls for that weekend.

27. That lack of proper notice should have nullified the tolls straight away and SMT said so at the time.

28. Doc 3 sets out why the April 2018 Order may not be valid (and if so the 2017 Order with all its faults is the Order that applies), but if the 2018 Order was valid, there is still a question of whether proper notice was given. The 2018 Order is dated 19 April and Section 1 (2) says that "The scheme set out in this Order shall have effect". That means that it was in effect immediately, even before Notice of it was published (it was in London Gazette on 25 April). This further lack of real notice is unreasonable.

Offer to accept a reduced payment

29. The PCNs and the Notices of Rejection are not valid because of the wording and offers to accept a reduced payment.

30. Where a registered keeper of a motor vehicle has been issued with a PCN and instead of paying it, challenges it by making a representation, then under Section 8 (9) of the Regulations-

"It is the duty of a charging authority

- (a) to consider them and any supporting evidence which the person making them provides; and
- (b) within the period of 56 days beginning with the date on which the representations were served on it, to serve on that person notice of its decision as to whether or not it accepts—
 - (i) that one or more of the grounds in paragraph (3) has been established; or
 - (ii) that there are compelling reasons why, in the particular circumstances of the case, the penalty charge notice should be cancelled. "

31. But it has been the general practice of Merseyflow acting for HBC where they have received a representation from the registered keeper of the vehicle, to reply saying "..We are prepared to accept a reduced payment of £2.00 per PCN.." In some cases this has been said in what was titled a 'Notice of Rejection', in other cases the offer is in a letter which is not headed as a Notice of Rejection. Either way this offer is outside what the Regulations would embrace as a 'rejection' and seems to circumvent the requirement in Section 9 (1) for cancelling PCNs.

32. The 'Notice of Rejection' also says "If you do not pay the amount due or enter an appeal within 28 days of the date of service of this Notice, a Charge Certificate may be issued." This is not exactly the wording specified under section 10 (1) of the Regulations- (a "notice of rejection") must—

- (a) state that a charge certificate may be served under regulation 17(1) unless within the period of 28 days beginning with the date of service of the notice of rejection—
 - (i) the penalty charge is paid; or
 - (ii) the person on whom the notice of rejection is served appeals to an adjudicator against the penalty charge;

Not only is the wording on the PCN not the exact wording specified but also 10 (1) (a) (i) refers to the amount due as being the "penalty charge" and not some different amount.

Using someone who is not a Traffic authority to collect and enforce tolls is not allowed

33. Section 42A of The River Mersey (Mersey Gateway Bridge) (Amendment) Order 2016 says at (6)-

“The powers conferred by this article may not be transferred under article 43(1) (power to enter into concession agreements and lease or transfer the undertaking, etc.) to any person who is not a traffic authority under section 121A (traffic authorities) of the Road Traffic Regulation Act 1984(d).”

34. HBC has directly or indirectly (possibly through Mersey Gateway Crossings Board Ltd) entered into an agreement with Emovis (using the name 'Merseyflow') for the entire administration and enforcement of the tolls. Emovis is not a traffic authority under section 121A (traffic authorities) of the Road Traffic Regulation Act 1984, so HBC are not complying with the 2016 Amendment Order.

35. HBC may be aware of this and perhaps to obscure what is happening have in the name of the Traffic Enforcement Court started issuing Notices of Recovery (TE3) where the name of the 'Applicant' authority is shown as 'Mersey Gateway Crossing'. There is no such body whether a traffic authority or not.

Discrimination based on whether a person is a Halton resident or not

36. [Section 175 of TA 2000](#) at subsection 5 lists various 'particular' cases where different charge or no charge may be made. Discrimination based on residence is not on the list. Discriminating in cases that are not in the list is not excluded, but if Parliament had intended in 2000 that discrimination based on place of residence would be allowed then they would have included it in the list of particular cases.

37. Item (f) on the list is "different methods or means of recording, administering, collecting or paying the charge". It was only added by Parliament by an amendment in the Local Transport Act 2008. If the list at subsection 5 was meant to allow discrimination on the basis of where you live, then surely Parliament would have taken that opportunity to add it to the list of cases.

Council are not publishing accounts for the scheme as required by the TA2000

38. [Section 6 of Schedule 12 of the TA2000](#) requires that the relevant authority shall keep an account for the scheme and that a statement of the account should be published in the annual accounts of the authority.

39. In answer to various information requests from SMT which in part were asking what the forecast income from penalties was, HBC said that they had no budget or forecasts for penalty income and that "all monies received by Halton Council in relation to the Mersey Gateway project are paid in to the Project Account, which is ring fenced from the Council's main stream finances". HBC did not give any figures for this 'Project account'.

40. HBC have published their annual accounts for 2017/18. As the bridge opened in October 2017, there should be a statement of the account for the bridge. Though the accounts do have various references to the Gateway scheme, there is no statement of the bridge account. The Council are not complying with a key requirement of the Act.

Process of making a representation and an appeal is not reasonable

41. Given that there is a penalty system enforceable through the courts there should be a straightforward way of contesting the penalty. If there is not then the system is unjust.

42. The Secretary of State for Transport and the Lord Chancellor loaded the dice when they decided at Section 5 (3) of the Regulations that the penalty is reduced by 50% if payment is made within 14 days. They would have known that this would put people off making a representation even if the person believes that the PCN is not correct. It is also unreasonable that there is no time limit for the issue of PCNs, if they are not issued on a timely basis then the registered keeper may not remember whether they had really failed to pay the tolls or what the circumstances were.

43. Assuming that the person still wants to challenge the PCN, it can be done in two ways. One way is by letter mail, but that carries the risk that Merseyflow will not receive the letter. SMT suggests that people should use registered post, but the need for that will deter some people from using letter mail.

The other way is through the Merseyflow website, but that has various issues. Obviously the first issue is that many drivers / registered keepers will not be able to use any online form system and may not even use the Internet.

44. Even for those who are able to use the online system there are difficulties. Having found the almost hidden link to 'making a representation' on the ['Pay penalty charge' page](#) there are seven further pages and two require you not only to make a selection but to also click on 'The option I have selected...'. The 'Your details' page requires that ALL the fields are completed- this includes an email address and two telephone numbers. Many people will be confused or not have an email address and two phone numbers. They will abandon making a representation. Those getting a bit further may be deterred because the online system only allows one reason to be given for making the representation. Even for those who go to the end, all you get is a 'Confirmation' page. The page has no reference number and (despite demanding an email address) there is no email confirmation that the representation has been recorded and it could be many weeks before the driver receives any letter from Merseyflow.

45. Given that Merseyflow have issued in the first year over 900 thousand PCNs, it is not reasonable that it is so difficult to make a representation and this makes the whole process invalid.

46. To a lesser extent the same applies to the TPT system, which normally requires that appeals against Notice of Rejection are made online and also requires an email address (though the TPT does suggest how someone without an email address can get one).

Doubt whether the April 2018 Order was properly made

47. Doc 3 sets out the saga of the making of the April 2018 Order. HBC did not comply with [The Local Authorities \(Executive Arrangements\) \(Meetings and Access to Information\) \(England\) Regulations 2012](#).

48. Neither did they carry out, as required by TA2000, a proper consultation on the changes that were being made to the 2017 Order as press and public were not told the real reason why HBC needed a new Order.

Overall the Gateway scheme is so bad that the tolling should be removed

49. Tolling in any circumstances is opposed by drivers. The case of the two Mersey bridges in Halton is one of the worst ever instances of the imposition of tolling. In particular the suffering caused by the administration and maladministration of tolling and penalties is so bad that it is unreasonable and contrary to justice. The tolling should be scrapped.

50. The TPT do not have the power to scrap tolling, but they can make it clear that they will not be party to enforcement of tolling through use of the Road User Charge regulations. They can do this by allowing any and all appeals against Notices of Rejection on the grounds that there has been 'procedural impropriety'.

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