

## ***Practice Guidance Document No.6***

### **DETENTION**

**Commencement** **01/10/2019**

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### GUIDANCE

1. The Department issues the following Guidance as to how Departmental staff should interpret the law in relation to the return of seized vehicles under detention (impounding) legislation.
2. An operator's licence is required to carry goods (or burden) connected with any trade or business or for hire or reward, if using a motor vehicle on a road with:
  - a gross plated weight of more than 3.5 tonnes<sup>1</sup>; or
  - if it has no gross plated weight, but an unladen weight of more than 1525 kg
3. An operators' licence is necessary even if the vehicle is only used for a short period of time.
4. The licensing of operators ensures the promotion of road safety and fair competition in the transport industry. Unlicensed operators have no obligation to apply any kind of safety standards that are promoted by the operator licensing legislation and enforcement agencies are not able to easily carry out the necessary checks to ensure that those standards are being adhered to. Unlicensed operators do not have to bear the cost of compliance thereby gaining an unfair commercial advantage over their properly licensed competitors.
5. Vehicle examiners in NI (Driver & Vehicle Agency (DVA)) and GB (Driver & Vehicle Standards Agency (DVSA)) have been given powers under the 2010 Act to detain vehicles used by unlicensed operators. Police officers also have the same powers of detention under Section 42(2) of the Act.
6. 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").

### **Goods Vehicles Legislation: The Goods Vehicles (Licensing of Operators) Act (Northern Ireland) 2010**

7. Schedule 2 of the 2010 Act allows that any laden heavy goods vehicle operating on a public road for the carriage of goods (either for hire or reward or in connection with any trade or business) without the authority of a goods vehicle operator's licence, can be detained.
8. Section 1 of the 2010 Act provides that...no person shall use a goods vehicle on a road for the carriage of goods a) for hire or reward or b) for or in connection with any trade or business carried on by him, except under a licence issued by this Act. Section 58 defines "goods vehicle" as a motor vehicle constructed or adapted for use for the carriage of goods, or a trailer so constructed or adapted; "carriage of goods" includes the haulage of goods and "goods" includes goods or burden of any description.

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<sup>1</sup> To be interpreted in conjunction with the Goods Vehicles (Licensing of Operators) (Exemption) Regulations (Northern Ireland) 2012

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The Goods Vehicles (Licensing of Operators) Regulations (Northern Ireland) 2012 sets out the classes of vehicles for which an operator's licence is not required – see Annex 1

9. Article 8(2) of Regulation (EC) No 1072/2009 defines the extent to which non-resident carriers from other Member States are permitted to operate national road haulage services (i.e. cabotage). This is limited to three such operations within seven days following entry to the relevant Member state. Where a foreign based haulier applies for an operator's licence in the UK, that haulier will become a 'resident carrier'<sup>2</sup> and subject to the ongoing obligations to comply with domestic law including Vehicle Excise Duty (as per section 1 of the Vehicle Excise and Registration Act 1994). In order to obtain a Vehicle Excise Disc it will usually require the applicant to present a valid roadworthiness test certificate.
10. The Goods Vehicles (Enforcement Powers) Regulations (Northern Ireland) 2012, allows for the detention and disposal of vehicles, where the operator doesn't hold a current goods vehicle operator's licence. Regulation 9 provides for the opportunity to apply to the Department for the return of a detained vehicle. Regulation 4 allows for the release of a detained vehicle without the need for an application under Regulation 9.
11. Regulation 8 requires that where a vehicle has been detained DVA shall publish a notice in the Belfast Gazette, which gives a brief description of the property detained and the vehicle's registration mark (if any), indicating the time and place at which it was detained and the powers used. It also lists those persons who should be served with a notice of the detention, including the Department.
12. The notice must also describe the procedure for making an application for the return of the vehicle and/or the contents and must make clear what might happen if no-one claims it within the specified period. The specified period must be a minimum of 21 days, beginning with the date on which the notice is published or, if later, a copy of the notice is served.

### *Applications to the Department*

13. The owner of a detained vehicle may within that specified period apply to the Department for the return of the vehicle. Any application has to comply with the requirements of Regulation 9(2), namely that the application be in writing and be accompanied by a statement of one or more grounds specified in Regulation 4(3) and a statement indicating whether the applicant wishes the Department to hold a hearing.
14. Regulation 2 of the Goods Vehicles (Enforcement Powers) Regulations 2012 defines "owner", as:
  - (a) in the case of a vehicle which at the time of its detention was not hired from a vehicle-hire firm under a hiring agreement but was registered under the Vehicle Excise and Registration Act 1994<sup>3</sup>, the person who can show to the satisfaction of an authorised person that at the time of its

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<sup>2</sup> 2000/063 Reids Transport Co Ltd

<sup>3</sup> 1994 c. 22

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detention that person was the lawful owner (whether or not that person was the person in whose name the vehicle was registered)

- (b) in the case of a vehicle or trailer which at the time of its detention was hired from a vehicle-hire firm under a hiring agreement, the vehicle-hire firm; or
- (c) in the case of any other vehicle or trailer, the person who can show to the satisfaction of an authorised person that at the time of its detention that person was the lawful owner

### *Grounds for an application*

- 15.** Regulation 4(3) of the Goods Vehicles (Enforcement Powers) Regulations (Northern Ireland) 2012 sets out the grounds for the return of a detained vehicle. The grounds are:

- (a) that, at the time the vehicle was detained, the person using the vehicle held a valid licence (whether or not authorising the use of the vehicle)
- (b) that, at the time the vehicle was detained, the vehicle was not being, and had not been, used in contravention of section 1 of the 2010 Act
- (c) that, although at the time the vehicle was detained it was being, or had been, used in contravention of section 1 of the 2010 Act, the owner did not know that it was being, or had been, so used
- (d) that, although knowing at the time the vehicle was detained it was being, or had been, used in contravention of section 1 of the 2010 Act, the owner:
  - (i) had taken steps with a view to preventing that use; and
  - (ii) has taken steps with a view to preventing any further such use.

### *Hearings before the Department*

- 16.** Under Regulation 10 the Department must hold a hearing if requested to do so by the applicant or if the Department decides that it would be appropriate to hold a hearing before making a determination on the application. The hearing should be held within 28 days of receipt of the application at a time and place specified by the Department in the notice of the hearing.
- 17.** It is an adversarial process and the parties are entitled to give evidence, to call witnesses, to cross examine witnesses and to address the Department both on the evidence and generally. The hearing will generally be in public but the Department may direct that the whole or any part of a hearing be held in private if it is satisfied that it is in the interests of justice due to:
- (a) the likelihood of disclosure of intimate personal or financial circumstances
  - (b) the likelihood of disclosure of commercially sensitive information or information obtained in confidence
  - (c) other exceptional circumstances
- 18.** The Department retains discretion to admit such persons as it considers appropriate.

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### *Notification of determinations*

- 19.** Regulation 11 requires the Department to notify the applicant in writing of its determination of an application as soon as reasonably practicable and:
- (a) where no hearing is held, within 21 days after receiving the application; and
  - (b) where a hearing is held, within 14 days of the conclusion of the hearing

### *Extension of time*

- 20.** Regulation 21 allows the Department to extend the periods relating to the decision making process where the Department considers it to be necessary in order for a particular case to be dealt with fairly and justly. The Department should record the reasons for the extension of the time.

### **Case law**

- 21.** This Guidance may be subject to any decisions of the courts and to subsequent legislation. Current case law is mainly concerned with applications for the return of goods vehicles. The following principles and examples have been extracted from existing case law.
- 22.** A tractor unit (Motor Vehicle without a trailer) is a goods vehicle. A tractor unit conveying empty trailers to and from the testing station amounts to the carriage of goods as goods includes burden of any description. The hauling of trailers by a tractor unit for the purposes of testing and repair as part of a trade or business requires an operators' licence. A tractor unit is a separate vehicle from a trailer and can only fall within the exemption if it is proceeding to the testing station for the purpose of a test upon itself<sup>4</sup>.
- 23.** It is unlawful in Northern Ireland to use a goods vehicle on a road, for the carriage of goods, either for hire or reward or in connection with any trade or business carried out by the user, without holding an operator's licence, unless permitted to do so by a legal exemption. The Vehicle Excise and Registration Act 1994 provides exemptions for Vehicle Excise Duty for recovery vehicles. They are defined as vehicles constructed or adapted for the purpose of "lifting, towing and transporting a disabled vehicle". In these circumstances the Upper Tribunal has held that the correct test is whether the use of the recovery vehicle was for transporting genuinely disabled vehicles<sup>5</sup>.
- 24.** One of the exemptions allowed under section 2(2)(b) is the use of a vehicle for international carriage by a haulier established in another Member State. International carriage is defined by Council Regulation (EC) No. 1072/2009 as being "a journey undertaken by a vehicle the point of departure and the point of arrival of which are in two different Member states, with or without transit through one or more Members States or non-members". Under Regulation (EC) No. 1072/2009 any haulier from another Member State who enters NI whilst delivering an incoming international load and who complies with the conditions set out in Article 8 may take advantage of a further exemption known as 'cabotage'. This permits an incoming vehicle, after discharging its international

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<sup>4</sup> 2002/134 WC Commercials, Booth v DPP [1993] R.T.R. 379

<sup>5</sup> 2008/011 Ansvar Holdings

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load, to undertake three further collections and deliveries within NI before the vehicle leaves the country, within seven days. Those operations will only conform to the 2009 regulation if the haulier can produce clear evidence of the incoming international carriage and each of the consecutive cabotage operations. That evidence must be kept in the vehicle and made available for inspection at any roadside check<sup>6</sup>.

25. Section 58 of the 2010 Act deem the user of a vehicle to be the driver, if they own it (under hire purchase or loan etc.), or, in any other case, the person who employs/contracts the driver. The Upper Tribunal considered the question of who is operating in 2004/377 E A Scaffolding and Systems Ltd and 2004/426 E A Contract Services Ltd and confirmed that it is generally the employer of the driver who will be the operator for the purposes of the legislation. The key in determining whether or not a person is an employee, is often to be found in the terms of employment; or if a service provider, in the contract for supply of services. Terms or a contract of employment have not been comprehensively defined in legislation or case law. The courts have adopted various tests in order to determine whether or not a relationship amounts to a relationship of employment but the general approach is to consider all the factors relevant to the issue of employment and to weigh up those factors that point towards the existence of a contract of employment and those that point away from such a contract<sup>7</sup>.
26. In the E A Scaffolding case the Tribunal also approved of the traffic commissioner's reliance on a Court of Appeal decision in *Interlink Express Parcels Limited v. Night Trunkers Limited & Another* [2001] EWCA Civ 360. In exceptional circumstances it may be necessary to look at wider factors. This case turned on the identity of the operator under sections 2 and 58(2) of the Goods Act. In considering the temporary transfer of employment Arden LJ carried out a detailed review of the law. The Tribunal remarked that this was a factually complex case which could not easily be summarised. It deprecated "*salami slicing*" those parts of the day where one activity was carried out from those parts of the day where another, such as driving, might be undertaken. The Tribunal relied on the principle that "*Interlink had the right to control the way in which the Night Trunker drivers operated their vehicles, and in all the circumstances that such drivers were properly to be regarded as temporary deemed servants of Interlink and accordingly as its servants for the purposes of section 58(2) of the 1995 Act*".
27. In determining who is operating, the issue is therefore likely to be one of control: for instance is someone entitled to give the orders as to how the work should be done? The greater the amount of control exercised over the details of the work to be done, the more likely the relationship is to be one of employment<sup>8</sup>.

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<sup>6</sup> 2011/060 Nolan Transport v VOSA and SoS for Transport, 2016/008 Van Der Gaag Transport De Lier BV v DVSA

<sup>7</sup> Carmichael v National Power plc [2000] IRLR 43 approved 3 questions posed by the judge in Readymix Concrete (South East) Ltd v Minister of Pensions and National Insurance [1968] 1 All ER 433: the obligation to provide a personal service; the obligation to be controlled in relation to the manner of the task to such an extent that the worker becomes a servant; and that there is mutuality of obligations. HMRC has advised that to all intents and purposes, lorry drivers cannot be self-employed when they are driving a lorry, unless they are owner/drivers with a licence to operate:

<sup>8</sup> Simmons v Heath Laundry [1910] 1 K.B. 543

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- 28.** In terms of the application, the apparent requirement to lodge that application within 21 days is to be viewed as discretionary rather than mandatory. “It follows that a literal interpretation of the Regulations is more likely to shut out those with a strong claim rather than those with a weak claim or no claim at all”<sup>9</sup>. Where the prescribed time limits are not complied with, in the absence of bad faith, the Department will retain jurisdiction to hear the application. However, it is good practice to refer an application to the Department to consider making case management directions including the extension of time limits where necessary in the interests of justice<sup>10</sup>.
- 29.** In many cases, owners of detained vehicles may not ask for a hearing because they think that this is unnecessary. They might think that the case for return of the vehicle is obvious and consequently not request a hearing. If the question of knowledge is at issue the Department should be alive to the need to explore this issue. If the issues or facts are other than straightforward the Department must give serious consideration to the holding of a hearing to enable the applicant to attend and present all material facts to the Department.
- 30.** The applicant must first prove ownership of the relevant vehicle before the Department is required to consider other issues, although it may be necessary for the Department to hear all of the evidence<sup>11</sup>. In the case where there are multiple claims the Department may be required to determine who was the legal owner (as opposed to the owner of a beneficial interest) at the time the vehicle was detained<sup>12</sup>. The correct test is whether the appellant had produced sufficient evidence to satisfy the Department upon the balance of probabilities that they are the owner, not whether there is credible evidence that the vehicle is owned by anyone other than the applicant. Neither the production of the log book nor the identity of the registered keeper is conclusive evidence that the applicant is the owner<sup>13</sup>. Financial evidence showing that money was used to purchase the detained vehicle is unlikely to be sufficient in the absence of a loan or leasing agreement and/or other evidence as to rights over the vehicle<sup>14</sup>.
- 31.** As a general rule the DVA witnesses should give evidence first at a hearing and they must establish the case for detaining the vehicle<sup>15</sup>. It is for DVA to show that its officers had reason to believe that the detained vehicle was being, or had been, used on a road in contravention of the legislation<sup>16</sup>, on the balance of probabilities. The applicant will then give evidence, with the burden of proof being on them to establish ground/s for the return of the vehicle. This sequence assists the applicant since they are able to put a case to the Department before calling evidence<sup>17</sup>.
- 32.** The Upper Tribunal has repeated the general rule that ownership is the sensible starting point in any detention hearing or decision because it is only the owner

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<sup>9</sup> 2003/90 and 2003/122 CPT Commercials (Stockport) Ltd and CPT & sons Transport UK Ltd, 2005/471 Excell A Rate

<sup>10</sup> 2012/018 & 19 Steve Barry Smith, Helen Graham v DVA

<sup>11</sup> 2011/029 David Pritchard – considered the exercise of deciding on credibility

<sup>12</sup> 2013/015 Commercial Tradings Ltd

<sup>13</sup> 2005/565 Construction Access UK Ltd, 2005/259 R J Evans

<sup>14</sup> 2005/218 B Menear

<sup>15</sup> 2012/037 F&M Refrigerated Transport Ltd refers to section 48 of DVA s Operations Manual setting out DVA's policy on detention

<sup>16</sup> 2012/058 Alan Knight Transport BV & Alan Michael Knight

<sup>17</sup> 2005/449 W J Furber

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who can apply for the return of a detained vehicle<sup>18</sup>. It advises that where there is any reasonable doubt about the right to detain the enforcement agency would be well-advised to be cautious about resisting an application to adjourn. If the true owner of a detained vehicle can prove (a) ownership and (b) that DVA had no right to detain the vehicle, then DVA may face other liabilities<sup>19</sup>. The Upper Tribunal has indicated that where a detention appeal raises a complex point, the enforcement agency should consider whether or not it needs to be represented, in its own interests and the interests of justice<sup>20</sup>.

33. Once unlawful use is established the burden of satisfying the Department that the vehicle should be returned is on the applicant<sup>21</sup>. Only the owner may apply for the return of the detained vehicle as per the regulations<sup>22</sup>. If that can be shown then the burden of proof in an application for return of a detained vehicle based on knowledge lies with the applicant<sup>23</sup>. On the issue of the owner's knowledge, the applicant must establish that they had no knowledge of the contravention at the time when the vehicle had been used, whenever that was and whether such use was at the time of detention or on some earlier occasion<sup>24</sup>. In stating that the *owner has the difficult task of proving a negative* the Upper Tribunal makes clear that the onus of proof regarding knowledge remains on the applicant seeking return of the vehicle.

### *General approach to Knowledge*

34. Any reason for failing to act, or any other explanation put forward by the owner must be considered and assessed. The Upper Tribunal has indicated that this is most appropriately done in the course of deciding whether or not a case comes within a particular category.
35. A good reason for failing to make inquiries is likely to mean that the owner was not guilty of a high degree of fault. The motivation for the owner's conduct, or failure to take certain steps, is likely to be extremely relevant. Circumstances which show that the owner's conduct was inadvertent or accidental would mean that it was not wilful. It will be necessary for the Department to consider the circumstances of each vehicle separately and to make separate findings in relation to each.
36. The Department might need to consider whether obvious inferences were drawn or whether obvious enquiries were made. If the applicant did not suspect wrongdoing or had their suspicions allayed that is not actual knowledge, but if they did suspect wrongdoing but failed to make enquiries then that is another matter<sup>25</sup>. It may be necessary to determine whether simple questions, such as the applicant satisfying itself of the existence of the operator's licence, were asked<sup>26</sup>. If they did not make those enquiries, the onus is on the applicant to say why not. If the true situation would have become apparent, on the basis of

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<sup>18</sup> 2012/053 Clayton Car Sales Ltd

<sup>19</sup> For instance under Torts (Interference with Goods) Act 1978, for the civil courts to determine.

<sup>20</sup> 2012/037 F&M Refrigerated Transport Ltd

<sup>21</sup> 2007/062 Thomas McKinney & Son Ltd

<sup>22</sup> Alan Knight Transport BV (as above)

<sup>23</sup> 2007/30 & 31 Industrial and Corporate Finance

<sup>24</sup> 2002/056 J Tote

<sup>25</sup> 2003/ 003 Close Asset Finance

<sup>26</sup> 2007/30 & 31 Industrial & Corporate Finance



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enquiries that any honest and reasonable person would make, then the applicant must justify the decision not to pursue those enquiries. It may be difficult for an intelligent and/or experienced businessman to claim naivety where there are grounds to suspect that further enquiries (for instance use of the internet) are required and thereby every opportunity to find out about the licensing regime<sup>27</sup>. *“In the absence of some innocent explanation if they failed to do so wilfully (that is to say – deliberately, intentionally and with a high degree of fault) and recklessly (that is to say – with a lack of caution) then actual knowledge can be imputed”*<sup>28</sup>.

37. In the case of corporate applicants, whilst a company is often likened to a human body, with its directors acting as the controlling mind<sup>29</sup> it is not the knowledge of the directors but that of the company as a whole, which may be under consideration. Where the company has a clear process, for instance for checking whether there was an operator’s licence, and that process is ignored by a member of staff, the predecessor to the Upper Tribunal, the Transport Tribunal, has rejected an argument that this is merely negligent<sup>30</sup>, as the company was on notice of the requirement.
38. The Department is advised to find such facts as they can on the evidence and then decide whether the owner has discharged the burden of establishing, on balance, that they did not have actual, imputed or constructive knowledge. There is no residual discretion for the Department to import the concept of proportionality into the tests laid out in the legislation<sup>31</sup>.
39. The purpose of the regulations is to prevent owners knowingly permitting or facilitating the unlawful use of vehicles<sup>32</sup>. Once DVA has established a right to detain the burden of proof is on the Applicant. Any claimant who fails to attend a detention hearing runs a significant risk that the application will fail because there is no evidence to prove the ground upon which return is sought and/or because the applicant is unable to answer any point raised during the hearing. The Department cannot be expected to know what case the applicant might be able to make and is not required to become involved in helping an applicant to complete the grounds. The hearing is adversarial and the presiding officer must remain neutral. **The Upper Tribunal has now set out the principles on knowledge in 2013/021 Societe Generale Equipment Finance Ltd v VOSA which summarises the established law in paragraphs 110 – 121 of 2011/60 Nolan Transport v VOSA, as per the following guidance.**
40. Every claim for the return of a vehicle based on a lack of knowledge raises a deceptively simple question, which the Department must answer. The question is this: “Has the claimant satisfied me that they probably did not know that the vehicle was being or had been used in contravention of ... the Act?”. The

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<sup>27</sup> Asset 2 Asset Ltd (As above)

<sup>28</sup> Asset 2 Asset Ltd (As above)

<sup>29</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.

<sup>30</sup> 2006/406 PCF EL Ltd

<sup>31</sup> 2004/152 Frank Meager, WC Commercials (as above), 2011/025 Asset 2 Asset, 2011/060 Nolan Transport v VOSA & SoS for Transport, 2016/028 Bolle Materieel BV v Driver & Vehicle Standards Agency, 2018/025 Shaun Stark

<sup>32</sup> 2011/025 Asset 2 Asset Ltd

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Department should avoid two temptations: first to take short cuts and second to suggest that an applicant should have done something where no such legal obligation exists. The Upper Tribunal has therefore suggested adopting a structure or route for reaching a final decision, based on the decided cases.

41. The starting point is to ask *“Is there any evidence before me on the basis of which I could be satisfied that the claimant probably did not know that the vehicle was being or had been used in contravention of the Act?”* If there is no such evidence the Department should say so, indicate that the burden of proof is on the applicant and that, in the absence of any evidence capable of showing lack of knowledge of use the ground has not been made out. There is no need for the Department to go further or to embark on the process.
42. The Upper Tribunal has provided a useful reminder of the five categories of knowledge:
  - i. **Actual knowledge**  
This should present little difficulty, as it will require evidence of actual knowledge of the use in contravention
  - ii. **Knowledge that the person would have acquired if they had not wilfully shut their eyes to the obvious**
  - iii. **Knowledge that the person would have acquired if they had not wilfully and recklessly failed to make such inquiries as an honest and reasonable person would make**

Categories (ii) and (iii) involve findings which justify imputing actual knowledge. See paragraph 118 in Nolan Transport but no separate finding of dishonesty is required in order to impute actual knowledge because the conduct, which must be proved, is in itself inherently dishonest. It is important to note that these categories require proof of a high degree of fault on the part of the claimant. A finding can only be justified once findings of fact have been made which satisfy the Department that each of the ingredients of the category in question has been established.

- iv. **Knowledge of circumstances that would indicate the facts to an honest and reasonable person**
- v. **Knowledge of circumstances that would put an honest and reasonable person on inquiry**

Categories (iv) and (v) involve constructive knowledge. Findings required to establish category (iv) or (v) knowledge, on their own, are unlikely to amount to more than mere negligence, which is not sufficient to establish knowledge so that a claim under the regulations will fail. There must be evidence to support an additional finding that the applicant was acting dishonestly or had a dishonest motive in either failing to recognise that the vehicle(s) were being used in contravention of the Act or in failing to make the inquiries which an honest and reasonable person would have made.

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### *Steps to preventing future use*

43. The evidential burden is on the applicant to show that, although knowing at the time the vehicle was detained that it was being, or had been, used in contravention of the legislation, the owner: (i) had taken steps with a view to preventing that use; and (ii) has taken steps with a view to preventing any further such use. The Upper Tribunal has considered the meaning of these provisions and determined that they not only relate to third party owners but also to owner/operators. The Tribunal went on to explore the interpretation of “steps” which means *“all reasonable steps available to the owner”* or *“all those steps that a reasonable owner would take in the circumstances they find themselves in, not only in the context of preventing past unlawful use but future unlawful use.”* The Tribunal went further to state “the hurdle is a high one” and owners *“should be able to demonstrate robust systems and procedures that they have put in place which would constitute reasonable steps...along with adequate explanations as to why those steps did not work in the instant case”*<sup>33</sup>. In making an application under paragraph 4(3)(d) the owner will be accepting that criminal offending has taken place as a pre-condition to the sub-paragraph and may be leaving themselves open to prosecution.
44. In the ordinary course of events, the applicant should be able to produce documentary evidence<sup>34</sup> to show (translated if necessary):
- the necessary systems were in place to ensure that the planning of journeys of vehicles into NI would, in the ordinary course of events, be compliant with the legislation, for instance planning guidance and instructions given to those responsible for scheduling vehicles and their journeys
  - the training provided to those responsible for scheduling journeys
  - the scheduling in the instant case which had resulted in the impounding
  - the investigations undertaken by the management of an owner/operator as to what went wrong in the instant case and insofar as there have been more than one warning letter sent to the owner/operator about unlawful operation in NI, the investigations following each warning letter and the additional steps taken to prevent the commission of criminal offences in NI
  - the disciplining, retraining or dismissal of staff who were responsible for scheduling a vehicle which resulted in the commission of a criminal offence in NI
  - the instructions and procedures which were in place to ensure that the driver of a vehicle undertaking cabotage had with them the necessary documents for inspection during roadside checks so that Article 8(3) of EU Regulation 1072/2009 is complied with; the disciplining, retraining and dismissal of staff, including drivers who have failed to ensure that Article 8(3) EU Regulation 1072/2009 was complied with

The above list is not exhaustive.

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<sup>33</sup> Van Der Gaag Transport De Lier v DVSA, As Above

<sup>34</sup> Van Der Gaag Transport De Lier v DVSA, As Above

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45. To assist the Department and GB traffic commissioners the Upper Tribunal has suggested the following questions be posed in assessing the evidence, so that nothing is left out, any finding of inherent dishonesty can be properly justified, and to provide a process for taking into account and assessing any innocent explanation:

a) *What inquiries would an honest and reasonable person have made in the circumstances faced by the person claiming the return of the vehicle?*

If the answer is "None" there can be no question of imputed actual knowledge under category (iii).

If the answer is that an inquiry or some inquiries would have been made the questions that follow must be answered separately in relation to each inquiry that the honest and reasonable person would have made.

The inquiries, which an honest and reasonable person will make, inevitably depend on the circumstances of each case, and will therefore involve a question of fact and degree based on the evidence in each individual case. A finding against a particular Finance Company cannot amount to a legal precedent but may have persuasive value if there is no material difference in the circumstances of another case. The Department is entitled to take into account the extent to which the applicant has been put on notice that there may not be an operator's licence. The Upper Tribunal referred to circumstances where Finance Companies rely on checks before lending money. There is no legal requirement that a Finance Company must inquire, at regular intervals, to ensure that an operator continues to hold an operator's licence but if in the circumstances of, for instance, a hire purchase agreement, inquiries would have been made at regular intervals and then there may be evidence to justify an alternative finding in that case. Evidence would need to deal with frequency, cost, effectiveness and proportionality. It is therefore a question of fact in each individual case. The applicant may be in difficulty if it can be shown that the applicant was told, for example, that the operator's licence had been revoked or was warned that the operator had been called to a public inquiry at which revocation is a possibility as an honest and reasonable person would undoubtedly make inquiries.

By reference to 2003/003 Close Asset Finance there is no legal requirement to make any inquiry as to the existence of an operator's licence but whilst a relevant factor it is not a decisive factor. It does not exempt a finance company from the obligation to make any inquiry that an honest and reasonable person might. The Department is entitled to have regard to the well-known principle that everyone is taken to know the law, so an applicant is taken to know that it is unlawful, under the Act, to operate without an operator's licence, that operating a vehicle in contravention of the Act renders the vehicle liable to be impounded and that the grounds on which an impounded vehicle can be returned to its owner are limited to those set out in the Regulations. It is open to the Department to conclude that knowledge of these matters would influence the decision of the honest and reasonable person as to whether or not to make inquiries. If there is evidence that the applicant belongs to a recognised trade body which has issued guidance on operator licence checks, whilst not decisive, the

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Department ought to take that into account in deciding what the honest and reasonable person would have done.

If there is some evidence then the Department must assess it. In requiring an applicant to prove a lack of knowledge the regulations require proof of a negative, which can be difficult. The Department needs to be careful not to reverse the burden of proof as the Department does not have to be satisfied that the claimant did know of the use in contravention. If there is a convincing answer to the starting question then the Department is free to rely on it without looking at other 'proof of knowledge'.

- b) *Did the claimant make such inquiries?* If the answer is "Yes" there can be no question of imputed actual knowledge under category (iii).
- c) *Did the claimant wilfully refrain from making such inquiries?* For the purposes of this question 'wilfully' means 'deliberately and intentionally' as opposed to 'accidentally or inadvertently'.

If the answer is "No" there can be no question of imputed actual knowledge under category (iii).

If the answer is "Yes" the next question must be answered.

- d) *Did the claimant recklessly refrain from making such inquiries?* For these purposes 'recklessly' means 'not caring about the consequences of failing to make such inquiries'.

If the answer is "No" there can be no question of imputed actual knowledge under category (iii).

If the answer is "Yes" the next question must be answered.

- e) *Was a high degree of fault involved in wilfully failing to make such inquiries?*

If the answer is "No" there can be no question of imputed actual knowledge under category (iii).

If the answer is "Yes" a finding that the vehicle owner had imputed actual knowledge under category (iii) is justified.

### INSTRUCTIONS

46. The Department issues the following Instructions. The above Guidance relates to matters which may be relevant to an application for return of a vehicle. These Instructions are in respect of the approach to be taken by staff and dictate the operation of delegated functions.

#### Basis of Instructions

47. These Instructions are issued to provide practical advice on the administrative arrangements to those who support the Department in fulfilling its statutory functions.
48. Illegally operated vehicles can be detained by the DVA officers. There will usually have been an opportunity given to obtain a licence. Vehicles are detained where DVA have reasonable cause to suspect that the vehicle is still being used illegally. As indicated above the operator has the right to apply to the Department for its return subject to proof that the operator is the lawful owner of the vehicle.
49. Detention might happen in one of the following circumstances (but will not always be limited to these circumstances):
- the operator has had its licence revoked by the Department
  - the operator has been warned or prosecuted by the enforcement agencies for operating without a licence
  - there have been repeat applications for a licence but no authority to operate has been given by the Department
  - the operator is using a foreign registered vehicle, not authorised on a UK licence, and is engaged in an operation outside the scope of the Cabotage rules
  - the operator has used an operators' licence identity disc issued to another operator
  - the operator has displayed a document which purports to be an operator's licence identity disc with intent to deceive
50. Staff members are reminded that detention hearings, unlike public inquiries, always involve two parties, one of which is DVA. DVA should therefore be treated as with any other party to proceedings with all relevant contacts recorded.

#### Notification of Detention

51. DVA will check:
- whether the vehicle is exempt from operator licensing
  - whether or not the 'user' of the vehicle holds an operator's licence
  - whether the vehicle is specified on any operator's licence
52. Once the detention has taken place and DVA has notified the Department of this, staff at the Department shall maintain a file regarding the matter and all contacts with DVA and all parties should be recorded and kept on that file.

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- 53.** DVA should already have considered and prepared a brief compliance history, information as to previous applications, previous enforcement and roadworthiness history with evidence to support its conclusion that the user does not hold an operator's licence. DVA might also need to present evidence of an up-to-date list of vehicles also used by the applicant (including weight, type etc.); roadworthiness test and vehicle excise duty status for those vehicles; the registered keepers; whether there is outstanding finance on any of the vehicles (via the HPI database); the type of business carried out by the operator; routes used, destinations and times of journeys and the like.
- 54.** DVA is expected to supply the Department with a summary that explains its reasons for the detention to include the following:

  - the full name and address of the user of the vehicle
  - if the licence was revoked, the date and reasons for revocation
  - evidence that the operator has continued in business, including any enforcement action taken
  - confirmation that a HPI check has been made, including the date and outcome
  - any other relevant facts that the Department might require
- 55.** Any witness statements prepared by the authorised person and any accompanying DVA enforcement officers should also be made available to the TRU at the earliest opportunity.
- 56.** DVA must inform any parties with an interest in the vehicle that the alleged breach has occurred and will arrange for the necessary legal notice to be published in the Belfast Gazette. The notice should refer to any load, luggage and/or personal belongings etc., that have been temporarily stored
- 57.** Irrespective of whether or not contact was made at the roadside, DVA must notify the following in writing prior to the notice appearing in the Gazette:

  - the owner of the vehicle (as defined in the Regulations)
  - the hirer (if the load has been stored)
  - the relevant Chief Constable of PSNI
  - the Association of British Insurers
  - the British Vehicle Rental and Leasing Association (BVRLA)
- 58.** DVA will send an application form and fact sheet for the return of the vehicle to the apparent owner of the vehicle. The last date for appeal is 21 days from the date of publication.
- 59.** Once DVA has sent the TRU notification that a vehicle has been detained, including a copy of the notice issued to the vehicle's owner (without enclosures) the TRU must place a copy of the email on file. The TRU staff will need to start preparing for the possibility of listing a hearing in the event of an application for the return of the vehicle.
- 60.** Once the 21 day application deadline has passed without an application for the return of the vehicle being received, the matter must be referred to the Department for a determination on the papers. In the event of there being no written application it is in order for the Department to determine the matter without

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a hearing. As a matter of good practice it should wait a further seven days before sending notification to DVA that the vehicle should be disposed of.

### Applications to the Department and accompanying time limits

61. The owner of the vehicle may make an application in writing to the Department within 21 days of the notice, on the grounds set out above at paragraph 15.
62. Once the applicant has submitted a written application form (known as written representations) to the Department for the return of the vehicle(s) the onus is on the applicant to satisfy the Department that one of the grounds is met. Staff must inform the Head of TRU as soon as an application is received and put a submission to the Head of the Unit for any case management directions (see below).
63. The written representations should then be brought to the attention of the Head of TRU as soon as possible and they will then consider the application on the papers and determine whether it can be dealt with on the papers or whether the application should be listed for a hearing.
64. If the applicant requests a hearing then the Department is obliged to convene one. If not the Head of TRU must decide whether a decision can be reached by considering the written representations or whether fairness requires that a hearing be held<sup>35</sup>. The Head of TRU expects that where an application is being made for the return of the vehicle that the Department will convene a hearing, even where one has not been requested by the applicant. This will enable the applicant (if they choose to attend) to present all relevant evidence that might not have been included in the written application.
65. Once an application is received by the Head of TRU they will consider it either by written representations or at a hearing. In any event all actions must be carried out as quickly as possible and in any event within the timescales specified by legislation set out below:

	<b>Application</b>	<b>Hearing</b>	<b>Determination</b>
Subject to Department's power to extend the periods under Regulation 21	Minimum 21 days beginning with the date on which the notice is published or, if later, a copy of the notice is served. (Regulations 8(2) & 10)	Within 28 days of receipt of the application (Regulation 10)	No hearing – 21 days from receipt of the application. Hearing – 14 days after the hearing (regulation 11)

66. If an application is received after the 21 day time limit the Department must be notified as soon as possible. Staff at the TRU must ascertain if the vehicle has been disposed of by DVA and notify the Head of TRU and the applicant accordingly. If the vehicle has been disposed of there will be no redress against the Department provided that the time limits and accompanying procedures have been adhered to. If the vehicle has not been disposed of, DVA will be requested to delay disposal until the Head of TRU has determined whether to consider the application out of time.

<sup>35</sup> See Practice Guidance and Instructions on Case Management



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67. In the event that the Head of TRU decides to hear the appeal out of time DVA must be notified forthwith and it must be requested to delay disposal of the vehicle until the conclusion of the application. TRU cannot be held responsible for a vehicle's disposal if it decides to hear an application outside the 21 day time period if the vehicle was not already disposed of at the time that DVA was notified of the late application
68. In view of the prescribed timetable it may, in certain circumstances, be appropriate for the Head of TRU to make initial directions for the supply of evidence. This minimises the risk of a hearing having to be adjourned part-heard and will help to ensure that all parties know the basis of the other party's case. Initial directions may include a requirement on the applicant to provide evidence of ownership such as a V5C (but see above), proof of purchase and payment, insurance, any contracts and/or other documents relating to the use of the vehicle such as bank statements and lease agreements/ contract. In the event that DVA has not already supplied all evidence to be relied upon, it will be appropriate for the Head of TRU to make a direction, and for DVA to supply copies of any documents referred to at paragraphs 41 to 45, including any relevant documents obtained at the point of seizure, the results of any inquiry in relation to ownership, any reports from the police or other agencies.

### Proceedings

69. If the matter is to proceed by way of an oral hearing it is to be listed as quickly as possible and in any event, to ensure compliance with the time frame set out at paragraph 19 above. This will often mean that the application will be given priority over licence applications and other public inquiries. As a general rule the hearing will be held in public but the Department and its staff are reminded of the provision for some evidence to be heard in private as set out at paragraph 17 and 18 above.

### The Department's Decision

70. Having considered all the evidence the Department will decide on the application and notify the applicant in writing within 21 days of receipt of the application (if there is no hearing), or within 14 days of the conclusion of the hearing. In either case the decision must specify the ground/s upon which the application either succeeds or fails. If there has been a hearing, full written reasons should also accompany the decision. The Department may extend these times where an individual case requires more time to be dealt with fairly and justly.
71. If the applicant is successful the vehicle can be returned to them and if not, the vehicle will be retained by DVA. However, both parties have a right of appeal and so the TRU must ensure that both parties are made aware of these appeal rights and so should not direct the return of the vehicle to DVA until the expiry of that appeal period. Similarly if the DVA appeals it may choose to retain the vehicle pending the expiry of the appeal period. If there is no appeal against a decision not to return a vehicle or the appeal is unsuccessful the vehicle can be sold or crushed with the proceeds of any sale returned to the rightful owner, less any costs.

### Appeals

72. If the Department decides that the detention was proper the applicant may choose to appeal to the Administrative Appeals Chamber of the Upper Tribunal but must lodge that appeal within one month of the Department's decision<sup>36</sup>. The Upper Tribunal Secretariat will send notification of the appeal to the TRU. If no appeal has been lodged after this time, the vehicle may be sold or disposed of. If an appeal is made the TRU should inform DVA, so that any disposal is prevented. DVA should always notify the TRU when property has been disposed of and its staff should check that the notification had been received.
73. In the event of an appeal the TRU should supply the Upper Tribunal with copies of all associated documentation, including a transcription of any hearing in the usual way<sup>37</sup>. The file should be retained by the TRU for at least 12 months from the date of detention or the completion of outstanding appeals and/or expiry of a relevant appeal period.
74. Decisions of the Upper Tribunal can be appealed to the Court of Appeal, and from there to the Supreme Court (previously the House of Lords). There is also the possibility of an appeal to the European Court of Human Rights.

### Transport Regulation Unit

01 May 2020

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<sup>36</sup> [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/866220/consolidated-ut-rules-20200201.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/866220/consolidated-ut-rules-20200201.pdf)

<sup>37</sup> See Practice Guidance and Instructions on Appeals

# ANNEX 1: CLASSES OF VEHICLES FOR WHICH A LICENCE IS NOT REQUIRED

## Goods Vehicles (Licensing of Operators) Regulations 2012

### Classes of Vehicle for which an Operator's licence is not required

1. A vehicle constructed or adapted primarily for the carriage of passengers and their effects, and any trailer drawn by it, while being so used.
2. A vehicle which is being used for funerals.
3. An emergency vehicle which is being used for police, fire and rescue or ambulance purposes.
4. A vehicle being used in by the Serious Organised Crime Agency in exercise of its functions.
5. A vehicle which is being used under a trade licence issued under the Vehicle Excise and Registration Act 1994<sup>(1)</sup>.
6. A vehicle used by or under the control of Her Majesty's United Kingdom forces or a visiting force.
7. A vehicle being used under the direction of HM Coastguard or of the Royal National Lifeboat Institution (or similar) for the carriage of lifeboats, life-saving appliances or crew.
8. A vehicle being used solely on roads under the control of a harbour authority.
9. A vehicle being used by a local authority in the discharge of any function conferred on or exercisable by that authority under Regulations made under the Civil Contingencies Act 2004<sup>(2)</sup>.
10. A vehicle being used in an emergency by a public undertaking for the supply of water, electricity, gas or telephone services.
11. A vehicle proceeding to or from a vehicle testing centre<sup>(3)</sup> for the purposes of an examination of that vehicle and/or its trailer, provided that the only load being carried is a load required for the purposes of the examination under the Goods Vehicles (Testing) Regulations (Northern Ireland) 2003<sup>(4)</sup>.
12. A vehicle fitted with a machine, appliance, apparatus or other contrivance which is a permanent or essentially permanent fixture for carrying out maintenance on the road, water, electricity or gas networks and provided that the only goods carried on the vehicle are—
  - (a) required for use in connection with the function of the machine, appliance, apparatus or contrivance or the running of the vehicle; or
  - (b) mud, including contents of road gullies, or other matter swept up from the surface of a road by the use of the machine, appliance, apparatus or other contrivance.
13. A tower wagon, mobile elevated platform or trailer drawn thereby, provided that the only goods carried on the trailer are goods required for use in connection with the work on which the tower wagon or mobile elevated platform is ordinarily used as such.
14. A vehicle which is being used for snow clearing, or for the distribution of grit, salt or other materials on frosted, icebound or snow-covered public roads or for going to or from the place where it is to be used for the said purposes or for any other purpose directly connected with those purposes.
15. A showman's goods vehicle and any trailer drawn thereby.
16. An agricultural tractor as defined under regulation 2 of the Motor Vehicles (Construction and Use) Regulations (Northern Ireland) 1999<sup>(5)</sup> and used on the public roads solely for—
  - (a) agriculture, horticulture or forestry purposes;
  - (b) activities falling within cutting verges bordering public roads; and
  - (c) cutting hedges or trees bordering public roads or bordering verges which border public roads.
17. An agricultural vehicle which is—
  - (a) designed for off road use;
  - (b) designed to lift and load; and
  - (c) used only in agriculture, horticulture or forestry.
18. A limited use vehicle which is used solely for the purposes relating to agriculture, horticulture or forestry and—
  - (a) is used on public roads only in passing between different areas of privately-owned land; and
  - (b) the distance it travels on public roads in passing between any two such areas does not exceed 1.5 km.
- 19.—(1) A motor vehicle authorised to carry goods for hire and reward or in connection with a trade or business elsewhere than in the United Kingdom—
  - (a) which if it were used in Great Britain for purposes or in circumstances corresponding to those for which it is used in Northern Ireland, would by virtue of regulations made for the purpose of implementing any Community obligation or any agreement relating to the international carriage of goods by road which has been applied to Northern Ireland, be exempt from the requirement for the user to hold an operator's licence under section 2 of the 1995 Act; or
  - (b) which carries a permit valid for the journey on which the goods are being carried issued with the authority of the Secretary of State for Transport such as, if the vehicle were used in Great Britain for purposes and in circumstances corresponding to those for which it is being used in Northern Ireland, would satisfy the requirements of section 2 of the 1995 Act, as amended by regulations made for the purposes of implementing any Community obligation or any agreement relating to the international carriage of goods by road which has been applied to Northern Ireland.

## Goods Vehicle Operator Licensing

- (2) A motor vehicle which is authorised under section 2 of the 1995 Act to carry goods for hire or reward in Great Britain and which is being used in Northern Ireland to carry goods for hire and reward shall be exempt from the provisions of section 1 of the 2010 Act.
20. A vehicle proceeding to or from or engaged in a practical test of competence to drive that vehicle under Article 5 of the Road Traffic (Northern Ireland) Order 1981(6), provided that the only load being carried is the load required to be carried on the vehicle for the purposes of the test, as prescribed in regulation 26 of the Motor Vehicles (Driving Licenses) Regulations (Northern Ireland) 1996(7).
  21. A vehicle being used for the instruction of drivers who have not passed the practical test of competence to drive the vehicle under Article 5 of the Road Traffic (Northern Ireland) Order 1981, provided that the only load being carried is the load required to be carried on the vehicle for the purposes of the test, as prescribed in regulation 26 of the Motor Vehicles (Driving Licenses) Regulations (Northern Ireland) 1996.
  22. A vehicle being used in the course of a driving lesson, periodic training or driving test for the purpose of enabling that person to obtain a CPC within the meaning of the Vehicle Drivers (Certificate of Professional Competence) Regulations 2007(8), provided that no goods are being carried other than those allowed to be carried for the purposes of the initial CPC test as prescribed in regulation 5A of those Regulations(9).
  23. A vehicle from another EU member state used in the UK under EU cabotage regulations.
  24. A vehicle which is constructed or permanently adapted primarily for any one or more of the purposes of lifting, towing and transporting a disabled vehicle when it is carrying out one of the following functions—
    - (a) the recovery of a disabled vehicle;
    - (b) the removal of a disabled vehicle from the place where it became disabled to premises at which it is to be repaired or scrapped; and
    - (c) the removal of a disabled vehicle from premises to which it was taken for repair to other premises at which it is to be repaired or scrapped.

## DOCUMENT CONTROL HISTORY

<b>Version 1.0 (published 01/10/2019)</b>	<b>Version 1.1 (published 01/05/2020)</b>
Paragraph 37:	Definition of Transport Tribunal added
Paragraph 72:	Correction to timeframe for appeal, and inclusion of source.