

## ***Practice Guidance Document No.5***

### **LEGAL ENTITIES**

#### **INCLUDING INSOLVENCY & REGULATION 29**

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# GUIDANCE

### Basis of Guidance

1. The Department issues this guidance to provide information as to the way in which it believes that it should interpret the law in relation to different legal entities, changes in those entities and correspondence with them. This Guidance may be subject to decisions of the courts and to subsequent legislation. The Department, however, refers to the following principles extracted from existing legislation and case law.
2. Where findings from the Upper Tribunal relate to traffic commissioners in GB, those findings and subsequent recommendations will be applied within Northern Ireland by the Head of Transport Regulation Unit (“Head of TRU”) on behalf of the Department for Infrastructure (“the Department”).

### Legal entities

3. It is important that the Department is satisfied as to the legal status of an applicant or operator. By way of example, the Upper Tribunal has stressed that *in the eyes of the law a sole trader and a limited company are quite different legal people or legal entities. It is the legal entity which operates the vehicles which must hold an operator's licence*<sup>1</sup>. A company or other corporate body has a distinct legal personality from its members (shareholders), officers or directors. In other cases, it may be necessary to determine the individual(s) responsible for the undertaking, for example the partners in a partnership, where restrictions might apply<sup>2</sup> or the relationship with another corporate body<sup>3</sup>. Regulation 4 of the Goods Vehicles (Qualifications of Operators) Regulations (Northern Ireland) 2012 makes it a condition of a standard licence for operators to inform the Department within 28 days of any change in the name or legal form of the undertaking and the address of establishment.

#### *Individuals - Sole Traders*

4. This, as the name suggests, is an individual trading on their own account. Whilst the individual may use a trading name, for legal purposes the correct entity is the individual.

#### *Companies*

5. A company has a legal personality distinct as from its members (shareholders), owners, directors or officers. The company can therefore hold an operator's licence in its own name. The licensing legislation refers to a company. In the Companies Act 2006 the term company is usually defined as a body formed

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<sup>1</sup> 2012/008 Brian Richards t/a B Richards

<sup>2</sup> Regulation 27 of The Goods Vehicle (Licensing of Operators) Regulations (Northern Ireland) 2012 states that a 'firm' (partnership) shall be treated as separate to an individual partner

<sup>3</sup> Regulation 28 of The Goods Vehicle (Licensing of Operators) Regulations (Northern Ireland) 2012.

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under that legislation but it can, in limited circumstances, include other bodies<sup>4</sup> and overseas companies<sup>5</sup>. Further guidance is available via Companies House.

6. The name of a private limited company must end with the word "limited" or the abbreviation "Ltd" and this should be on all company correspondence and documents. A private company need not have any employees but it must have at least one director. It need not have a company secretary unless its articles of association stipulate otherwise.
7. The name of a public limited company must end with the words "public limited company" or the abbreviation "plc"<sup>6</sup>. A public limited company is required to have a company secretary. A public limited company is one whose shares are traded, as opposed to the simple limited company whose shares cannot be so transferred.
8. It is the company that is operating the vehicles that must hold the operator's licence<sup>7</sup>. However, a limited company may own subsidiaries that are private limited companies. In limited circumstances the Department might allow authority for those subsidiaries to operate.
9. A limited company must be registered with the Registrar at Companies House and is given a unique company number. Whenever a company changes its name, the legal entity remains the same and this is reflected by the same company number. A company must of course notify the Transport Regulation Unit (TRU), via the Central Licensing Office (CLO), of any change. If there is a change in company number then this represents a new entity and a new licence will be required.
10. A company may in many ways be likened to a human body. It has a brain and nerve centre which controls what it does. It also has hands which hold the tools and act in accordance with directions from the centre. Some of the people in the company are mere servants and agents who are nothing more than the hands to do the work and cannot be said to represent the mind and will. Others are directors and managers who represent the directing mind and will of the company, and control what it does. The state of mind of these managers is the state of mind of the company and is treated by the law as such<sup>8</sup>.
11. As the Tribunal indicated in 2003/350 Al Madina Transport Ltd:  
*"Directors have collective responsibility for the company that they manage. It is their responsibility to set the standards that employees are expected to meet; it*

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<sup>4</sup> See sections 104 and 103 of the Companies Act 2006

<sup>5</sup> Part 34 of the Companies Act 2006, The Overseas Companies Regulations 2009, and Overseas Companies (Execution of Documents and Registration of Charges)(Amendment) Regulations 2011

<sup>6</sup> Companies Act 1985 ss.25 & 27A

<sup>7</sup> Regulation 28 as above, under which the subsidiary is deemed to be the user

<sup>8</sup> HL Bolton(Engineering) Co. Ltd v TJ Grahams & Sons Ltd [1957] 1 QB 169. The Supreme Court and its predecessor have since further defined the term controlling mind in cases such as Tesco Supermarkets Ltd v Nattrass [1971] All ER 127 as the directors under the memorandum and articles of association or those in actual control who are able to bind the company. In cases where the company has been charged with criminal offences the courts have declined to find that a company had the necessary intent without the involvement of an individual holding a sufficiently senior position in the company who could be identified with the company as its 'directing mind and will' -VOSA v FM Conway Ltd [2012] 290 Admin. The principle might be extended to the act of applying for a licence.

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*is their responsibility to ensure that those standards are actually met, and that undertakings and promises made in their name are complied with”.*

A company is required to have at least one director<sup>9</sup> and where no Director can be contacted, nor found on Companies House register, the Department can proceed to revoke the licence. Directors have a legal duty to act in good faith, exercise independent judgment and act with skill, care and diligence; there is also a duty to avoid conflicts. The statutory responsibilities pursuant to section 172 Companies Act 2006 are summarised as follows:

- duty to act within the powers conferred by the company’s constitution (i.e. its Memorandum and Articles of Association)
- duty to promote the success of the company for the benefit of its members (i.e. its shareholders)
- duty to exercise independent judgement
- duty to exercise reasonable care, skill and diligence
- duty to avoid conflicts of interest
- duty not to accept benefits from third parties
- duty to disclose any interest in a proposed transaction or arrangement with the company

12. Directors have collective responsibility for the company which they manage and it is therefore their responsibility to set the standards which employees are expected to meet and to ensure that those standards are met. Persons who control an entity which operates heavy goods or public service vehicles must have sufficient knowledge to exercise proper oversight<sup>10</sup>. In the United Kingdom directors have the same legal duties, responsibilities and potential liabilities regardless of whether they are full-time or non-executive directors. The Department is entitled to assume that directors are all equally responsible for the management of a company and therefore equally culpable for any non-compliance<sup>11</sup>. A director may be able to demonstrate to the contrary by, for example, reference to minutes of Board meetings. It may be that individual directors have well-defined roles, so that one or more director(s) is more responsible for maintenance and road safety than others.

13. Any new application must satisfy the Department as to the identity of the director(s), and must show that the company has adequate financial resources. Section 250 of the 2006 Act does not provide an exhaustive definition of ‘director’. The case law<sup>12</sup> indicates that there are three ways which a person can be held to be a director of a limited company:

- (i) directors in law (de jure), who have been lawfully appointed as directors of the company in question and whose names appear as directors of that company on the register at Companies House
- (ii) shadow directors as defined by section 251 of the 2006 Act, which provides that it means: *“a person in accordance with whose directions or instructions the directors of the company are accustomed to act”* but

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<sup>9</sup> Section 154 Companies Act 2006

<sup>10</sup> 2012/025 First Class Freight Ltd

<sup>11</sup> 2010/071 Eurofast

<sup>12</sup> 2014/011 David Keith and Julie Bradley by reference to Secretary of State and Industry v Dennis George Holloer & Others [2006] EWHC 1804 (Ch) and Holland V Commissioners for HMRC & another [2010] UKSC 51

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excludes a person giving professional advice to the directors. A shadow director must be shown to play a part in the corporate governance of the company in question by telling the de jure director or directors what to do. It is not necessary to show that a shadow director gave all the directions or instructions necessary for the company to function

- (iii) directors in fact, (de facto); as above, the decision will turn on the findings of fact made in the case. There is no single test to determine who is a de facto director but what is required is an assessment of all the evidence relevant to the part that the person concerned has played. It is not necessary for the person concerned to have participated in decision making over the whole field of the company's activities but a person can only be held to be a de facto director if they participate or have the right to participate in collective decision making on corporate policy and strategy and its implementation. In any assessment there is a need to distinguish between, on the one hand, those who decide the policy which a company is to follow and/or those who decide how to implement that policy and/or those who originate the orders which are given to subordinates and, on the other, those who are instructed to implement policy decisions or to carry out orders passed down from above

**14.** The Upper Tribunal has set out the steps to be taken<sup>13</sup> if there is evidence to suggest that someone has acted as a de facto director:

- (i) the allegation must be included in the call-up letter addressed to the directors with reasons for making the allegation and alerting the concerned party to the possibility that they may be found to be a de facto director with a consequential risk of disqualification
- (ii) the party for whom the allegation is made against should be sent a separate call up letter in the above terms
- (iii) if the issue arises during the course of a hearing, the Department should put the party on notice of their concerns about their role within the company and thereby give them an opportunity to deal with the concerns. If the party does not accept that they were a de factor director then the matter should be adjourned and a separate call up letter sent out so that they can deal with the issues in a separate hearing
- (iv) if the concerns only begin to formulate when the Department is writing their decision then again the party should be put on notice so that they can deal with the concerns prior to the Department coming to their decision. If necessary a further hearing should be offered with a full call-up letter being issued

**15.** From 6 April 2016 Companies and LLPs must keep a register of individuals/entities that have control over them. From 30 June 2016 they have been required to supply this as part of the confirmation statement (previously referred to as an annual return) and those seeking to incorporate must also send statement of initial significant control. The provisions apply to UK incorporated companies limited by shares, guarantee, unlimited companies and Societates Europaeae, even if dormant. They do not apply to limited partnerships or Charitable Incorporated Organisations, or companies subject to Chapter 5 of the Financial Conduct Authority's Disclosure and Transparency Rules and

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<sup>13</sup> 2016/050 Lorraine Baldwin, Andrew Skelton and Wayne Baldwin

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companies with voting shares admitted to trading on a regulated market in the UK or EEA or on specified Swiss markets, USA, Japan and Israel. Overseas companies will be subject to the requirements in their home Member State but might still be required to disclose their ownership or control of companies registered here<sup>14</sup>.

**16.** A person of significant control is defined as someone who:

- in/directly holding 25% of the shares
- in/directly holding 25% voting rights
- in/directly holds the right to appoint/remove majority of Directors
- has the right to/does exercise significant influence or control
- has the right to/does exercise significant influence or control over the activities of trust/firm which would itself satisfy any of the above conditions.

The provisions impose a duty on the entity to take reasonable steps to identify people who have significant control; and those people are obliged to respond to requests for information. The entity must ensure that the information is kept up to date.

**17.** The Upper Tribunal has suggested the following questions but it may not be necessary to ask every question in every case:

- did the person concerned participate in directing the affairs of the company?
- did the person concerned operate at the same level as the properly appointed directors as opposed to being subordinate to them at all times?
- did the person concerned describe them self as a director or were they held out by anyone in authority to be a director of the company?
- did the person concerned simply give advice to the directors and then withdraw or did they remain and join with other directors, whether de jure or de facto and participate in decisions affecting the future of the company?
- does the evidence show that the person concerned did in fact participate in decision making about strategic or policy issues, including their implementation, not merely as an agent or employee or adviser, but as part of the corporate governing structure of the company?

**19.** The Department can therefore infer that a person is exercising authority as if they were a director and may proceed to make further findings on that basis.<sup>15</sup> The Upper Tribunal has indicated that the Department is at liberty to consider who the controlling mind of a company really is, and to look behind the facade of an incorporation to find out who is really responsible if wrongdoing by a company is found<sup>16</sup>. It is possible for a new company to be a front for a company in liquidation where the new company is a front for the controlling mind of the company in liquidation.

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<sup>14</sup> Part 21A Companies Act 2006 (Register of people with significant control Regulations 2016; European Public Limited-Liability (Register of People with significant control) Regulations 2016; Limited Liability Partnerships (Register of People with significant control) Regulations 2016.

<sup>15</sup> 2011/361 Springwood Trading Ltd, 2006/056 Paul Owen Transport Services Ltd

<sup>16</sup> NT/2014/019 OC International Transport Ltd v DOENI, see also 2014/046 Marshland Logistics Ltd & John McGuinness in line with the Supreme Court in Prest v Petrodel Resources Ltd & Others [2013] UKSC 34



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20. It is for the Department to assess the culpability of directors on the basis of the evidence in each case. The jurisdiction of the Department is not limited to the director's current at the date of the determination of matters and it may take action against a director who was in post at the time of any relevant conduct. However, another company is not to be regarded as a shadow director of any of its subsidiaries for the purposes of the general duties on directors under the Companies Act merely because the directors of the subsidiary are accustomed to act in accordance with its directions or instructions.
21. The Upper Tribunal has indicated that where the corporate entity is in effect an extension of an individual director(s) then the 'corporate veil' can be lifted so that the individual cannot hide behind limited liability status to reveal the reality of the structure and the operation of the transport undertaking.
22. Another form of corporate entity is a Community Interest Company. This is different to a limited company, with special additional features, as it is created for the use of people who want to conduct a business or other activity for community benefit, and not purely for private advantage. This is achieved by a "community interest test" and "asset lock", which ensures that the company is established for community purposes and that the assets and profits are dedicated to those purposes. They must be registered as a community interest company with the Regulator. The CIC Regulator has supervisory powers under sections 41 to 51 of the Companies (Audit, Investigations and Community Enterprise) Act 2004. The investigation powers are similar to the powers under the Companies Act 1985 used by the Companies Investigation Branch but are limited to the CIC status. They do not prevent other investigations into the general activities of the company. However, the regulator has additional powers to intervene in the affairs of a community interest company, including the power to remove directors.

### *Partnerships*

23. A partnership is created by a legally binding agreement (written or unwritten) between two or more legal persons to work together. In a partnership, each partner is jointly (together) and severally (individually) liable for the acts of the partnership. Compliance with an operator's licence is therefore the responsibility of all the partners<sup>17</sup>. Partnerships must not be confused with a newer type of body known as a Limited Liability Partnership (LLP).
24. Any two or more individuals can be partners. Where a new partner joins the business or where an existing partner leaves the business the partnership is terminated in law unless specifically allowed for in the written partnership deed (agreement). Similarly when one or more partners leave a partnership this may mean that there has been a change in entity and the Department must be notified. Where a partner dies there are particular provisions under regulation 29 of the Goods Vehicles (Licensing of Operators) Regulations (Northern Ireland) 2012. Where one or more new partners join, a new partnership may be created and again there is a change in entity. The Department must be informed and a new application may be required. When a partner leaves a business whether through death, expulsion or retirement and that partnership is to continue, the outgoing partner must receive payment from the others for his/her share.

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<sup>17</sup> 2014/066 Bridget Burden & Partners

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25. Two or more companies might combine their resources to carry out what is termed a Joint Venture. This can take different forms. Each individual company carries out a separate contract, although they may cooperate for administrative or organisational purposes. Each company would be liable for its own contraventions and could therefore be prosecuted in its own name without reference to any of the other companies involved. The companies involved contribute resources to the formation of a new company for the purpose of the joint venture. This separate company is a legal person, which can be prosecuted in its corporate name. The companies involved conduct the venture under a business name without forming a new company. This will constitute a partnership in which the companies are the partners. They will be jointly and severally liable for contraventions arising from the venture<sup>18</sup>.

### *Limited Liability Partnerships*

26. Limited Liability Partnerships<sup>20</sup> are known as "LLPs" and for licensing purposes, they share nearly all the features of a company. An LLP must register at Companies House, and its name must end with the words 'Limited Liability Partnership', or 'LLP'. It must state its name on all its correspondence and documents.
27. As with a company, the LLP's registered office will be recorded at Companies House. As with partnerships the members can be individual persons and/or corporate entities. The LLP belongs to its 'members' or 'designated members' and all existing or designated members of an LLP must be recorded with Companies House<sup>21</sup>. Individual designated members of the LLP may have additional functions within the partnership associated with its running, e.g. the signing of the accounts; when acting in these roles the designated members will be acting on behalf of all participants in the LLP. If the number of designated members falls to one then there is a period of grace of six months before the LLP status and protections are lost.

### *Business names*

28. Many individuals and many companies use trading names, these have no legal status and so the 'real' legal name must be used for the operator's licence. A person carrying on a business in a name other than his/her own must include his/her true name in business correspondence and documents, and also specify an address where documents can be served. There is also a requirement to display this information in a prominent position at every place of business.
29. Similar provisions apply:
- to partnerships where the name of each partner must be stated if the name of the partnership does not consist of the surnames of the partners
  - to registered companies which operate under a name other than the full corporate name of the company.

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<sup>18</sup> Section 1 of the 1890 Partnership Act

<sup>20</sup> Limited Liability Partnerships Act 2000

<sup>21</sup> Limited Liability Partnerships Act 2000 ss.2(2) & 8



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### *Unincorporated bodies*

- 30.** An unincorporated body is an association or a body of persons that is not incorporated e.g. a sports or social club where the members contribute funds to pay for running costs. An unincorporated body has no distinct legal personality although it does meet the legal definition of a person<sup>22</sup>. It may therefore apply for an operator's licence.

### *Trusts*

- 31.** Trusts should hold licences in the names of the trustees, specifying that they are trustees of a particular property or properties (as if a trading name).

### *Charities*

- 32.** A charity can be established in a number of forms, such as a charter body; a company; a trust; or by Act of Parliament. A charity can also be incorporated, including charitable incorporated organisations. Registration as a Northern Ireland charity is compulsory if your organisation is, or will be, charitable. This means:

- it has exclusively charitable purposes
- it is governed by the law of Northern Ireland
- it is an institution, that is, it is an organisation that is an independent body, the hallmarks of which include having control and direction over its governance and resources

This is irrespective of size, annual income or whether the organisation has already applied to HMRC for charitable tax exemptions<sup>23</sup>.

- 33.** The register of charities in Northern Ireland is now in place. The register is available for public inspection and the supply of copies upon request and is also accessible via the website. Charities with an annual gross income above a specified amount are required to show registration on all financial documents.

### *Schools*

- 34.** The classification of schools and the status of local education can be confusing. The Education Authority is the employing authority for teachers in controlled (i.e. state owned) schools and the non-teaching staff in controlled and voluntary maintained schools but most of their responsibilities regarding the employment of staff are delegated to Boards of Governors. The Council for Catholic maintained Schools is the Employing Authority for teachers in Catholic voluntary maintained schools but again most of its responsibilities in this regard are delegated to the Boards of Governors of these schools. The Board of Governors of other voluntary maintained schools is the employer of teachers in its own school. In the case of the voluntary grammar schools and grant maintained

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<sup>22</sup> The Interpretation Act 1978, sections 5 and 11 and schedule 1, defines the word "person" in any Act or subordinate legislation since 1889, unless a contrary intention appears, as "a body of persons corporate or incorporate".

<sup>23</sup> <https://www.charitycommissionni.org.uk/start-up-a-charity/registering-a-new-charity/>

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integrated schools, the Board of Governors is both the Employing Authority and the employer of the staff in the school. There is a very small number of independent schools, the employer of the drivers may be a private proprietor or a school committee. The situation in independent schools will vary. All cases must be considered in relation to its own particular circumstances, in order to determine who the appropriate operator is.

### *Employees*

**35.** The First-Tier Tribunal (Tax) has considered the employment status of drivers<sup>24</sup>. Her Majesty's Revenue & Customs ('HMRC') is concerned that haulage operators are wrongly treating workers as self-employed or are hiring workers through their own companies in ways that are not compliant with tax laws and therefore fair competition amongst other operators. Their position is that in road haulage it is rare for someone to be genuinely self-employed unless they are an owner-driver. HMRC has issued detailed guidance on employment status<sup>25</sup>. HMRC is aware that some companies wrongly believe that anti-avoidance legislation does not apply and that HMRC cannot pursue workers, agents and their companies<sup>26</sup>. This is comparable to the Employment Appeal Tribunal's finding that drivers working for a taxi phone app (Uber) were not self-employed but were instead workers<sup>27</sup>. Ultimately the legal test for self-employment was set out in the case of Ready Mix Concrete<sup>28</sup> with three key hurdles:

- (i) the worker has to be subject to a right of control. If there is no right of control of any kind then you will not have a contract of service. However, it was also made clear in the judgment that, although a right of control is an important factor in determining employment status, it is not necessarily a determining factor;
- (ii) personal service must be given. However, the court did highlight that a limited right of delegation was not inconsistent with a contract of service; and
- (iii) the other factors present are consistent with a contract of service. Factors such as ownership of significant assets, financial risk and the opportunity to profit are not consistent with a contract of service.

In general someone is self-employed if they are in business on their own account and bear the responsibility for the success or failure of that business. Conversely they will be employed if they personally work under the control of their engager and do not run the risks of having a business themselves.

## **Bankruptcy, Sequestration and Insolvency**

### *Individuals – Sole Traders*

**36.** Bankruptcy proceedings under the jurisdiction of a bankruptcy court allow the property of a debtor to be seized. That property may then be realised and, subject

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<sup>24</sup> TC/2015/03681 RS Dhillon and GP Dhillon Partnership v The Commissioners for her Majesty's Revenue & Customs

<sup>25</sup> <https://www.gov.uk/hmrc-internal-manuals/employment-status-manual/esm4210>

<sup>26</sup> <https://www.gov.uk/hmrc-internal-manuals/employment-status-manual/esm3505>  
<https://www.gov.uk/guidance/ir35-find-out-if-it-applies>

<sup>27</sup> UKEAT/0056/17/DA Uber B.V. and Others v Mr Y Aslam and Others

<sup>28</sup> Ready Mix Concrete (South East) Ltd v Minister of Pensions and National Insurance [1968] 2 QB 497

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to certain priorities, distributed amongst the people to whom the debtor owes money<sup>29</sup>.

37. Bankruptcy is only applicable to individuals and not to companies.
38. A debtor may enter into a "voluntary arrangement" with creditors regarding payment of their debts<sup>30</sup>. Such an arrangement ceases in the event that a debtor is made bankrupt.
39. An undischarged bankrupt is prohibited from acting as a director or taking part or being concerned directly or indirectly in the promotion, formation or management of a company; except with the permission of the court by which they were adjudged bankrupt during the currency of their bankruptcy<sup>31</sup>. As an individual they may not meet the requirements in operator licensing terms<sup>32</sup>.
40. Bankruptcy will usually dissolve a partnership and prevent a debtor from acting as a director of a company. A self-employed trader will have to disclose the fact that they are bankrupt when obtaining credit. Individuals wishing to avoid bankruptcy can seek an individual voluntary arrangement (IVA) under Part VIII of the Insolvency (NI) Order 1989. The IVA consists of a contractual arrangement with creditors. It usually only covers the claims of unsecured creditors and allows an individual to agree a payment plan for repayment of some or all of the debts. The individual will have to pay fees to an insolvency practitioner but may allow the individual to write off debt and/or to avoid bankruptcy. It may therefore allow a commercial advantage over competitors trading in the same environment.

### *Insolvent Companies*

41. Trading whilst insolvent is unlawful and may result in the directors becoming personally liable for a company's assets. An insolvent company can enter into a company voluntary arrangement (CVA), which allows a company with debts or that is insolvent to reach an agreement with its creditors for the repayment of some or all of its corporate debts over an agreed period of time. A company voluntary arrangement can only be implemented by an insolvency practitioner. If 75% (by debt value) of creditors agree, then all the creditors are then bound to the terms of the proposal. Creditors are then unable to take further legal actions whilst the CVA is in place. The CVA may allow the company to write off debt and/or to avoid insolvency.
42. The Companies House register will reveal whether a company is the subject of one of the several procedures connected with company insolvency. The most important procedures are:
  - administration
  - voluntary winding up
  - compulsory winding up

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<sup>29</sup> Sections 252-256 Insolvency Act 1986

<sup>30</sup> Sections 264-371 Insolvency Act 1986

<sup>31</sup> Company Directors Disqualification Act 1986

<sup>32</sup> Section 23(1)(h) Goods Vehicles (Licensing of Operators) Act (Northern Ireland) 2010

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43. A company in the course of either form of winding up is said to be "in liquidation". For goods operators Regulation 29 of the Goods Vehicle (Licensing of Operators) Regulations (Northern Ireland) 2012 may be invoked if supported by the Liquidator.
44. At the completion of the winding up process, the company is dissolved. Administration may be succeeded by winding up, but a company that is in liquidation may not be placed under administration. These procedures can be initiated by the company or by its creditors.
45. Directors will have had advanced notice of the financial difficulties and those directors should therefore have notified the Department before the procedures are underway<sup>33</sup>.
46. Companies which find themselves in difficulties can seek to avoid formal insolvency by entering into a company voluntary arrangement (CVA) with creditors. The legal agreement prevents those creditors from seeking to have the company liquidated and allows that company to continue trading even through insolvency. The Directors will stay in control of the company and may allow them the opportunity to sell the business or to seek refinancing. However, whilst a CVA avoids a formal finding of insolvency it does amount to a material change, which should be notified to the Department and will prompt further enquiries.

### *Administration*

47. A company goes into administration when an administrator is appointed to manage the company's affairs, business and property. A person may be appointed as administrator of a company in one of three ways: by an order of the court; as the holder of a floating charge, or by the company (or its directors)<sup>34</sup>.
48. The administrator must perform their function with the objective of (a) rescuing the company as a going concern; or (b) achieving a better result for the company's creditors than would be likely if the company was wound up; or (c) realising property in order to make a distribution to one or more secured/preferential creditors. Paragraph 70 of Schedule B1 of the Insolvency (Northern Ireland) Order 1989 describes that Administrator as acting as the agent of the company in administration. However, this must be read in the context of Paragraph 68 which indicates that *the administrator shall on his appointment take custody or control of all the property to which he thinks the company is entitled*. Whilst the company remains as the operator the Administrator has responsibility for the property rights in the operator's licence. The Upper Tribunal has made clear that responsibility for compliance extends not only to directors but to those who exercise a *controlling interest*<sup>35</sup>. The administration order represents a material change in the circumstances required in order to enjoy an operator's licence.

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<sup>33</sup> 2008/410 Brian Hill Waste Management Limited paragraph 16

<sup>34</sup> Insolvency Act 1986

<sup>35</sup> 2010/029 David Finch

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49. Regulation 29 of the 2012 Regulations may be invoked but must be supported by the Administrators<sup>36</sup>. Directors should notify the Department as soon as administration becomes a distinct possibility.

### *Winding-up/liquidation*

50. A company may be wound up in one of two ways:
- voluntary winding-up by resolution of the company or its creditors;
  - compulsory winding-up most commonly on the application of a creditor to the court.
51. In voluntary winding up, the Registrar of Companies must be notified by the liquidator as soon as they form the opinion that the company will be unable to pay its debts. In a Creditors' Voluntary Liquidation (CVL) the creditors must ratify the appointment of the liquidator who is appointed to realise the assets so that the creditors can be paid. The liquidation is in effect under the control of the creditors but the liquidator must act impartially and in good faith.
52. A compulsory winding up must also be notified to the Registrar and directors should notify the Department where such a situation is pending or likely to arise<sup>37</sup>.

### *Receivership*

53. A company's creditors who have advanced money to it in the past are likely to hold "debentures", that is a document acknowledging the debt, which usually provide for a charge on the company's assets. This charge will be called a 'fixed charge' where it is secured on particular property, or a 'floating charge' where it is secured on the assets generally.
54. Remedies are available to debenture holders who are concerned about the recovery of their debt. A holder of a debenture secured by a fixed charge may appoint a receiver to deal with the disposal of the charged property only. A debenture holder who is secured by a floating charge may appoint an administrative receiver who will be responsible for the administration of the company.
55. An official receiver<sup>38</sup> may be appointed on an application to the court by debenture holders where a compulsory winding-up is in progress. An administrative receiver is appointed to control the financial dealings of the directors, and to ensure that the debenture holder's interest is not prejudiced by the way the company is run. An administrative receiver must advertise their appointment in the Belfast Gazette<sup>39</sup>.
56. A company in receivership is not necessarily in liquidation, and the appointment of a receiver or an administrative receiver does not necessitate of itself the company's winding up, (although the winding up of the company may well follow).

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<sup>36</sup> 2008/ 410 Brian Hill Waste Management Ltd

<sup>37</sup> Brian Hill Waste Management Limited (as above) paragraph 16

<sup>38</sup> Insolvency Act 1986

<sup>39</sup> Insolvency Rules

## Goods Vehicle Operator Licensing

Therefore, if the company is simply in receivership it may still meet the financial standing criteria but it is a notifiable event and finances should be requested.

57. As it is possible that the company is both in liquidation (being wound up) as well as in administrative (or other) receivership, it is essential that you have clear information as to the true position. It may be brought to your attention by a court notice that a company is in receivership. If so you should, therefore, check whether they are also in liquidation.
58. Winding up in the interest of the creditors may proceed notwithstanding the appointment of a receiver on behalf of a debenture holder(s). The role of administrative receiver will be vacated if the company is the subject of an administration order.

### *Dissolved companies*

59. Once a company is dissolved it ceases to exist.
60. Where there is a voluntary winding-up, a liquidator is appointed to distribute the assets of the company to creditors and then to distribute any surplus to those entitled to it. As soon as the company's affairs are fully wound up, the liquidator must make an account of what they have done and call a general meeting of the company.
61. After this general meeting, the liquidator sends the account and confirmation of the meeting to the registrar of companies, who registers this on the company register. The company is then deemed to be dissolved on the expiry of three months from the date of the registration. Any interested person may apply to the court for an order deferring the date at which the company is dissolved.
62. Where there is a winding up by the court, the company will be dissolved, usually no later than the expiry of three months following the registrar registering:
  - an application by the Official Receiver (where the Official Receiver is the liquidator) for an early dissolution of the company on the ground that the Official Receiver believes that the company's realisable assets are insufficient to meet the expenses of the winding up and that no further investigation is required; or
  - a liquidator's notice that the final meeting of creditors has taken place and that the liquidator is vacating the office of liquidator; or
  - a notice from the Official Receiver that the winding up of the company by the court is complete

### *Director disqualification*

63. Disqualified persons must not, without the leave of the court, be a director, liquidator or administrator of a company, or manager of company property, or in any way, directly or indirectly, be concerned or take part in the promotion, formation or management of a company for a specified period. The Companies House website or enquiries of the Companies Investigation Bureau should confirm whether there has been a disqualification.



## Goods Vehicle Operator Licensing

### *Employees*

- 64.** The Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE) implements protections for employees where the ownership of a business is transferred. This can apply when an insolvency practitioner takes over the running of a business<sup>40</sup>. There is a 14 day restriction after which the insolvency practitioner is obliged to adopt the contracts of employment for existing employees at that time<sup>41</sup>.

### *Partnerships*

- 65.** A partnership is an agreement between individuals. A bankruptcy order might be made against individual partners. This may call into question the legal and financial viability of the partnership as a whole; as might the kind of “voluntary arrangement” referred to above.
- 66.** In the event of the insolvency of a limited liability partnership, the laws applicable to companies under the Companies Acts 1985 and 2006 and the Insolvency (Northern Ireland) Order 1989 will apply.

### *Death, bankruptcy (sequestration), liquidation/administration/receivership*

- 67.** An operator’s licence cannot be transferred between legal entities<sup>42</sup>. Regulation 29 of the Goods Vehicles (Licensing of Operators) Regulations (Northern Ireland) 2012 applies where an individual or “actual holder” (including a partner but not a member of an LLP) dies or becomes a patient under Part VII of the Mental Health (Northern Ireland) Order 1986.
- 68.** These provisions also apply to a company and LLP going into liquidation or an administration order being made in relation to that company; or the appointment of a receiver or manager of the trade or business of the actual holder of a licence. An administrator etc., cannot operate without that authority<sup>43</sup>.
- 69.** The Department is not obliged to make an order under the above provisions without an application.
- 70.** Regulation 29(4) states that the other person should be carrying on the business of the actual holder of the licence, as opposed to a separate business.
- 71.** In this situation the Department would expect the directors of a company to have notified it prior to any administration, as failure to inform it of a material change in circumstances may lead to adverse conclusions being drawn against those directors<sup>44</sup>. The case law provides the following guidance on this type of application<sup>45</sup>:

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<sup>40</sup> Regulation 8 Transfer of Undertakings (Protection of Employment) Regulations 2006

<sup>41</sup> Paragraph 99 of Schedule B1 of the Insolvency Act 1986 and *Re Paramount Airways Ltd* (No. 3) [1995] 2 AC 394

<sup>42</sup> 2015/009 *Richard & Sylvia Jones t/a Acorn Skips*

<sup>43</sup> *P Plant Ltd & PGC Skip Hire Ltd* (As above)

<sup>44</sup> See *Guidance and Directions on Good Repute and Fitness*

<sup>45</sup> *Brian Hill Waste Management Ltd* (as above)

## Goods Vehicle Operator Licensing

- once an Administrator is appointed they must decide whether or not to carry on the transport business of the company. If they decide not to do so they should take immediate steps to surrender the licence and to return the discs for the authorised vehicles
- if the Administrator decides to carry on the transport business of the company, either personally or by appointing managers, they must make an application
- where the Administrator decides to appoint someone else the terms of the agreement will need to be considered with care. The agreement must provide for the management of the business of the company in administration not, for example, to use the vehicles covered by the operator's licence of the company in administration for the purposes of some other business. An Administrator who makes an application should provide the Department with a copy of the agreement with the application or as soon afterwards as possible
- if the Administrator does nothing they should not be surprised if the company is called to a public inquiry on the grounds of loss of good repute, loss of financial standing and, possibly, unlawful operation
- if the company was called to a public inquiry before being put into administration there is no reason why that public inquiry should not continue. If the Administrator decided to continue the transport business, by making an application, the convenient course is likely to be to consider both matters in the course of the same public inquiry
- if the company is in administration at the time of the public inquiry the primary issues are likely to be the good repute and financial standing of the Administrator and/or any manager appointed by the Administrator. If the previous directors of the business, (or any of them), have been appointed to manage it then their good repute will also be in issue and any past conduct, especially in relation to the company before it went into administration, is likely to be relevant
- where the person appointed to manage the company on behalf of the Administrator already holds an operator's licence the convenient course is likely to involve the transfer of vehicles to that licence, with, if necessary, an application for a variation to increase the number of vehicles authorised, together with the revocation or surrender of the original licence

### *Pre-packaged sales*<sup>46</sup>

**72.** An arrangement for the sale of all or part of a company's business or assets can be negotiated with a purchaser prior to the appointment of an administrator. The administrator can then effect the sale immediately upon appointment or shortly afterwards, without the prior approval of the creditors or the permission of the court. The administrator, however, must act in the interests of the purposes of the administration and notify creditors within 28 days of sale<sup>47</sup>. Insolvency practice indicates that creditors should be provided with a detailed explanation and justification of why a pre-packaged sale was undertaken, so that they can be satisfied that the Administrator has acted with regard for their interests<sup>48</sup>. It is important to remember that the Administrator is concerned with ensuring that the largest amount of money is available with which to pay back creditors. The Administrator will probably seek to avoid reducing that amount by ensuring that employment obligations are transferred elsewhere quickly and pre-packaged

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<sup>46</sup> See Phoenix Applications in Guidance and Directions on Good Repute and Fitness

<sup>47</sup> Rule 4.228 Insolvency Rules

<sup>48</sup> Statement of Insolvency Practice (SIP) 16

## Goods Vehicle Operator Licensing

sales often allow for this. Whilst there may be advantages to the creditors, pre-packaged purchases by former Directors impact may be relevant to the consideration of their fitness or repute<sup>49</sup>.

### Changes in entity

- 73.** Where there has been a change in entity the new entity will need to make an application for a new licence in its own right. The Department will then consider action against the original licence<sup>50</sup>. In many cases the Department will be able to accept surrender of the original licence and consequently grant of a licence to the new entity will require the old entity to surrender the licence. This might apply, for example, where a partnership ceases and a limited company is formed. In other cases, revocation of the licence held by the old entity may be required but this revocation will not necessarily prevent grant of a new licence to the new entity provided that there are no serious compliance issues and provided that there are no undue concerns regarding “phoenix” entities or “fronting”.

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<sup>49</sup> See Practice Guidance and Instruction on Good Repute and Fitness

<sup>50</sup> R-v-Secretary of State for Social Services ex parte Chapman and Taylor, The Times February 5<sup>th</sup> 1996, 2008/410 Brian Hill Waste Management Ltd.

# INSTRUCTIONS

74. The Department issues the following Instructions. The aforementioned Guidance relates to matters which may affect the holding of an operator's licence. These Instructions are addressed to the Department in respect of the approach to be taken by staff acting on its behalf and dictate the operation of delegated functions.

### Basis of Directions

75. These instructions are issued to provide practical advice on the administrative arrangements to those who support the Department in fulfilling its statutory functions. In the interests of adopting a consistent approach to decision making the following checks have been identified to assist support staff, who must decide whether to refer a case to the Head of TRU for consideration and the circumstances in which the Head of TRU may wish to consider an application or existing licence at a public hearing.

#### *Individuals - Sole Traders*

76. The trading name should always be checked as this may hint to what may actually be a partnership e.g. ANP Skip trading as ANP & DJ Skip. However, an assumption should not be made that just because the trading name refers to two names or initials that it is necessarily a partnership. Staff should check the name(s) on the financial evidence served in support of the application. There may be occasions where it will be appropriate to complete an officer search at Companies House to ascertain if the individual is also a director of one or more companies. This may be relevant for a number of reasons such as whether licences are held by those other companies or to ascertain if the individual will have sufficient time to attend to compliance if a licence is granted.

#### *Companies and LLPs*

77. A company and LLP must be correctly described in any formal documentation. Companies and LLPs are obliged to state their full names, registration numbers, and registered addresses on all of its business letters and other forms. Its name should appear outside every place where its business is carried on, and on all its other correspondence and trading documents.
78. The Companies Register can be used to confirm:
- the company's correct name
  - its company number
  - the address of its registered office
  - its directors (past and present)
  - whether the company is in the process of being wound up
79. The general enquiry line of the NI Insolvency Service should also be able to confirm whether a compulsory winding-up order has been made, by quoting the company number.

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### *Company or LLP: change of name or structure*

- 80.** Where a company or LLP has changed its name, this does not affect any legal proceedings. The company number will remain the same and correspondence can refer to the new name and, if the operator has failed to notify the Department of the change, might also refer to previously “known as....”. This will also apply when a company registered as limited is re-registered as unlimited, and when a company registered as unlimited is re-registered as limited. The company's former names will be listed on its record at Companies House.
- 81.** When a change of name is notified or there is a suspicion of a phoenix application<sup>51</sup> it is essential that the company number is checked<sup>52</sup>.
- 82.** Where correspondence is received from someone other than a director, a letter signed by a current director on headed paper or a Board Meeting minute confirming the authority of the person to bind the company, is required<sup>53</sup>.
- 83.** Changes of directors must be notified to the Department and thereafter the DVA Intelligence Unit should be asked to conduct a check of any new directors. Staff members may also make enquiries to determine whether evidence of finance should be requested if the departing director was also a shareholder.
- 84.** If staff acting on behalf of the Department speak to a person representing an LLP about a matter that will have a material effect upon the licence (such as potential revocation or surrender) it is best practice to require that a designated member (see paragraph 28 above) provides written confirmation on the LLP's headed paper of the authority of that person to represent the partnership's guiding mind.

### *Subsidiaries*

- 85.** A company is a ‘subsidiary’ of another company (its parent or holding company), if that other company:
  - holds a majority of the voting rights; or
  - has the right to appoint or remove a majority of the board of directors; or
  - controls alone, under agreement with other members, a majority of voting rights; or
  - it is a subsidiary of a company that is a subsidiary of the parent

### *Partnerships*

- 86.** All partners should be named on licence documentation and all correspondence. As with the above, staff might complete a search for each partner, for the reasons given above. Where an application or existing licence are the subject of a hearing all the partners should be asked to attend, unless there are good reasons for excluding some, particularly if the division of responsibilities is unknown. Discretion may be exercised based on factors such as the nature of the alleged breaches and the division of responsibilities within the partnership but the decision should be referred to the Head of TRU.

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<sup>51</sup> See Practice Guidance and Instructions on Repute

<sup>52</sup> See attached Annex Re: Company Names

<sup>53</sup> See Companies Act 2006 , Section 44 - Execution of documents

## Goods Vehicle Operator Licensing

87. If an individual partner becomes bankrupt proof of finance should be requested and questions raised with the partners as to the exact position.
88. When a partner leaves for whatever reason that particular partnership terminates unless the partnership deed (written agreement) specifically states otherwise. The remaining partners may decide to continue to work together as a different partnership, but this equates to a change in the legal entity. In the interests of consistency this must be treated in the same way as any other similar change. If the numbers fall to one at any time then the partnership is at an end. The remaining 'partner' must therefore apply for a sole trader licence if the business is to continue. If an application is made to surrender by one of the partners it will be necessary to check that the individual has the authority of the other partners.

### *Unincorporated and other bodies*

89. Any queries regarding an unincorporated body should be referred to the Department. As per the Guidance it may be necessary to address Trusts via individual trustees. This will be different if it is a charitable trust where the trustees are incorporated. In respect of charities, members of staff should find out what sort of charity is involved before referring to the Department. This may be apparent from the register of charities and/or from the charity itself or the NI Charity Commission. If the charity is a company, it will be registered at Companies House. If trustees have not been incorporated, then documents should refer to them in their own names as trustees.

### *Death, bankruptcy (sequestration), liquidation/administration/receivership*

90. Where the licence holder, including one of the partners, is deceased or has been deemed mentally incapacitated in law the Department is likely to deal with an application under regulation 29;
  - sympathetically (if notified within a reasonable time)
  - on the papers alone
91. Save in unusual circumstances the Department is likely to grant an application allowing a sufficient period to permit the applicant the opportunity to surrender the licence and/or make a new application. Any new application will be dealt with on its merits depending on the circumstances at the date of the application. Section 24(3A) refers to the time limits for rectification allowed under Regulation (EC) 1071/2009 (see Article 13).
92. A company in the course of either form of winding up is said to be "in liquidation". The Department and its staff are reminded that for goods licence holders Regulation 29 of the Goods Vehicle (Licensing of Operators) Regulations (Northern Ireland) 2012 may be used but only with the support of the Administrators<sup>54</sup>. Directors should therefore notify the Department as soon as administration becomes a possibility so that the Regulation 29 procedure can be used.

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<sup>54</sup> 2008/ 410 Brian Hill Waste Management Ltd



## Goods Vehicle Operator Licensing

- 93.** In the case of a Regulation 29 procedure, the application form must be completed and signed by the liquidator, administrator or receiver. A former director does not have authority to make this application and therefore all correspondence should be addressed to the liquidator, administrator or receiver following their appointment. Arguments that some other party can pursue this type of application are misconceived, as the Upper Tribunal case law summarised above suggests. It is a long established principle that grant of an operator's licence confers property rights on the lawful holder. Provisions such as those contained within the Insolvency Order indicate that it is the administrator who is the authorised agent and requires the administrator to take possession of assets, which will include the operator's licence, and it is on that basis that the administrator is permitted to pursue this application. The Department may only interfere with the rights of that holder with lawful justification such as the change in financial status. It is therefore only the administrator who has locus (i.e. the right) to pursue the application. If the administrator etc. does not make an application then the licence should be subject to surrender or revocation depending on the circumstances of the case. Note that where a revocation is recommended the Directors should be notified and given an opportunity to return the licence and discs, and made aware of the potential impact of revocation on other current or future undertakings requiring an operator's licence.
- 94.** Insolvency practitioners are often not aware of these provisions or the available case law referred to in the attached Guidance. Administrators usually have a 21 day window from the Notice of Intention to try and secure the employment for the employees of the business. Regulation 29(4) [goods vehicles], makes it clear that the applicant must actually be carrying on the trade or business which indicates that the Administrator cannot make an application until the Notice of Appointment. The Administrator will be under pressure to progress the application as quickly as possible. Staff in the Department are expected to assist as much as possible and, where there is notice of a potential application the Department should allow time to consider that application.
- 95.** An application must be determined by the Department at an oral hearing with all parties and witnesses given the opportunity to attend. The hearing will often be at short notice subject to the public inquiry schedule, due to the urgent nature of such applications.
- 96.** If the Department considers it desirable to hear evidence of a likely application by a new entity at the hearing of the Regulation 29 application, it will do so and may then give an indication on the prospects of success of grant and how many vehicles and trailers the Department deems it appropriate to authorise in the circumstances. If, having heard all oral and written evidence the Department determines that it is appropriate to allow the Regulation 29 application it must indicate the duration of any order.

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### *Dissolved Companies*

97. Where a company or LLP has been wound up or dissolved it no longer exists in law. There is therefore no legal entity to write to in respect of an operator's licence. That being the case where there is an existing licence there is no need to go through the formal process of sending a proposal to revoke as there is no entity which can respond and/or request a hearing. In those circumstances the matter can be referred straight to the Department to make the order for revocation.

### **Transport Regulation Unit**

01 May 2020

### ANNEX 1 - COMPANY NAMES

It is not possible to have two companies registered with the same name at the same time. Once the company goes into either a voluntary or, compulsory liquidation section 216 of the Insolvency (Northern Ireland) Order 1989 would apply.

Detail can be found at [www.insolvency.gov.uk](http://www.insolvency.gov.uk) under the heading 'Publications/Information about insolvency procedures'.

Under section 180 of the Insolvency (Northern Ireland) Order 1989, a director/shadow director (either at the date of liquidation or in the previous 12 months) of a company which has entered into insolvent liquidation is prohibited from using a name if:

- it is a name by which the liquidating company was known at any time in that period of 12 months; or
- it is a name, which is so similar to a name as above as to suggest an association with that company.

The ban lasts for five years. Therefore, a director/shadow director cannot use the name or trading style or a similar name of a liquidated company in a successor company, sole proprietorship, or partnership business for a period of five years. There are certain exceptions as follows:

- if the director obtains leave of the court; or
- where a company or business buys the whole, or substantially the whole, of the business of the company in liquidation from the liquidator. If this happens or is intended to happen under arrangements made by an administrator, administrative receiver or supervisor of a voluntary arrangement of the insolvent company, the director must use a prescribed form to publish a notice in the London Gazette and also send it to all creditors known to the director or whose names and addresses could be obtained by making reasonable enquiries. The notice may be published and given before the completion of the sale arrangements but must be published and given no later than 28 days after completion; or
- for an interim period where an application has been made to the court within seven days of the liquidation, continued use of the name is permitted for six weeks from the date of liquidation, or until the court reaches its decision, whichever is earlier; or
- where another company has been known by that name for more than 12 continuous months prior to the liquidation and has been actively trading during that period

If a person wishes to complain about a breach of these provisions, they should address their complaint to the liquidator/official receiver. It is a criminal offence (punishable by imprisonment or a fine or both) for anyone to contravene the restrictions. Furthermore, any person who contravenes them, or acts or is willing to act on instructions given by another whom they know to be in contravention of the restrictions, may also be held personally liable for all the 'relevant debts', defined as the debts incurred by the company whilst the breach is happening (section 181 of the Insolvency (NI) Order 1989).

## Goods Vehicle Operator Licensing

Where the directors/a company under the control of the directors acquire the whole, or substantially the whole of the business, the liquidator must give notice to the creditors. Sanction of the creditors'/members' committee is not required for a connected party transaction, but the liquidator has a statutory obligation to give notice to the committees where they dispose of any property of the company to a person who is connected with the company.

## ANNEX 2: EU LEGISLATION

Regulation 3 of the Goods Vehicles (Qualifications of Operators) Regulations (Northern Ireland) 2012 states that a standard licence constitutes an authorisation to pursue the occupation of road transport operator for the purposes of:

**Regulation (EC) 1071/2009 establishing common rules concerning conditions to be complied with to pursue the occupation of road transport operator repealed Council Directive 96/26 EC and applicable from 4<sup>th</sup> December 2011**

### **Article 3 - Requirements for engagement in the occupation of road transport operator**

1. Undertakings engaged in the occupation of road transport operator shall:

(c) have appropriate financial standing; and

2. Member States may decide to impose additional requirements, which shall be proportionate and non-discriminatory, to be satisfied by undertakings in order to engage in the occupation of road transport operator.

### **Article 13 - Procedure for the suspension and withdrawal of authorisations**

1. Where a competent authority establishes that an undertaking runs the risk of no longer fulfilling the requirements laid down in Article 3, it shall notify the undertaking thereof. Where a competent authority establishes that one or more of those requirements is no longer satisfied, it may set one of the following time limits for the undertaking to rectify the situation:

(c) a time limit not exceeding six months where the requirement of financial standing is not satisfied, in order to demonstrate that that requirement will again be satisfied on a permanent basis.

3. If the competent authority establishes that the undertaking no longer satisfies one or more of the requirements laid down in Article 3, it shall suspend or withdraw the authorisation to engage in the occupation of road transport operator within the time limits referred to in paragraph 1 of this Article.

## DOCUMENT CONTROL HISTORY

<b>Version 1.0 (published 01/10/2019)</b>	<b>Version 1.1 (published 01/05/2020)</b>
Paragraph 5:	Reference to “other bodies” clarified
Paragraph 26:	Removal of reference to Scottish Partnership Law, and LLP references applicable only to Scotland and Wales
Paragraph 33:	Corrected to reflect NI guidance on Charities