Scottish Futures Trust

EVIF Programme - SFT Guidance and Template Concession Contact – Update Note 2 - Liability Caps - November 2025

Version 1.0

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Contents

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Disclaimer: The text below relates to the procurement of EV ChargePoint concession contracts by Scottish local authorities. It is intended to provide authorities with points for discussion with their internal / external legal advisers to inform approaches to procurement. It is not a substitute for independent legal and procurement advice - each project should be considered on a case-by-case basis to reflect project-specific circumstances.

1.0 Background

SFT's guidance "Commercial Considerations for EV Infrastructure Service Contracts" includes high-level commentary on a range of commercial considerations relevant to EV ChargePoint concession contracts, including the use of indemnities and liability caps.

This note provides additional commentary on liability caps, responding to market feedback and experience from procurements, drawing on SFT's wider experience of PPP type projects and historic HMT SoPC4 guidance for the PFI/PPP sector. The objective is to help local authorities consider approaches to establishing caps on liabilities, where these are considered appropriate by the authority and represent value for money (VfM).

This note does not cover the methodology for establishing a quantum for any liability cap, which should be considered on project-by-project basis.

There are some key differences that need to be borne in mind when making a comparison from the PPP sector with an EV charge point concession contract.

1. In an EV charge point concession contract the local authority is not buying a service but enabling a charge point operating company to provide a service to third parties from local authority sites.
2. In the current market, EV charge point concession contracts are likely to be funded through a mixture of grant funding from Transport Scotland and third-party equity sourced either from the charge point operating company's internal resources or from third party funders. Regardless of how the project is funded, the ability of the project's funders to accept the position taken on liability caps and the associated requirements of any parent company guarantee should be explored during the procurement process.

2.0 General Indemnities

- Certain types of liabilities can't be capped (e.g. for death or personal injury due to negligence).
- Authorities should not offer caps on indemnities as a matter of course and should only allow caps or restrictions on other types of indemnities if they believe this offers clear VfM.

3.0 Overall Limitation of Liability

- An overall liability cap is generally not provided for in a typical PPP type contract. If an overall liability cap were to be offered in an EV charge point concession contract, depending on the level of the cap, this could undermine the transfer of economic risk to the concessionaire.
- A better approach would be for the authority to consider if there are specific liabilities it could make sense to cap on a VfM basis rather than using an overall cap.

4.0 Sole Remedy Provisions

- If the authority is applying service credits or performance deductions through the KPI framework, it should generally not seek compensation in damages in addition to levying deductions for service or KPI failures.
- This 'sole remedy' principle should only operate to prevent double recovery for the same loss. There could be breaches by the concessionaire which cause losses to the authority that aren't captured by the KPI framework. If so, the authority will need a different remedy, which could be a claim under an indemnity or a breach of contract claim.

5.0 Late Service Commencement

- The two main deliverables for an EV charging concession during the installation period are the migration of existing EVCI off the CPS network in advance of the date agreed with Transport Scotland, and the delivery of an expanded network in line with the outcomes set out in the grant offer letter.
- If the concessionaire fails to meet the agreed date for the migration of existing EVCI off the CPS network, the authority could be exposed to additional costs or lost

income. Setting damages or service credits at pre-estimated costs/lost income is a reasonable approach. Assuming there are no mitigating circumstances, it is suggested that authorities should not cap the concessionaire's liability for failure to meet agreed migration milestones. However, authorities should also consider the interaction between delayed migration, application of liquidated damages/service credits and termination rights. In other words, what level of delay, beyond the agreed migration date, would the authority be prepared to tolerate before considering terminating the concession.

- If the network expansion plan is not delivered on time, there is risk that the authority may not be able to comply with the conditions set out its grant offer letter. Despite the network expansion plan being delivered late the authority is unlikely to incur a loss; therefore, authorities should take advice as to the appropriateness of the application of damages or service credits for late delivery and what level such damages or service credits should be set at. If this approach is taken and assuming there are no mitigating circumstances, it is suggested that authorities should not cap the concessionaire's liability for failure to meet expansion delivery milestones. In a similar manner to the migration of existing charge points, authorities should consider the interaction between delayed network expansion, liquidated damages and termination rights.

6.0 Performance Deductions

- In some sectors it is common for there to be a cap on the value of financial deductions which can be made in respect of poor performance.
- In an EV charge point concession if the service is not available the concessionaire will not be generating income from the contract. Therefore, it will be important that any financial deductions that are levied via the KPI framework are limited to where the authority experiences a loss of service.
- Capping of performance deduction payments to the authority shouldn't operate so as to insulate the concessionaire from financial risk. Any performance deduction cap must always be justified on VfM basis.
- Authorities should ensure that the concessionaire remains incentivised to offer a high-quality service and should therefore not concede a cap on deductions without taking appropriate advice.

- 'Retrospective' deductions (under the payment mechanism) – where authority discovers a performance failure has existed undetected for a period of time – if used, a cap may be appropriate.

7.0 Liability under an Early Termination Scenario

- Authorities should discuss with their legal advisers the approach to be adopted and the methodology for calculating the level of compensation payable on early termination of the concession contract.
- SFT has developed a discussion paper (update-note-1-compensation-on-early-termination), which authorities should consult.
- If, as a result of a concessionaire default, the authority chooses to terminate the contract and adopts the 're-tendering' or 'no re-tendering approach', this may result in an amount owed to the authority by the concessionaire (i.e. where the 'termination sum' is negative).
- The authority may wish to consider capping the amount due to the authority from the concessionaire in such circumstances.
- If so, it will be important to ensure that any cap takes into account the anticipated costs that the authority would expect to incur in relation to the termination event.
- SFT's template contract sets out other events of material default in addition to poor performance. Authorities should discuss with their legal advisers whether any caps should be restricted to those that relate to events of default due to poor performance under the KPI framework or include other headings of material default as set out in the template contract.

8.0 Procurement Considerations

- Any liability caps should be introduced at the outset of the procurement process so all bidders can price on same basis.

- Liability caps will be a key issue for the project's funders and authorities should satisfy themselves as part of the procurement process that all funders (whether internal or external) have approved the project's scope and contract terms – including the position on liability caps and parent company guarantees.