

## ***Practice Guidance Document No.8***

# **GOODS VEHICLE OPERATOR LICENSING CASE MANAGEMENT**

**Commencement**

**01/10/2019**

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**PG8 - Version 1.1 Issued:**

**01/05/2020**

# GUIDANCE

1. The Department issues the following guidance in relation to goods vehicle operator licensing case management.
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 TRU on behalf of the Department for Infrastructure (“the Department”).

## Guidance

3. This guidance is issued to provide information as to the way in which the Department believes decisions relating to the determination of a case should be taken so as to ensure fairness of proceedings and the decision-making process. This Guidance may be subject to decisions of the courts and to subsequent legislation. The guidance is based on the following principles from existing legislation and case law and applies to operator licence cases. As such the generic terms: ‘party’ or ‘parties’ and ‘hearings’ have deliberately been adopted.
4. The responsibility for taking action under the relevant legislation is the responsibility of the Department. The Goods Vehicles (Licensing of Operators) Act (Northern Ireland) 2010 makes it clear that the Department may hold such an inquiry as it thinks necessary for the proper exercise of its functions.
5. Whilst there is a strong argument in favour of consistency of approach this should not be mistaken for uniformity of decisions and consistency must not be pursued at the expense of the merits of individual cases. The Department will exercise its discretion with regard to the principle of proportionality as enshrined in British, European and human rights law<sup>1</sup>. The impartiality of the Department is required as part of the obligations on the State<sup>2</sup>.
6. *“The role of the Department as exercised by the Head of TRU [Transport Regulation Unit] is essentially a judicial one, but a public inquiry is an inquiry and the Department has a duty to inquire carefully and diligently. It is a pro-active role, although the Head of TRU must always be careful to maintain an open mind until the conclusion of evidence and submissions, and must never assume the role of the prosecutor. Nevertheless, the duty of the Head of TRU will often involve ascertaining the true facts, which means exploring and testing the evidence and resisting so far as practicable those witnesses who attempt to pull the wool over his or her eyes”*<sup>3</sup>. The combination of an inquisitorial function<sup>4</sup> with a judicial process requires fairness and objectivity<sup>5</sup>. The Department will also be alive to the master/servant relationship existing between some of the witnesses and parties to the proceedings.

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<sup>1</sup> Human Rights Act 1998

<sup>2</sup> Al-Le Logistics Limited etc. [2010] EWHC 134 (Admin) paragraph 92 and 2000/065 AM Richardson

<sup>3</sup> 2011/025 Asset 2 Asset Ltd

<sup>4</sup> Witnesses are not required to swear an oath or to make a formal affirmation. Cases such as R v Abdul Majid [2009] EWCA Crim 2563, R v Mehbrban EWCA 2627, and R v Naaem Saddiq [2010] EWCA Crim 1962 illustrate that the primary consideration is what binds the conscience of the individual

<sup>5</sup> 2012/036 Patrick O’Keefe t/a O’Keefe Building

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7. Whilst witnesses do not give evidence to a public inquiry under oath, they are nevertheless under an obligation to tell the truth and not to mislead in any way. Witnesses should be aware that where there are concerns that they might not have told the truth or where they might have produced false documents, either to DVA or in the inquiry, a full inquiry may be made by either DVA or the police. In the event that a witness is found to have lied or to have produced false documents, the matter will be referred to the police with a request that they be prosecuted for conspiracy to pervert the course of justice. Witnesses should note that there have been previous instances of such prosecutions and that the courts have imposed terms of imprisonment upon such witnesses. However, the obligations go further than simply telling the truth. As the Upper Tribunal has stressed, the Department cannot proactively oversee every detail of the many thousands of operator's licences which are in existence. The regulatory regime relies to a very significant degree upon the integrity and honesty of those who hold operator's licences and CPC qualifications to proactively keep the Department informed of any change in circumstances<sup>6</sup>.
8. Any interlocutory decision, (i.e. a decision which is ancillary to the actual final decision, but which is so closely linked to that final decision so that it cannot to be considered 'procedural' or merely administrative) must also meet these requirements as it might impact on the fairness of the final disposal of a case. In reaching those ancillary decisions the Department must also act in the interests of justice<sup>7</sup>. They are therefore judicial functions<sup>8</sup>. Like any tribunal, the Department must ensure compliance with the Article 6 right to a fair hearing in deciding issues of civil law. The jurisdiction of the Department includes granting applications, curtailment of authorisation, suspension of licences to operate, revocation of licences to operate and personal disqualification of operators and directors, as well as taking action against transport managers who do not work to the requisite standard.
9. The jurisdiction is often described as a practical one. The legislation is concerned with road safety and fair competition<sup>9</sup> but the Department must have regard to the decisions of courts and the principle of proportionality in deciding what is commensurate with the circumstances of each individual case<sup>10</sup>. Where there has been non-compliance, the Department must have regard to the potential impact on an operator of any regulatory action and make an assessment of the operator as at the date of the decision. Case management plays an important part in ensuring the Department has all the necessary evidence available to inform that final decision.
10. Case management may, for instance, involve providing time to consider and prepare evidence, to seek representation and providing an interpreter when

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<sup>6</sup> 2014/053 & 54 Carmel Coaches Ltd & Anthony Grove Hazel

<sup>7</sup> Al-Le Logistics Limited etc. paragraph 100

<sup>8</sup> 2011/364 Heart of Wales Bus & Coach Co Ltd & C Jones

<sup>9</sup> By way of example, in *Cleansing Service Group Ltd v VOSA* [2006] EWHC 662, Sullivan J adopted the ordinary and natural meaning in construing provisions relating to the exceptions. He observed that as the regulation was required to protect public safety Parliament would have decided the limits placed upon the exceptions with some care.

<sup>10</sup> 2002/217 *Bryan Haulage (No 2) (Transport Tribunal Appeal)*, *Muck It Limited and Others v Secretary of State for Transport* [2005] EWCA Civ 1124 and *Crompton v Department for Transport North West Area* [2003] EWCA Civ 64, *Priority Freight Limited and Paul Williams (Transport Tribunal appeal 2009/225)* and *Guidance and Directions on the Principles of Decision Making*.

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required<sup>11</sup>. The Department should be careful about the language used in communicating case management decisions and must explain the use of technical terms such as 'adjourn' or 'reconvene'<sup>12</sup>. Any request to record the hearing or send live text based communications during the hearing must be referred to the presiding officer for directions to be issued on a case by case basis. Where the Department has reserved its decision any further evidence or documentation received thereafter must be referred to the Head of TRU or the nominated presiding officer, who will then decide if it is necessary to reconvene the public inquiry.

11. There is no requirement on the Department to engage with applicants, operators or transport managers prior to or during proceedings except within the protections allowed at a public inquiry. The Department should be wary of being drawn into any process of consultation prior to taking statutory action, in view of their wider duty to the public at large and to the fairness of proceedings.

### *Interim licences and variations*

12. Authority to operate on an interim basis is available to applicants for a goods vehicle operator's licence at the discretion of the Department.
13. An operator's licence is defined under Section 58 of the 2010 Act as having the meaning given in Section 1(1) of the Act - a licence which authorises the use of a goods vehicle on a public road for the carriage of goods:-
  - for hire or reward, or
  - for or in connection with any trade or business carried on by the operator.
14. Section 21(2), states that an interim licence is an operator's licence. The Department therefore needs prima facie to be satisfied that the requirements of professional competence, financial standing<sup>13</sup> and good repute have been considered before interim authority is issued for a standard licence. As a matter of consistency this has been interpreted to include fitness and the availability of finance for a restricted licence.
15. The Department may issue an interim licence/direction in the same terms as those applied for or in different terms in respect of:
  - the number of vehicles authorised
  - different motor vehicles specified
  - weight restrictions on the vehicle(s) and/or trailer(s)
  - that no trailers are authorised to be used
  - that all vehicles to be used must be specified
  - the maximum number of vehicles and/or trailers whose relevant weight exceeds a specified weight
  - fewer places are specified as operating centres
  - conditions which restrict the use of an operating centre
  - limited to a period of time<sup>14</sup>

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<sup>11</sup> Including the Welsh Language Act 1993

<sup>12</sup> 2006/111 Kent Coach Travel Ltd

<sup>13</sup> 1984/V2 Michael John Mortimer

<sup>14</sup> 2011/050 A Tucker & Son Ltd

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16. The Department may take account of any undertakings given when reaching a decision on interim authority.
17. A full licence can have no effect before the interim licence terminates. Sections 21(8) and 22(6) provide that a decision to refuse an interim licence/variation cannot be appealed. The interim licence/direction terminates when any of the following occur:
  - the date on which the full licence comes into force or the Department takes action to revoke the interim licence under section 23 and/or 24 as appropriate
  - the time at which the application is withdrawn
  - the date on which the application is finally disposed or such earlier date as is specified
18. An application is finally disposed of at the earliest date by which the application and any appeal to the Upper Tribunal arising out of the application have been determined, or any time for bringing such an appeal has expired, or the date on which the application or appeal is withdrawn.

### *Listing of cases*

19. The listing of cases for hearing can often be complicated and will inevitably require an estimation of how long a case will require<sup>15</sup>. Other factors might also impact on listing such as the availability of a presiding officer and/or inquiry room. The Head of TRU has a number of different related tasks where the administration and interests of justice require them to devote time, for instance submissions so that new businesses can start operating or to the preparation of written decisions where parties may be anxious to learn the outcome of a hearing. Generally, whilst the interests of justice must be considered, there are no specific time requirements for the listing of cases, although detention hearings must take place within 28 days of the receipt of the application<sup>16</sup> (subject to the power of the Department to extend this period<sup>17</sup>). In the uncommon event of a party objecting to a particular official hearing the case, the reasons must be put in writing and the individual official will respond with reasons for their determination and must be allowed opportunity to respond<sup>18</sup>.
20. Where there are obvious issues in common, it would clearly be unsatisfactory for the Department to come to what might be seen as inconsistent conclusions. The Upper Tribunal has indicated that it is perfectly proper to list related cases together<sup>19</sup>. Where the Department makes this type of listing decision, the reasons should be recorded for future reference<sup>20</sup>.

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<sup>15</sup> 2016/050 Lorraine Baldwin, Andrew Skelton, Wayne Baldwin

<sup>16</sup> Regulation 10 of the Goods Vehicles (Enforcement Powers) Regulations (Northern Ireland) 2012

<sup>17</sup> Regulation 21 of the Goods Vehicles (Enforcement Powers) Regulations (Northern Ireland) 2012

<sup>18</sup> For guidance see the Upper Tribunal approach in 2014/072 Ian Russel Nicholas t/a Wigan Container Services. An allegation of bias is a serious matter and should not be made lightly. In this case the Tribunal noted with approval the decision of the traffic commissioner to refer the case herself. The maker of any such allegation needs to prove more than that the traffic commissioner came to the wrong conclusion and must specifically show that the traffic commissioner was prejudiced and/or predisposed to find against the party irrespective of the evidence. For that reason no complaint can be considered until after the final appeal.

<sup>19</sup> 2001/041 Tate Fuel Oils, 2009/240 AM Kydd t/a Sandy Kydd Road Transport, 2010/030-32 Canalside UK Ltd & Lewis Robly Horn t/a LR Horn, Stay Decision Jarson Ltd t/a Rob Jones Tractor Hire

<sup>20</sup> ATEC Scaffolding (Preston) Ltd (as above)

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- 21.** The effect of concurrent criminal proceedings needs to be considered carefully by the Department. The Court of Appeal has considered the potential impact of regulatory proceedings on the fairness of other proceedings:

*“When assessing the weight of the considerations... the intrinsic importance of the disciplinary process is clearly a very significant but not an overriding factor; it will also be necessary to evaluate the degree of public importance of the case under consideration, the seriousness of the allegation of professional incompetence and/or professional misconduct, and the urgency of their resolution in the disciplinary context. Thus, for example, allegations of dishonesty or other professional malpractice which, if proved, would be likely to lead to the striking off of a member, must clearly weigh heavily or perhaps even overwhelmingly on the institute’s side of the scale”<sup>21</sup>.*

- 22.** The Department, however, must also consider road safety, which lies at the heart of the legislation. There may be an urgent public interest in resolving the issues before criminal proceedings<sup>22</sup>. The Department can face a difficult decision in which advocates are expected to assist the tribunal. If the Department decides to proceed in advance of criminal proceedings, steps should be taken to protect the fairness of those proceedings. If the Department decides to wait it may, in the end, prove impossible to deal with other aspects of the hearing fairly, in advance of the evidence, which is to be given at the criminal trial. The inevitable consequence is delay, which carries with it other issues such as witness memory and the need for a more up to date assessment of compliance.
- 23.** Where the Department concludes that a hearing must await the outcome of criminal proceedings it is important that steps are taken to keep the delay to a minimum. It is acceptable for the Department to inform the Public Prosecution Service and the relevant courts pending a disciplinary hearing, and ask for regular information about the progress of the criminal proceedings. Where the Department decides that a hearing must await the conclusion of the criminal case, steps should be taken to ensure that the hearing is resumed as soon as possible thereafter<sup>23</sup>.
- 24.** In deciding where to hold a hearing, the Department will wish to ensure the objects of the legislation are met so that relevant information might be taken into account and the fairness of proceedings ensured (allowing a party the opportunity to test the evidence). There may be other factors which also need to be taken into account<sup>24</sup>. In some cases, evidence might be heard in private so that regulatory action is not delayed but the risk of prejudice to future proceedings is minimised.

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<sup>21</sup> R v. Institute of Chartered Accountants in England & Wales and Others, ex parte Brindle and Others (1994 BCC 297) at 310

<sup>22</sup> 2004/255 M Oliver

<sup>23</sup> 2006/149 A & C Nowell, 2010/049 Aspey Trucks Ltd

<sup>24</sup> 2001/056 Paul Williams t/a Garden Materials Landscaping regarding a traffic commissioner’s inspection of the relevant site.

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### Adjournments

25. *“The decision whether to grant an adjournment does not depend upon a mechanical exercise of comparing previous delays in other cases with the delay in the instant application. It is not possible or desirable to identify hard and fast rules as to when an adjournment should or should not be granted. The guiding principle must be that (traffic commissioners) should fully examine the circumstances leading to applications for delay, the reasons for those applications and the consequences to (the parties). Ultimately, they must decide what is fair in the light of all those circumstances. The court will only interfere with the exercise of ...discretion ... in cases where it is plain that a refusal will cause substantial unfairness to one of the parties”<sup>25</sup>.*
26. In considering a request for an adjournment, the purpose of the adjournment should be clear as the Department will properly be concerned with the potential impact on road safety<sup>26</sup>. An adjournment may have to be balanced against the age of the case but the pressure to get a case to a hearing can lead to a far greater delay than a limited adjournment if justice cannot be done. The Department will need to think very carefully when asked to adjourn stale cases<sup>27</sup>. There may be occasions when the adjournment is simply a device to postpone the impact of a decision and the correct course may be to refuse. However, there may also be other cases where a relatively short adjournment of a hearing will avoid a real risk of a much greater delay if it later appears either during the hearing, or on appeal, that the interests of justice and fairness require an adjournment. The Department is entitled to take into account the alleged conduct of the operator in relation to any DVA or police investigations<sup>28</sup>. Any tribunal will be concerned to ensure fairness for example, where an interpreter is required<sup>29</sup> or so that all the relevant documentation is available to the parties so that they can properly answer all matters that may be addressed to it/them in respect of the possible conduct. The situation might well change in the course of a hearing and there is therefore a need to be aware of the requirement to keep a request for an adjournment under constant review<sup>30</sup>.
27. There is a considerable public interest in hearings taking place on the date set and so hearings should not be adjourned unless there is good and compelling reason to do so. In considering the competing interests of the parties, the Department should examine the likely consequences of the proposed adjournment and its likely length. The reason that the adjournment is required should be examined and if it arises through the fault of the party seeking the adjournment, that is a factor against granting the adjournment, carrying weight in accordance with the gravity of the fault. The administration of an effective and efficient system will bring about great benefits to users of the Department’s inquiries<sup>31</sup>. Requests for adjournments on medical grounds should be supported by medical evidence which states if and why a party cannot attend a hearing<sup>32</sup>. Any court is not automatically bound by a medical certificate and may exercise

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<sup>25</sup> Lord Bingham in R. v. Hereford Magistrates (1998) 163 JP 433; (1997) 2 Cr App R 340 at p.353

<sup>26</sup> As per the Upper Tribunal in the stay decision in Patrick O’Keefe t/a O’Keefe Building

<sup>27</sup> 2008/413 Al-Le Logistics Ltd and others

<sup>28</sup> 2010/064 JWF (UK) Ltd

<sup>29</sup> 2013/062 Sukhvir Kaur t/a Major Cars, 2017/002 Mohammed Akbar t/a Choudhury Transport

<sup>30</sup> Al-Le Logistics Limited etc. [2010] EWHC 134 (Admin) paragraph 48

<sup>31</sup> Visvaratnam (2010) 174 JP 61; (2009) EWHC 3017 Admi

<sup>32</sup> 2010/024 Hedley Simcock



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its discretion to disregard a certificate<sup>33</sup>, which it finds unsatisfactory and in particular where:

- the certificate indicates that the party is unfit to work (rather than to attend the hearing)
- the nature of the ailment ( e.g. a broken arm) does not appear to be capable of preventing attendance at a hearing
- the party is certified as suffering from stress/anxiety/depression and there is no indication of the party recovering within a realistic timetable

Any application for an adjournment requires a decision and must be referred to the Head of TRU, or presiding officer<sup>34</sup>, and similarly the decision must be communicated to the party<sup>35</sup>. If the Department accepts that a party's absence from the hearing is not the fault of that party the general rule is to not proceed in absence unless there is a compelling reason to proceed<sup>36</sup>. If the Department does not believe the explanation, reasons should be given<sup>37</sup>. Where an operator has the opportunity to engage in a professional and cooperative way but fails to do so, then repeated avoidance may result in the loss of that licence<sup>38</sup>.

- 28.** Schedule 3 of the Goods Vehicles (Licensing of Operators) Regulations (Northern Ireland) 2012 sets out the provisions relating to the giving of notice of a public inquiry (PI). The date, time and place may be varied, but, if so, the full notice period may have to be recalculated. An irregularity, however, in the notice can be cured and the hearing can proceed if the Department is satisfied that no injustice or inconvenience will be caused<sup>39</sup>. Where the operator has been properly alerted to the hearing date and fails to attend, in the absence of medical evidence<sup>40</sup> or a good reason, then the Department is entitled to proceed in absence<sup>41</sup>.
- 29.** In line with most tribunals there is a rebuttable presumption that a hearing will proceed as listed even in the absence of parties<sup>42</sup>, provided that the Head of TRU, or presiding officer, is satisfied that the party has been given the required notice, has been served with sufficient evidence, and that there are no other factors where the interests of justice require an adjournment.

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<sup>33</sup> R V Ealing Magistrates' Court (ex parte Burgess) (2011) 165 JP 82

<sup>34</sup> 2000/002 Grifpack

<sup>35</sup> 2005/110 G DEM

<sup>36</sup> R (on the application of M) v Burnley, Pendle and Rossendale Magistrates' Court 174 JPR 102 , 2004/362 Britannia Hotels

<sup>37</sup> 2006/192 S Shirley

<sup>38</sup> JWF (UK) Ltd (as above)

<sup>39</sup> 2009/524 Ocean Transport Ltd

<sup>40</sup> 2010/023 Taj the Grocer Ltd

<sup>41</sup> 2010/69 John Francis Donnelly

<sup>42</sup> 2009/524 Ocean Transport Ltd approved the decision of the traffic commissioner who had waited for nearly an hour before proceeding with a public inquiry when the operator had not been in contact with the Office of the Traffic Commissioner at all, 2018/033 A Bros Halal Meat Ltd

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### Notice

- 30.** The Department produces publications which contain details of all applications during a given period. Inspection of licence applications only can be requested under the provisions of Regulation 8 of the Goods Vehicles (Licensing of Operators) Regulations (Northern Ireland) 2012. Where full notice has not been provided it might still be possible to see the operator. At times it may be appropriate for an operator to be seen without the full notice period having expired. Section 24 of the Goods Vehicles (Licensing of Operators) Act (Northern Ireland) 2010 requires notice of the grounds upon which the Department might take action against an existing licence, with time to make representations. The party must first have the opportunity to present a case and there is no scope for the equivalent of an interim injunction based on a one-sided view of the evidence<sup>43</sup>. This does not prevent the Department from considering preliminary matters such as interim authority<sup>44</sup> without a full hearing. An in chambers hearing, or preliminary hearing can be beneficial in narrowing or crystallising the issues<sup>45</sup>. Where a party is called to a hearing to resolve a particular matter, the Human Rights Act 1998 still applies.

### Disclosure

- 31.** The Department is required to give notice in writing of what action might be in contemplation. A notice must state the grounds on which the Department is considering that action and invite the party to make representations<sup>46</sup>. The party should know the case it has to meet but there is no obligation to set all of this out in the call-up letter, it can equally be communicated through disclosure of reports<sup>47</sup>. *“It would be impracticable for the Department to be expected to disclose everything which they have ever seen. Departmental staff should identify the evidence which is to be considered at the hearing”* to ensure that the party is given proper notice so that the party can prepare for the hearing<sup>48</sup>. Where it emerges that the evidence has not been disclosed, the Department should order an adjournment to allow time for preparation<sup>49</sup>. The length of the adjournment will depend on the particular case. The deliberate tactic of waiting to see what evidence the Department has before making admissions or representations has been deprecated and may impact on repute<sup>50</sup>.
- 32.** Call-up letters are not to be viewed as pleadings. The essential requirement is one of fairness but there should be no doubt as to the issues being raised. Some matters are so obviously relevant that they can be included without further justification; others are so obviously irrelevant that they must be excluded. In between there are two categories that require more care: 1) material the relevance of which only becomes apparent when some explanation is given; 2) material where a decision on whether or not it is relevant requires further investigation in the course of the hearing. A call-up letter may have to be drafted with these distinctions in mind<sup>51</sup>.

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<sup>43</sup> 2006/487 D & H Travel

<sup>44</sup> Only available under section 21 of the Goods Vehicles (Licensing of Operators) Act (Northern Ireland) 2010

<sup>45</sup> 2003/300 Andrews (Sheffield)

<sup>46</sup> 2001/072 AR Brooks

<sup>47</sup> 2010/025 Skip It (Kent) Ltd and others

<sup>48</sup> 2001/039 BKG Transport, 2001/072 AR Brooks

<sup>49</sup> 2000/005 M Williams, 2005/357 John Bayne & Sons

<sup>50</sup> 2006/313 D Lloyd, see Guidance and Directions on Good Repute and Fitness

<sup>51</sup> 2007/104 S Lloyd

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- 33.** In a fluid jurisdiction such as this, where operators continue to operate after the preparation of initial evidence and a call-up letter, it is entirely appropriate that there be scope for raising additional matters, subject to ensuring that an operator has proper notice<sup>52</sup>. Where new issues emerge during the hearing that have not been raised in the call-up letter this is not fatal to the fairness of the proceedings as long as the relevant party is given time to consider those issues and any new material. It may not be necessary to adjourn to another date<sup>53</sup>. Once the Department has received answers which suggest a relevant line of enquiry, then it is legitimate for the Department to pursue the issue because it raises the question of whether the Department should have jurisdiction over the party in the future. The Department will consider whether there needs to be a full adjournment to allow time to consider the new material and fresh notification sent to clarify which matters are at issue<sup>54</sup>.
- 34.** In line with the useful guidance from the Senior President of Tribunals in May 2013, there is no obligation on the Department to provide a transcript of the audio recording of a hearing: *“where a recording of a hearing has been made and a copy is requested, it is for the judge to decide whether the reasons for the request are sufficient to justify its release and to ensure that the restrictions on its use are understood”*<sup>55</sup>. A party can apply for a copy of the transcript at their own expense but this may be subject to the consideration and approval of the Head of TRU, or presiding officer, and the possible redaction of any sensitive material<sup>56</sup>.

### Representation

- 35.** The Department is entitled to expect that the operator or applicant will attend a hearing. Where a company or other corporate body is called to a hearing it is reasonable to expect a director or equivalent, authorised to speak on behalf of the board, to attend that hearing. If the Department cannot be satisfied that the person before them has the requisite authority, the Department is entitled to ask for authority to be produced<sup>57</sup> or to find that the company is not present. The company or other corporate body should therefore seek permission from the Department to substitute a director before any hearing.
- 36.** As indicated above, the Department has a wide discretion as to the manner in which they conduct a hearing. Any person entitled or permitted to appear may do so on their own behalf<sup>58</sup> or can be represented by counsel (barrister) and/or a solicitor. There is no provision for free representation before a Departmental tribunal or Inquiry. If a party wishes to be represented then that it is a matter for the party. There are no active cost provisions in relation to public inquiries and therefore all costs are borne by the relevant party.

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<sup>52</sup> 2011/359 Paul Coleman t/a Coach UK Travel

<sup>53</sup> AR Brooks (as above), 2009/516 Ahmed & Ahmed.

<sup>54</sup> 2006/405 Transclara

<sup>55</sup> See also for guidance the Practice Direction issued by the Lord Chief Justice dated 14th February 2014 on Access to Audio Recordings of Proceedings.

<sup>56</sup> Third parties can request copies of decisions via contacting TRU.

<sup>57</sup> Upper Tribunal stay decision in Eurofast (Europe) Ltd 22 October 2010

<sup>58</sup> Barton v Wright Hassall LLP [2018] UKSC 12 – the Supreme Court recognised that when a party is not represented this might justify some allowances when making case management decisions and conducting hearings even if this will not necessarily justify applying a lower standard of compliance with rules and orders

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- 37.** Legally qualified representatives with rights of audience conferred upon them are authorised and regulated<sup>59</sup> to carry out reserved legal activities. Advocates are reminded of their professional duties not only to their client but also to the tribunal. It is particularly important for representatives to be alive to any potential conflict of interest. A legal representative of an employer is under a professional obligation to communicate any relevant information. If they were to attempt to also represent an employee there is a risk of a conflict of interest. If a conflict were to arise in that situation it would be difficult to envisage the representatives being able to continue to act for either party. It is the representative's responsibility to ensure they meet the outcomes of their regulating body's rules.
- 38.** Other potential representatives such as transport consultants have historically been allowed to appear before the Department. The approach of the courts has crystallised: litigants have a right to reasonable assistance however; the person assisting<sup>60</sup> has no right of audience unless granted by the court. This type of application is considered on a case by case basis<sup>61</sup> but leave for a "McKenzie Friend" to address the court is only granted in exceptional circumstances<sup>62</sup>. Whilst the Department has generally allowed unqualified advocates to appear before them, this is always at the discretion of the presiding officer. As with the courts, an unqualified representative must first seek permission to appear from the Department. The courts require McKenzie Friends to produce a curriculum vitae or other statement setting out relevant experience and confirmation that they have no interest in the case and understand the duty of confidentiality. In appropriate cases the Department may refuse to hear representatives other than from counsel or solicitors<sup>63</sup>. This distinction is based on the fact that unlike that of other representatives the conduct of counsel and solicitors is regulated in Northern Ireland by the Law Society of Northern Ireland, in England and Wales by the Bar Standards Board or the Solicitors Regulation Authority, and in Scotland by the Law Society of Scotland or the Faculty of Advocates, and therefore the submissions from counsel and solicitors carry more weight than those from other representatives<sup>64</sup>. Transport consultants and representatives who are not counsel or solicitors are nevertheless expected to display a degree of competence and openness with the tribunal<sup>65</sup> and if they fail in that regard it is open to the Department to indicate that the person will not be acceptable to act as an advocate at public inquiry in the future<sup>66</sup>. The Upper Tribunal has warned against tying in the provision of a transport manager with a consultancy service<sup>67</sup>. Nor can they expect to be permitted to act as both an advocate and a witness in the same proceedings<sup>68</sup>. Union representatives often appear to assist transport managers; whilst they may have limited experience of this type of hearing they

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<sup>59</sup> Solicitors Regulation Authority, Bar Standards Board, Law Society of Scotland and Faculty of Advocates

<sup>60</sup> Referred to as a McKenzie Friend following the case of *McKenzie v McKenzie* [1970] 3 All ER 1034

<sup>61</sup> Practice Guidance (McKenzie Friends: Civil and Family Courts) [2010] 1 WLR 1881

<sup>62</sup> *R v Conaghan* [2017] EWCA 618

<sup>63</sup> The senior judiciary has identified the risks to litigants from unregulated and uninsured individuals of varying and generally unverifiable competence who seek to carry out the equivalent of reserved activities.

Recommendations have been brought forward by the judicial working group chaired by Asplin J with the purpose of protecting parties from unregulated representatives. The proposals seek to clarify the courts' ability to refuse unqualified individuals to act as McKenzie friends. The proposals are similar to existing powers of those acting on behalf of the Department to consider a right of audience on a case by case basis and specifically refer to poor quality assistance and allow a bar to the individual from acting in this capacity in future

<sup>64</sup> 2005/385 K Grant, see also 2013/040 Southwaterstreet Ltd t/a S W Transport and Thomas McKinney

<sup>65</sup> 2006/252 A Hayden trading as Trans Consult, 2014/063 Pilkington Asbestos Services Ltd & Others

<sup>66</sup> 2006/252 Alex Hayden t/a Trans Consult

<sup>67</sup> 2012/013 Russet Red Ltd (as above), see also 2014/046 Marshland Logistics Ltd & McGuinness on the quality of audits

<sup>68</sup> 2010/001 Denise & Peter Walsh trading as Walsh Skip Hire

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are expected to demonstrate the same level of openness. In every case a representative is expected to clearly identify whether they are legally qualified and to correct any possible misapprehension<sup>69</sup>.

39. Paragraph 3(5) of Schedule 3 of the Goods Vehicles (Licensing of Operators) Regulations (Northern Ireland) 2012 gives the Department discretion to allow any person to appear at a hearing and if they do so, that person may be permitted to be represented by counsel (a barrister) or solicitor, including DVA. That representative may participate and make submissions to the degree permitted by the presiding officer and that kind of assistance should generally be encouraged<sup>70</sup>. More recent case law suggests that DVA may take an active role but this does not preclude the Department from acting as 'devil's advocate' and, even where DVA is represented, the inquiry remains an inquiry, with a duty on the Department to inquire<sup>71</sup>. The extent to which assistance is required is a matter for the presiding officer in the individual case<sup>72</sup>, not another party. The Department may adopt a practice in some cases where the advocate representing DVA suggests areas or topics, which might be put to an operator's witness. There is a risk that this might become too artificial and in some cases, the Department may allow direct cross-examination, similar to other inquisitorial processes<sup>73</sup>. It is for the Department to decide what is most appropriate, in the interests of justice.
40. In the case of any representative, where they cease to act for an operator, applicant and/or transport manager during the course of proceedings, they should notify the Department immediately. Failure to do so may result in unnecessary adjournments where a party has not been informed of a hearing or relevant evidence. A failure to inform the Department is not only discourteous but may result in legal representatives being reported to their professional body or a direction that the particular transport consultant may no longer act in cases. Similarly where representatives no longer act, they are expected to pass any papers served on behalf of the Department to their former client as soon as is reasonably practicable.
41. The Upper Tribunal has indicated its view about the late service of documents by parties to proceedings: bundles must be "*served sufficiently far in advance of a public inquiry to enable them to be considered and assessed*"<sup>74</sup>. The Upper Tribunal is clear that simply leaving a bundle of documents to the Department is not acceptable; they should be scheduled or indexed. The Upper Tribunal went as far as to describe it as the "*advocate's duty to introduce them properly and any which may contradict what a witness is saying **must** be put to the witness*". The service of documents is a matter of professional conduct. The call-up letter normally requests documents to be served in advance of the hearing date and, having given notice, if documents are not produced, the Department may proceed to make a direction<sup>75</sup>.

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<sup>69</sup> There are various criminal offences covering impersonation of a solicitor, attempts to carry out a reserved legal activity when not entitled and wilfully pretending to be a person with a right of audience.

<sup>70</sup> 2001/049 Norbert Dentressangle

<sup>71</sup> Asset 2 Asset Ltd (as above)

<sup>72</sup> 2001/068 Dukes Transport

<sup>73</sup> Interested persons may cross examine witnesses during an inquest.

<sup>74</sup> Nolan & Others (as above) paragraphs 101-102

<sup>75</sup> 2012/005 AND Haulage Ltd, The Upper Tribunal, whilst urging caution, did not criticise a decision to suspend a licence pending receipt of financial evidence where an operator might be dragging his or her feet or there are real concerns as to road safety. Section 54(5) of the Public Passenger Vehicles Act 1981 as prescribed in the Public

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42. In deciding on an application for an adjournment based on an advocate's unavailability the practice of the courts is that "counsel's convenience" will rarely be the sole basis for granting an adjournment. The above public interest must be balanced against a party's right to representation by an advocate of choice. The interests of justice may be equally served by the instruction of one of the number of alternative advocates who can appear at a public inquiry.
43. The majority of hearings before the Department will be inquisitorial in nature with parties present in order to assist the Department in reaching a determination<sup>76</sup>. Impounding hearings, however, are adversarial and therefore both parties are likely to be represented.

### *Location of inquiries*

44. Paragraph 1(2) of Schedule 3 of the Goods Vehicles (Licensing of Operators) Regulations (Northern Ireland) 2012 allows the Department to vary the location of a hearing at its discretion. Whilst there may be a public interest argument for local justice there are few other formal considerations beyond the attendance of witnesses<sup>77</sup>. In environmental cases it will usually be necessary for the Department to conduct a site visit of the actual premises in question, which may also influence the choice of location<sup>78</sup>.

### *Attendance of witnesses and hearsay*

45. As suggested above the Department has a wide discretion as to the witnesses and evidence which they may call. The Upper Tribunal has consistently stressed the advantage in seeing and hearing from witnesses<sup>79</sup> but subject to the above guidance on disclosure, the Department is entitled to take hearsay evidence into account<sup>80</sup>. The Upper Tribunal recognises that the steps, which the Department can expect a party to take, must be proportionate to the importance of the point at issue. Ideally, the person should be called to give evidence, or, at the very least should have made a statement, exhibiting for instance any file note that they made at the time<sup>81</sup>. As with other courts and tribunals where physical attendance is increasingly avoided, the Departmental presiding officer will need to exercise their professional judgement and skills. In preparing a case for hearing, staff may look at the response to any investigation to determine whether, for instance, a particular traffic examiner is in fact required. The Department will be aware of the pitfalls of hearsay evidence and in particular from unreported conversations<sup>82</sup>. Hearsay evidence can be difficult to assess as the Department cannot see and judge the demeanour of the person giving the primary account. It may also be difficult to clarify matters or to seek further information. The

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Service Vehicles (Traffic Commissioners: Publication and Inquiries) Regulations 1986 allows traffic commissioners to make a costs order, on notice of up to £125 in respect of a party who is found to have been frivolous, vexatious, improper or unreasonable in their conduct at an inquiry.

<sup>76</sup> See Practice Guidance and Instructions on Principles of Decision Making

<sup>77</sup> 2004/364 Pallas Transport Ltd

<sup>78</sup> 2001/056 Paul Williams t/a Garden Materials Landscaping

<sup>79</sup> NT/2017/042 Mark Lyons v Driver & Vehicle Agency and Department for Infrastructure, VST Building & Maintenance Ltd (As above)

<sup>80</sup> 2014/073 Skyway Travel (UK) Ltd, Fazal Karim Ali, Farmida Akhtar, 2017/038 Liliana Manole

<sup>81</sup> 2012/037 F & M Refrigerated Transport Ltd

<sup>82</sup> 2017/016 Damien Toner

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nonattendance of a witness may reduce the weight, which can be attached to the evidence but does not render it inadmissible. Where hearsay evidence is offered there should be ‘sensible steps’ to ensure that it presents a full, fair and reliable picture. Where a witness is called, the parties should be permitted to put relevant questions to that witness<sup>83</sup>.

- 46.** If a serious point of conflict arises, it is incumbent on the party to raise it so that the Department can then decide whether to adjourn to enable the witness to attend<sup>84</sup>. The party must be able to show real prejudice if the witness does not attend and it may be that the Department chooses to proceed on the basis of edited evidence which is largely or wholly accepted<sup>85</sup>. The Department should be alive to the significance of evidence and may proactively decide to adjourn a case to secure the attendance of a witness (such as a DVA Examiner), even where that evidence is agreed, where the interests of justice require it<sup>86</sup>. Where additional material comes to light after the hearing, it is likely that the presiding Departmental official will either reconvene the hearing or give the opportunity to comment in writing before reaching a decision<sup>87</sup>.

### *Hearings ‘in private’ or ‘closed sessions’*

- 47.** Paragraph 2(2) of Schedule 3 of the Goods Vehicles (Licensing of Operators) Regulations (Northern Ireland) 2012 and the general discretions referred to above give the Department power to exclude certain persons from proceedings. Hearings or parts of hearings where the public and others are excluded used to be referred to as ‘in camera’. In general there has been a move away from using Latin terms and instead they are referred to as ‘in private’ or “closed session”. Any hearing will usually be open to the public unless the case involves evidence where the Department is of the opinion that the interests of justice demand that all or part of the proceedings should be heard in private such as financial and/or commercially sensitive information. In addition, legislation requires the Department to process personal data (within the meaning of the General Data Protection Regulation (EU) 2016/679). The processing<sup>88</sup> of personal data<sup>89</sup> should be only what is required for the lawful exercise of the Department’s functions.

### *Stay of decisions*

- 48.** The Department has discretion to direct that certain decisions, usually relating to suspension or revocation of an operator’s licence, shall not take effect until an appeal is lodged and dealt with by the Upper Tribunal (previously the Transport Tribunal)<sup>90</sup>. The relevant provisions are to be found at section 26(2) of the Goods Vehicles (Licensing of Operators) Act (Northern Ireland) 2010.

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<sup>83</sup> 2014/043 Lee Mayfield t/a LDF Recycling

<sup>84</sup> 2001/053 M Williams

<sup>85</sup> 2003/147 W C Hockin

<sup>86</sup> Skip It (Kent) Ltd and others (as above)

<sup>87</sup> 2013/022 David James Root t/a Orange Coach Travel, see also Southwaterstreet Ltd (As above), which makes clear the obligations on the party to draw relevant matters to the attention of the presiding commissioner.

<sup>88</sup> “Processing” is defined as including “obtaining, recording or holding”, “organising, adapting or altering”, “retrieving, consulting or using”, “disclosing, disseminating or making available”, and “aligning, combining, blocking, erasing or destroying” data.

<sup>89</sup> “Personal data” is defined under the DPA as “data which relate to a living individual who can be identified ... from those data, or ... from those data and other information which is in the possession of, or is likely to come into possession of, the data controller”.

<sup>90</sup> See Practice Guidance and Instructions on Appeals

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49. The Upper Tribunal has indicated that any application for a stay, which is supported by new material that was not before the Department at the time of a public inquiry, should only be considered if it could not have been obtained, with reasonable diligence, for use at the public inquiry<sup>91</sup>. The previous approach risked the impression of an unfettered right of appeal but where an appeal is without merit and therefore bound to fail, the Upper Tribunal has upheld a decision to refuse a stay on the basis that allowing an operator to continue to operate pending the hearing would mislead other operators into thinking that responding to reasonable requests and providing evidence of finance is not considered to be particularly important<sup>92</sup>. The Upper Tribunal has gone on to say that: *the prospects of a successful appeal are an important factor in considering whether or not to grant a stay*. The reason is that if the prospects of success appear to be good the refusal of a stay may mean that the appellant is put out of business before the merits of the appeal can be tested. On the other hand, if the prospects of success are poor the grant of a stay may simply enable an operator to postpone the inevitable, in circumstances where public safety and/or fair competition are put at risk<sup>93</sup>. If it is clear that no grounds have been advanced which might lead to the conclusion that the Department was plainly wrong, then the conclusion will be that the appeal is likely to fail. In those circumstances other factors, especially safety and fair competition, are likely to carry greater weight<sup>94</sup>.
50. Where the Department's decision is due to come into effect very shortly after a stay has been refused, it will be appropriate for the Department to consider whether to defer the coming into effect of its decision. The party will need to decide whether they wish to appeal. In relevant cases, even where a stay is refused, deferred application of a decision may enable a further application to be lodged with the Upper Tribunal. A judge of the Upper Tribunal has 14 days in which to make a decision (section 26(4) of the Goods Vehicles (Licensing of Operators) Act (Northern Ireland) 2010. Rule 20(A) of the Tribunal Procedure (Upper Tribunal) Rules 2008 as amended, states that a person has seven days to supply a copy of a decision relating to a stay to the Upper Tribunal. In practice the timescale may be much shorter.

### *Active case management*

51. The Upper Tribunal has made clear that the public inquiry process cannot function where a party fails to adhere to the process and timescales as determined by the person calling the public inquiry, but substitutes their own timeframe for the submission of evidence and the determination of matters. It stated *"In this day and age, and especially in the essentially inquisitorial framework of the public inquiry system, there is in our view a clear duty on operators to help the Traffic Commissioner deal with cases fairly and justly – and to avoid delay, so far as compatible with the proper consideration of the material issues. The modern trend is to expect parties to tribunal proceedings (and, by analogy, operators) to co-operate generally. This will be especially important, and in the interests of the compliant operator, if it emerges that their operation is under scrutiny by VOSA or the traffic commissioner. A wise operator will take whatever*

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<sup>91</sup> 2002/040 Thames Materials

<sup>92</sup> Upper Tribunal stay decision in Tubular Solutions UK Ltd, see also John Heath t/a John Heath Transport

<sup>93</sup> Upper Tribunal stay decision in Truckit 24/7 Ltd

<sup>94</sup> Upper Tribunal stay decisions in Wendy Dina Kerr



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*steps are required to ensure that he takes advantage of every opportunity to submit relevant and helpful evidence before, and not after, matters come to a head, and well before a traffic commissioner sits down to make his or her final decisions*<sup>95</sup>.

- 52.** The Department is aware that in practice, most public inquiry hearings will be dealt with expeditiously and efficiently and that invariably they will not be listed for longer than half a day and that this time frame will be sufficient. Indeed in GB, traffic commissioners are accustomed to dealing with cases to conclusion (including delivery of the decision) within that time scale and this is generally regarded as best and normal practice. The Department will not be “overly legalistic,” but is keen to adopt an approach at public inquiry that will have the effect of achieving operator licence compliance. This will often involve a clear engagement with the operator at both the evidence stage and the decision stage.
- 53.** However, there will always be cases where it is clear that a particular public inquiry will be complex and time consuming and the Head of TRU will have to become involved in “case management” at an early stage. In these cases the Head of the TRU will use as useful guidance the principles of case management available from the ‘overriding objectives’ referred to in the Procedure Rules in both the civil and criminal jurisdictions. In these cases they will seek to actively manage the case whilst ensuring that cases are dealt with justly and expeditiously, so far as is practicable by:
- (a) ensuring that all evidence is served by the case work officer of the representative of the Department in a timely manner
  - (b) ensuring that any written evidence and representations from the operator and/or its representative is provided to the representative of the Department sufficiently in advance of the hearing so that it can be read and considered by them in advance
  - (c) ensuring that operators provide the documents requested by the Department in advance of the public inquiry where requested to do so
  - (d) identifying the issues for determination by the Department at an early stage
  - (e) ensuring value for money in the use of time and resources (including considering the need to call witnesses whose evidence may be agreed)
  - (f) dealing with the case in ways which are proportionate to:
    - (i) the size and type of licence/s involved
    - (ii) the nature and scale of the breaches
    - (iii) the complexity of the issues
    - (iv) the likely orders and directions to be made
    - (v) the likely effect upon the operator of the proposed orders and directions;  
and
  - (g) ensuring that the public inquiry is listed expeditiously and that an appropriate time estimate is allocated.
- 54.** Where the Department requires more information the correct approach is to make that request and to wait and see what is produced. When setting time limits within which specified steps must be taken it is best to express the requirements as a date by which the steps must be taken rather than as a period of time with

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<sup>95</sup> 2010/043 Stephen Mcvinnie t/a Knight Rider

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a potentially uncertain start/end date<sup>96</sup>. The Department will be aware of what is required in order to ensure a fair hearing and the requirements for disclosure. Where that additional information is not forthcoming it may be appropriate for the Head of TRU to instigate their own enquiries provided that, should there be any doubt as to the contents, the operator or other party is given the opportunity to consider that content and to comment upon it<sup>97</sup>.

**55.** In managing a case it may be useful for the Department to make case management directions for the parties to follow so that the case is in state to be heard and that parties are not disadvantaged. Examples of case management directions might include:

- for a party to indicate whether a DVA witness is required to attend by indicating what is at issue
- in impounding cases to serve documentary evidence of ownership
- to confirm that evidence is in a form which can be relied upon at a hearing
- to supply a time estimate and/or an indication of the names and number of witnesses to be called by that party
- to supply dates to avoid for listing
- to serve specified documents including skeleton arguments on a point of law<sup>98</sup>

The above is not an exhaustive list. The Upper Tribunal has criticised representatives for not supplying material in a timely manner. Parties are frequently requested to disclose documentary evidence such as original bank statements or maintenance records in advance of the hearing date. Compliance with directions allows for proper preparation, a more efficient use of tribunal time and therefore the interests of justice.

**56.** As indicated above, there are no formal rules of procedure which govern proceedings before a presiding official; consequently there are no specific powers related to failures to comply with directions. An unfortunate practice has developed whereby parties and/or their representatives ignore the given timetable for compliance. A failure to comply with the timetable given may result in the Department being unable to hear the case that day and, for instance, an application being put back into the list for another day. However, it should not be used as a device to avoid an adverse finding. The Upper Tribunal declined to criticise a traffic commissioner for suspending a licence pending receipt of appropriate financial evidence<sup>99</sup>. The Upper Tribunal observed that this type of order might be a *“powerful spur to rapid action on the part of an operator who may, up to that point, have appeared to be dragging his or her feet. We can also see how it can provide a measure of protection to the public in cases where it appears, on paper, that there are real concerns as to road safety”*. However, the Upper Tribunal urged caution and that the power should be used sparingly and on occasions in which it is essential in order to achieve a just result. The presiding official should ask: (i) is it necessary to compel the party to do something? (ii) is the threat to road safety so serious that suspension pending action on the part of

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<sup>96</sup> 2013/076 City Sprinter Ltd

<sup>97</sup> 2012/034 Martin Joseph Formby t/a G&G Transport

<sup>98</sup> As per *Tchenguiz v SFO* [2014] EWCA Civ 1333, the purpose of a skeleton argument is to assist the traffic commissioner be setting out as concisely as practicable the arguments upon which a party intends to rely. The skeleton should be concise; it should both define and confine the areas of controversy and not include extensive quotations from documents or authorities

<sup>99</sup> 2012/005 AND Haulage Ltd

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the party is essential? (iii) is suspension to prompt the party to do something proportionate to the situation? Alternatively, it may be appropriate to proceed to hear the case and to draw adverse inferences from the failure to comply with directions.

57. In certain circumstances during the course of a public inquiry it may be appropriate for the Department to indicate that it is no longer necessary to consider a particular issue raised in the call-up letter, for instance the recent availability of financial evidence or the recent employment of a transport manager may incline the Department to indicate there is no need to be addressed on the matter. Whilst this type of indication has frequently been found to be useful in tribunals across the jurisdictions, the Department is best advised to exercise caution. Often the nature of a case can change as the various witnesses give evidence during the course of the inquiry and if the Department has given such an indication too early, it can then be difficult to explain to the operator that the matter is once again under consideration. That said, the Upper Tribunal has indicated that whilst maintaining a fair and objective approach it is *“far better that a traffic commissioner be open about their concerns and suspicions, rather than for the first suggestion of something contentious to appear in a written decision sometime later. Nor does the Department have to meekly accept everything that they are told without probing and testing, and it is often necessary for the Department to put the contrary point of view (sometimes more than once) and to highlight the evidence that undermines the assertion being put forward. This allows a witness to have a chance of responding”*<sup>100</sup>.
58. The higher courts are clear that the more serious the allegation the more cogent the evidence should be in order to base a finding. The same can be said for the structure of a hearing. The Department should seek to minimise any potential for confusion or doubt as to what action might still be under consideration but should be careful to avoid the perception that they have already reached a conclusion<sup>101</sup>. An early neutral evaluation may identify the possibility of revocation (without prejudging the conclusion of any proceedings) and therefore the need to ensure that proceedings are properly structured. There will therefore be occasions when the Department needs to be explicit that particular action is still very much in contemplation<sup>102</sup>.

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<sup>100</sup> 2014/013 MM Telford Ltd & RMT Transport Ltd

<sup>101</sup> In 2003/350 Al Madina Transport Ltd the Transport Tribunal highlighted the difference between an indication that the traffic commissioner ‘cannot exclude the possibility’ and where the traffic commissioner is ‘minded to revoke’.

<sup>102</sup> 2016/007 W Meikle t/a MBS Transport

## INSTRUCTIONS

### Basis of Instructions

59. The above Guidance relates to matters which may influence decisions in respect of listing, adjournments, disclosure and any other matter ancillary to the final disposal of a case but which might impact on the fairness of proceedings. These Instructions relate to the approach to be taken by staff acting on behalf of the Department and are intended to assist in ensuring the fairness of proceedings involving operator/applicant or transport manager (parties).

### Interim licences/variations

60. Authority to operate on an interim basis is available to applicants for a goods vehicle operator's licence. There is no absolute right to operate under interim authority. The application form makes clear an interim licence/direction can only be granted where the application is complete and all supporting documents have been supplied.
61. The exact wording of the legislation provides for discretion by the Department and the courts have been reluctant to intervene to restrict this. For instance the Department may allow an interim licence for fewer vehicles than the total authority sought. A commentary to an earlier GB Act indicates that the equivalent provision was to enable grants on a temporary or trial basis and that interim licences would not normally be granted until the period for representations on environmental grounds had expired. It goes on to refer to special reasons why the applicant needs a licence earlier than the statutory timetable or where there may be unavoidable delays in processing the application. The example given is where accounts are provided as evidence of financial standing or possibly more on point where objections and/or representations have been lodged and need to be considered.
62. It therefore follows that any applicant for an interim licence needs to fully satisfy the Department that they meet the requirements and provide any supporting documentation to show the need to operate is urgent and unforeseen. The applicant will also need to demonstrate that the rights of statutory objectors etc., will not be undermined by the grant of interim authority.
63. Interim licences may only be granted under delegated powers where all mandatory requirements such as repute, financial standing and professional competence are met. The criteria set out in Practice Guidance 7 - Delegation of Authority - at Annex 2, sections 2c) or d) are satisfied which includes, but not limited to, making sure all decisions are recorded with appropriate reasons.
64. Where interim requests cannot be granted under current delegations the application must be referred to the Head of TRU who may require to be satisfied as to the reasons for allowing the applicant to enter the industry early or increase authority ahead of the full application process e.g. the award of a new contract or the need to increase vehicle/fleet size for commercial reasons and the like. Where interim authority has previously been refused any resubmission should, in the normal course, be made only where there has been a material difference in the application from the first submission.

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65. It is a condition of the licence that the Department is informed of any relevant changes within 28 days. This includes any changes to the mandatory requirements for a standard licence as set out in Article 3 of Regulation (EC) 1071/2009; whilst those changes may not attract a fee it is important that the operator is given an opportunity to apply for a period of grace<sup>103</sup>. This may then require submission to the Head of TRU for a decision on the time to be allowed, within the maximums allowed under Article 13 of Regulation (EC) 1071/2009.

### Late payment of fees

66. The provision to accept a late fee is contained within section 47(5) of the Goods Vehicles (Licensing of Operators) Act (Northern Ireland) 2010. This provision gives the Department discretion to determine that a licence does not terminate at the time when the fee is due by and not paid but continues in force if a fee is received or has been received after the due date; but only on a finding that there have been exceptional circumstances. Non-receipt of the fee request, forgetting to pay by the required date or overlooking the need to pay do not amount to exceptional circumstances, which would allow the Department to accept late payment<sup>104</sup>. There is no legal requirement for a reminder to be sent<sup>105</sup>. An applicant cannot ask for a late payment to be accepted on the basis that they have not received a reminder<sup>106</sup>. Similarly, where the late payment is due to mere oversight, more is required before exceptional circumstances may properly be found<sup>107</sup>. The obligation is on the operator to pay the fee on time.
67. Any submission regarding an application to make a late payment should outline the circumstances that led to the late payment and attempt to address the above factors, as well as identifying any other fact which might persuade the Department to find that there are exceptional circumstances. Claims that the fee was posted need to be supported by corroborating evidence<sup>108</sup>. The Upper Tribunal has made clear that the responsibility for paying the continuation fee, by the prescribed time, falls on the operator. Operators are expected to devise a reliable means of identifying the prescribed time for payment and then ensuring that they remind themselves of the need to pay before that date. That might be by reference to a regular diary entry, via the self-service system administered by DVSA, from a fee request or by reference to the operator's licence discs, which display the expiry date. The consequence of non-payment by the prescribed time is the automatic termination of the licence. Non-receipt of the fee request, forgetting to pay or overlooking the need to pay do not amount to exceptional circumstances which justify disregarding that automatic termination. The date on the vehicle licence disc is a reliable reminder of the date by which the continuation fee must be paid. Consequently, there can be no general discretion or delegation to accept late payments received within so many days of the due date.

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<sup>103</sup> See Practice Guidance and Instructions on Repute & Fitness, Practice Guidance and Instructions on Finance, Practice Guidance and Instructions on Operating Centres & Stable Establishments, and Practice Guidance and Instructions on Principles of Decision Making

<sup>104</sup> 2014/020 Seamus Joseph Patterson t/a Patterson Plant

<sup>105</sup> 2008/569 David Collingwood t/a Construction & Services, 2009/492 Clemente Fanciulli t/a PB Haulage

<sup>106</sup> 2013/017 Francis Edward Walter Cantle which corrects 2013/058 & 075 Patrick Ward t/a Allshires Landscapes and Overbrook Recovery Services Ltd

<sup>107</sup> 2001/062 T S G Smith t/a Western International, 2010/018 Horsebox Mobile Repairs Ltd

<sup>108</sup> 2013/069 Irene Clark

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68. Any submission regarding an application to make a late payment should outline the circumstances which led to the late payment and attempt to address the above factors as well as identifying any other fact which might persuade the Department to find that there are exceptional circumstances.

### Submissions - Whether to call to a hearing

69. The decision on whether to call to a hearing falls within the discretion of the Department<sup>109</sup>. *The decision to call to a public inquiry falls to the Head of TRU not to others or CLO officials, and it is part of their function. The Head of TRU may have regard to recommendations from their staff or others...*<sup>110</sup>. In reaching that decision they are assisted by the case submissions prepared by TRU and NICLO staff. A submission should refer the Head of TRU to the operator's history and size of fleet.
70. The Upper Tribunal has made clear on many occasions that each case must be considered on its own merits. Consistency of approach should not be mistaken for uniformity of decisions<sup>111</sup>. Inevitably, the concept of proportionality requires that interventions be graduated but each case will involve a collection of different and variable factors such that it is impossible to set anything more than starting points. Caseworkers should refer to appropriate Practice Guidance and Instructions including those on the Principles of Decision Making as to the potential outcome.

### Submissions

71. As the case law makes clear there is no requirement on the Head of TRU to engage in discussions with applicants and/or operators before reaching a preliminary decision on whether to call to a hearing. Operators are usually provided with an opportunity to comment in response to the findings of a DVA investigation. It may, however, be appropriate to request further comments on the first occasion when operators are found to have incurred a small number of prohibitions; minor failings in their maintenance system; a small number of tachograph errors; vehicle excise duty offences; minor convictions and any other offences not proceeded with. In these cases a letter can be sent to the operator requesting an explanation within a given timetable as to the reasons for the shortcomings and the steps being taken to overcome them, and to seek further assurances. In the event of convictions the operator will be asked to confirm whether any further offences are outstanding. A satisfactory reply might result in a recommendation for an alternative disposal.
72. Even the best organised operator may occasionally make a genuine mistake and, unless this is serious, action may not be required. It is expected, however, that an operator will learn from an incident and take prompt corrective action. A more serious view will be taken of repeated failings or a combination of apparent infringements.
73. Where one or more warning letters have been issued in the past five years, it is anticipated that the Department will wish to consider calling the operator to a

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<sup>109</sup> See Practice Guidance and Instructions on Delegations

<sup>110</sup> 2011/364 Heart of Wales Bus & Coach Co. Ltd & C Jones

<sup>111</sup> 2003/327 The Fox (A1) Ltd

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public inquiry. It, however, might also consider a 'final' warning letter. In appropriate cases the Department may request DVA Enforcement Officers to carry out a routine check to ensure compliance.

74. Members of staff should anticipate in preparing written submissions that the Department will wish to consider calling to a PI if:
- the operator does not appear to heed the warning letter, and non-compliance continues
  - the initial report is so serious that a PI is immediately justified by an apparent risk to road safety, fair competition or where the operator appears to have set out to flout the law deliberately
75. If the measures imposed at an earlier PI appear to have been effective and/or the relevant suspension or curtailment has expired, it will not normally be appropriate to call a further PI if the operator applies for the licence to be restored to the previous authorisation, or even further increased after an appropriate period, provided the Head of TRU is satisfied that standards have been restored and maintained. If appropriate, DVA will be asked to carry out checks to establish suitability. A case submission should be made to the Head of TRU to this effect.
76. Allegations on matters of fact relating to potential exercise of powers under sections 23 and 24 of the Goods Vehicles (Licensing of Operators) Act (Northern Ireland) 2010 will need to be considered by the Head of TRU. Reference should be made to the relevant Practice Guidance and Instructions.

### Periods of grace

77. For standard licences Article 13 of Regulation (EC) 1071/2009 allows but does not require the competent authority to provide a period of time to rectify the situation. The operator must be notified and should be given a limited time (because of the implications for fair competition), for instance 14 days, to make written representations before the Head of TRU decides whether to allow time for rectification and for what period by way of a notice served under section 24(3A) of the Goods Vehicles (Licensing of Operators) Act (Northern Ireland) 2010. To quote the Upper Tribunal: *"In our view, when considering whether or not to grant a period of grace, traffic commissioners will need some tangible evidence, beyond mere hope and aspiration, that granting a period of grace will be worthwhile, and that there are reasonable prospects for a good outcome. Some sort of analysis along these lines will be necessary because, amongst other reasons, traffic commissioners have to decide how long to grant. Moreover, as with a stay, there is no point in granting a period of grace if the likely effect is just to put off the evil day when regulatory action will have to be taken"*<sup>112</sup>. The maximum periods allowed under the legislation are as follows:

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<sup>112</sup> 2014/008 Duncan McKee

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Shortcoming		Maximum Period of Grace
Transport Manager	Departure	6 months
	Death or physical incapacity	6 + 3 months
Effective & Stable Establishment		6 months
Financial Standing		6 months to demonstrate that the requirement will be met <i>on a permanent basis</i>

- 78.** When a period of grace is granted to an operator, they are responsible for ensuring that they demonstrate the requirement is met prior to the expiry of any period of grace. An operator should therefore actively manage any dates and request an extension, when appropriate, whilst remembering that the grant and any extension is always at the discretion of the Department<sup>113</sup>. If a period of grace expires without the mandatory requirement being met then the Department is obliged to revoke the operator licence.

### Proposals to Revoke

- 79.** As with initial indications given by the Department at public inquiry this type of correspondence, also referred to as 'minded to letters', is intended to put the operator on notice that information has come to the attention of the Department which, if left unanswered, would require it to take action against the licence. The letter sent on behalf of the Head of TRU affords that opportunity to make representations within 21 days. It is important for staff to always check the record to ensure that a letter has not already been sent by another part of the Department (NICLO/TRU) and that if it has, then there is reference made or the dates for response are properly explained, so as to avoid confusion on the part of the operator<sup>114</sup>.

### Listing of cases

- 80.** Once the Department has called a case to a hearing the case papers will be transferred to the staff for preparation and for the case to be listed. The Department seeks to list public inquiries within twelve weeks of the decision calling the inquiry. This is subject to available resources and includes consideration of the relevant staff's diary. The period may also be extended if the Department believes that it is in the interests of the case to do so to allow proper consideration.
- 81.** Case management decisions are important to ensuring the interests of justice. This includes the listing of cases. The Department has therefore identified the following principles to identify priority cases when listing:

<sup>113</sup> 2018/011 Skyrider Ltd

<sup>114</sup> 2012/045 Goods 2 Go Ltd



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- any serious concerns regarding the safety of the transport operation;
- impounding (subject to the discretion to extend the time limits<sup>115</sup>)
- application by an Administrator etc., under regulation 29<sup>116</sup>
- applications held pending a hearing
- application for interim authority (where interim authority is not available)
- cases of serious non-compliance<sup>117</sup>
- cases of particular age

As indicated above, the availability of advocates is not a priority where alternative representation might be obtained. In ensuring that a case is ready for hearing it may be necessary to invite the Head of TRU to make case management directions (see above).

### Hearing Impaired Interpreters

- 82.** A hearing impaired party or their representative should, unless it is not reasonably practicable to do so, inform the TRU, in writing, no later than 14 days prior to the hearing that an interpreter will be required. The TRU should make the necessary arrangements and will meet the reasonable costs of interpreters for deaf and hearing impaired litigants for hearings. However, many people have a friend or relative who usually interprets for them. It is for the presiding officer to decide whether that friend or relative can exactly interpret what is being said during the hearing<sup>118</sup>. Unless the relative or friend has a recognised qualification in relaying information between deaf and hearing impaired people, it may be advisable to use a qualified interpreter<sup>119</sup>.
- 83.** Any room utilised for hearings or inquiries should be equipped with a hearing loop facility. A hearing-impaired party or their representative should inform the TRU, in writing, no later than 14 days prior to any hearing, that a hearing loop facility will be required<sup>120</sup>.

### Foreign Language Interpreters

- 84.** A party (who cannot speak or understand the language of the tribunal well enough to take part in the hearing) or their representative should, unless it is not reasonably practicable to do so, inform the TRU, in writing, no later than 14 days prior to the hearing that a language interpreter will be required.
- 85.** Where a party attends, and the presiding officer concludes that the party does not have that level of understanding, then it is open to them to proceed relying on a friend or relative<sup>121</sup>. The presiding officer should be satisfied that the proceedings will be properly interpreted, failing which the case will have to be adjourned in order that an interpreter can be booked to attend<sup>122</sup>.

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<sup>115</sup> See Practice Guidance and Instructions on Detention.

<sup>116</sup> See Practice Guidance and Instructions on Legal Entities.

<sup>117</sup> See Practice Guidance and Instructions on the Principles of Decision Making and the Concept of Proportionality, and in particular Annex

<sup>118</sup> See Paragraph above on Active Case Management

<sup>119</sup> Approach consistent with that adopted by HM Courts and Tribunal Service - <https://www.justice.gov.uk/newsite/courts/interpreter-guidance>

<sup>120</sup> See Paragraph above on Listing of Cases

<sup>121</sup> See Paragraph above on Active Case Management

<sup>122</sup> <https://www.justice.gov.uk/newsite/courts/interpreter-guidance>

### Pending prosecutions

- 86.** Occasions will arise when the Department has decided to call a case to an inquiry and information is received that a prosecution is pending against a potential party or an employee. Such cases will be referred to the Head of the TRU to decide whether the public inquiry should proceed or be delayed until the court proceedings have been concluded. The submission should take account of the fact that:
- the Department will be considering the operator's suitability to continue to hold an operator's licence in the round, as opposed to the court making a finding on a specific offence(s)
  - the likely time delay before the criminal proceedings are heard. In particular the Department will want to consider the scale of the implications that this will have for road safety or fair competition in the interim
  - the seriousness of the offence(s), and whether the outcome if determined before the PI, or diver conduct hearing, is likely one way or the other to lead the Department to reach a very different conclusion than it might otherwise expect to reach
- 87.** In cases where a public inquiry precedes court proceedings, the presiding officer may need to consider whether the interests of justice require part or all of the evidence to be heard in private. They may also need to consider whether to exclude certain individuals who are giving evidence even if this evidence is being given in private. For example, if a DVA prosecution is pending in the criminal courts it may be appropriate for DVA witnesses to be excluded after they have given their evidence and whilst the operator is giving their evidence. This will always be a question of fact and degree according to the circumstances of each case and will often require very careful consideration by the presiding officer who will want to seek a balance between the absolute requirement to ensure that the operator has a fair hearing and the need to admit all relevant evidence.
- 88.** Article 19 of EC Regulation 561/2006 seeks to guard against the risk of what is sometimes termed 'double jeopardy'. The Article specifically refers to penalties and in that context reference to "procedure" would mean a procedure aimed at imposing punitive measures. The Department is not concerned with punishment but the hearings are regulatory in nature. The limited protection against double jeopardy does not therefore apply<sup>123</sup> but can, if necessary, be argued as part of any subsequent criminal proceedings<sup>124</sup>.

### Communication with Representatives

- 89.** As above, the position of transport consultants is different from that of counsel and solicitors, whose conduct is regulated by their professional bodies. It is therefore appropriate to seek written confirmation that a transport consultant is authorised to act by the party in person or authorised officer (if it is a corporate entity) before communicating with that transport consultant. If a particular lawyer is not known by a member of staff then they may request an email from a company address confirming authority. As the case law above indicates

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<sup>123</sup> Regina v IK, Regina v AB, Regina v KA, Court of Appeal (Criminal Division), 16 May 2007.

<sup>124</sup> 2008/526 Kingman

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members of staff would be well advised to make a contemporaneous file note of any important conversation. The legislation gives a discretion to the Department to allow representatives other than solicitors and counsel to appear. They should seek permission from the Department in advance of any hearing at which they wish to be allowed to appear.

### Adjournments

90. Circumstances requiring adjournments can occur at any time leading up to or indeed during an inquiry. The Department will adjourn the proceedings if it considers that it is required in the interests of justice, i.e. to ensure that the proceedings are fair to all parties. Parties can apply for an adjournment prior to the inquiry by submitting a written request to the Department or by making a verbal application during an inquiry. Any request must contain a detailed reason as to why an adjournment is appropriate and, where possible, corroborating evidence should be included with the request (this may include details of a scheduled hospital appointment or pre-booked holiday confirmation). The Department will take all relevant factors into account when considering adjournment requests, including the effect on road safety of allowing an operator to continue and whether the relevant party has complied with any directions.
91. Applications for adjournments are to be submitted to the Department immediately and decisions taken on adjournment requests should be communicated to the party or their representative as soon as possible, with the aim of communicating the decision within three working days. If verbal notification of the decision is appropriate it is to be confirmed in writing at the earliest opportunity.

### Notification and disclosure of evidence

#### *Publication*

92. Notification of pending public inquiries should be placed in Applications and Decisions in accordance with legislative requirements. The Department may also send a list of all pending hearings to the relevant press officer who acts for the Department.

#### *Call-up letters*<sup>125</sup>

93. A letter inviting a party to attend a public inquiry will be sent in accordance with the legislative requirements. Schedule 3 of the Goods Vehicles (Licensing of Operators) Regulations (Northern Ireland) 2012 provides that “*at least 21 days’ notice before the date so fixed*” shall be given. In many cases the Department will seek to send call-up letters between 28 and 35 days before the scheduled date for the public inquiry but this is not mandatory. The letter should detail the reasons for calling the public inquiry, the evidence that the Department will consider and any further information the Department requires from the operator. The letter will also invite operators to make representations to the Department prior to the inquiry.

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<sup>125</sup> See Guidance and Instructions on Legal Entities and Service of Documents

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### *Presiding Officer's brief*

94. The case/PI clerk prepares a public inquiry brief (or bundle of papers) which will include all information proposed to be considered by the presiding officer at the hearing. The presiding officer cannot and will not be bound by any recommendation or information received from officials. *Some of the information received may come from enforcement officers, for example traffic examiners or vehicle examiners employed by DVA. Further information may come from the parties themselves, for example financial evidence and/or company records. It is open to a party to submit other documents and to make representations as to the scope of a hearing for the Department to rule on<sup>126</sup>.* Any request for further material should therefore be referred to the Department to apply the principles outlined in the attached Guidance and the overriding objective and to then decide whether further directions are required and/or to seek further information as to potential relevance.
95. A practice has developed amongst some operators and representatives whereby the Department is served with documents on the day of a hearing or shortly before. This impedes the Department's ability to prepare for a hearing and has been expressly disapproved of by the Upper Tribunal. Where the Department has requested evidence to be served in advance, if a representative is unable to comply with the request that representative should inform the Department well in advance of the hearing and explain why. It is not sufficient for a representative to take an inactive part in proceedings. Where a representative intends to rely on other evidence then it must be lodged with the Department at least seven days in advance. It may be necessary to produce evidence such as maintenance records on the day, but again, notice should be given to the Department seven days in advance. Any bundle to be relied upon should be scheduled or indexed. The documents should then be properly introduced by any representative. Representatives may also properly be asked to identify those matters at issue. Failure to properly prepare a case may be referred as a breach of professional standards. If documents are lodged that do not meet the above requirements then staff may refer them to the Head of TRU or presiding officer in order to decide whether to accept them in that form. However, the decision maker will be alive to any device to delay regulatory action being taken.

### **Representations from Parties**

96. As stated above, there is no requirement on the Head of TRU to engage with applicants, operators, transport managers, or other parties immediately prior to a hearing or during those proceedings. The Department recognises that at first sight some cases might appear to require the convening of a public inquiry but they might, in fact, be dealt with by an alternative disposal. Parties can submit written representations in response to reports of non-compliance or other adverse information. This helps to inform a decision on whether to take regulatory action thereby allowing resources to be targeted at those who present the greatest risk to road safety and/or fair competition<sup>127</sup>.

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<sup>126</sup> Al-Le Logistics Limited (as above) paragraph 36

<sup>127</sup> Further assistance on the starting point for regulatory action is available in Practice Guidance and Instructions on the Principles of Decision Making

### Formal (In Chambers) Hearings

97. There may be occasions where it may be necessary for the Deputy Head of TRU to invite an operator to a formal 'in chambers' meeting (ICH) to seek a detailed explanation for the failings that have been identified. This may allow the operator opportunity to provide assurances as to the steps taken to avoid any reoccurrence. This type of hearing will generally be offered where it is considered that an alternative method of disposal may be appropriate, such as, but not limited to, the giving of additional undertakings by the operator or a voluntary reduction in vehicle authority, but where this cannot be achieved through correspondence.
98. The purpose of the formal ICH is to consider issues of non-compliance/non-adherence to determine if the issues of concern can be dealt with at that forum or if they need to be escalated by way of submission to the Head of TRU for consideration of a preliminary hearing or public inquiry.
99. The Deputy Head of TRU is not authorised to make any regulatory decisions on behalf of the Department or to make any regulatory decisions associated with the hearing. The decision on whether to call the operator to a hearing or to deal with the alleged failings in another way will always remain with the Head of TRU. Depending on the actions taken and assurances received by the Deputy Head of TRU, it might be possible for the Head of the TRU to deal with the matter by way of correspondence and without convening a preliminary hearing or public inquiry. This regulatory action might include, for example, accepting a voluntary reduction of the licence authority and/or the giving of additional undertakings that are intended to deal with the operator licence failings. These could include, for example, detailed driver, transport manager and/or maintenance staff training packages or the implementation of new and comprehensive tachograph analysis systems.

### Preliminary hearings

100. These are not public inquiries and there is therefore no requirement to publish a notice of the hearings.
101. In complex cases a preliminary hearing can be beneficial in narrowing or crystallising the issues. It is a matter for the Head of TRU to decide whether a case would benefit from this type of hearing. Where a party is called to any preliminary hearing the Human Rights Act 1998 still applies.

### Location of inquiries

102. The majority of all public inquiries and impounding appeals, will be held in an available public inquiry room suitable for those purposes. It is, however, an established principle that public inquiries held on environmental grounds should be held as close as possible to the proposed operating centre as it is highly likely that the Department will conduct a site visit and it is important that the representors who will be local residents will be able to easily attend.

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**103.** The Head of TRU alone must make the decision on whether or not a public inquiry should be held locally to the operator. The decision shall not be delegated.

### Stays

**104.** Any request for a stay needs to be carefully considered and full written reasons should be given for the decision reached. Where a stay is refused, the party has a right of appeal, either through oral argument or in writing, to a judge of the Administrative Appeals Chamber of the Upper Tribunal<sup>128</sup>.

### Cases remitted for rehearing by the Upper Tribunal

**105.** The Department must always be made aware of any appeal in advance of the hearing and preferably upon first receipt of notification. Where the Upper Tribunal makes a direction or formal request the Head of TRU must be informed as soon as possible. Where a case is remitted for rehearing, the Head of TRU must also be alerted to any directions before the staff who work on their behalf take any action<sup>129</sup>. If another official is required to hear the case it is important for arrangements to be made as soon as practicable to avoid unnecessary delays in relisting.

**106.** Time is of the essence when a stay request has been received. Whilst a judge of the Upper Tribunal has 14 days in which to make a decision, in practice the time period will often be much shorter due to the impending date of implementation of the presiding officer's decision. The Department therefore has seven days to supply a copy of a decision relating to a stay to the Upper Tribunal. On refusal of a stay, staff should arrange for the following to be forwarded to the Upper Tribunal as a matter of urgency:

- in the case of an oral decision, an immediate transcript of the decision, together with a summary of the background to the case
- in the case of a written decision, a copy of the same with any additional comment as appropriate
- a copy of the full written reasons for the refusal of the stay
- all relevant papers should be copied to the person lodging the appeal

## Transport Regulation Unit

01 May 2020

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<sup>128</sup> See Guidance and Instructions on Appeals

<sup>129</sup> By example: 2012/028 Shamrock (GB) Ltd

## ANNEX 1 - GENERAL APPROACH

1. The Department makes decisions in respect of a number of jurisdictions and a timetable for hearings may be provided for in specific legislation. The Department has extracted the following principles and examples from existing legislation and case law to be used as a general approach in most cases.
2. The responsibility for taking action under the relevant legislation is vested in the individual presiding officer with a case. That responsibility cannot be properly fettered. The presiding officers will act as a single person tribunal. They therefore exercise their discretion with regard to the principle of proportionality as enshrined in British, European and human rights law.
3. The combination of an inquisitorial function with a judicial process requires fairness and objectivity. Presiding officers must have regard to the decisions of the higher courts and the principle of proportionality in deciding what is commensurate with the circumstances of each individual case. Case management may, for instance, involve providing time to consider and prepare evidence, to seek representation and providing an interpreter when required.
4. The listing of cases may be different for each presiding officer however, the Human Rights Act 1998 still applies. The party should know the case it has to meet but there is no obligation to set all of this out in the call-up letter, it can equally be communicated through disclosure of reports. Call-up letters are not to be viewed as pleadings. The essential requirement is one of fairness but there should be no doubt as to the issues being raised. Where new issues emerge during the hearing that have not been raised in the call-up letter this is not fatal to the fairness of the proceedings as long as the relevant party is given time to consider those issues and any new material.
5. The Department is entitled to expect that the operator and/or applicant and/or transport manager will attend a hearing. Where a company or other corporate body is called to a hearing a director is expected to attend. If the Department cannot be satisfied that the person before them has the requisite authority to speak on the company's behalf and to make binding undertakings, then the Department is entitled to ask for authority to be produced or to find that the company is not present. The company or other corporate body should therefore seek permission from the Department to substitute a director before any hearing.
6. Any person entitled or permitted to appear may do so on their own behalf or can be represented by counsel (barrister) and/or a solicitor. There is no provision for free representation. Other potential representatives such as transport consultants can only appear with the permission of the Department.
7. The Department has discretion as to the location of any hearing and witnesses and evidence which it may hear. In the interests of justice any hearing will usually be open to the public unless the case involves evidence where the Department is of the opinion that the interests of justice demand that all or part of the proceedings should be heard in private.

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8. In managing a case it may be useful for the Head of TRU to make case management directions for the parties to follow so that the case is in a state to be heard, and that parties are not disadvantaged, whilst ensuring that cases are dealt with justly and expeditiously, so far as is practicable.



## 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:

- (a) have an effective and stable establishment in a member State
- (b) be of good repute
- (c) have appropriate financial standing; and
- (d) have the requisite professional competence

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 (i.e. to pursue the occupation of road transport operator)**

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:

- (a) a time limit not exceeding 6 months, which may be extended by 3 months in the event of the death or physical incapacity of the transport manager, for the recruitment of a replacement transport manager where the transport manager no longer satisfies the requirement as to good repute or professional competence
- (b) a time limit not exceeding 6 months where the undertaking has to rectify the situation by demonstrating that it has an effective and stable establishment
- (c) a time limit not exceeding 6 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

2. The competent authority may require an undertaking whose authorisation has been suspended or withdrawn to ensure that its transport managers have passed the examinations referred to in Article 8(1) prior to any rehabilitation measure being taken.

## **Goods Vehicle Operator Licensing**

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.

## ANNEX 3 - DISCLOSURE PROTOCOL

### Principle

This is a fluid jurisdiction, where operators may continue to operate after the preparation of initial evidence and a call-up letter. Additional matters may arise so it is important to ensure the fairness of proceedings at all times.

A party appearing at a tribunal hearing before the Department is entitled to receive details of the case, which might result in:

- action being taken against their operator's licence
- an order disqualifying them from holding or obtaining or involvement in the management of an operator's licence
- an order disqualifying a person from acting as a transport manager
- a financial penalty being imposed under section 155 of the Transport Act 2000
- a proposal to refuse an application in respect of any of the above
- cases involving an application for return of a detained vehicle differ from the above in that they are inter parties, i.e. there is an applicant and a respondent, who will each have evidence to present. In those cases, the official may make case management directions for the parties to serve their evidence and to lodge a copy with the tribunal

### Guidance

There are no procedural rules covering disclosure but the following principles apply:

- the presiding officer can only make a decision on admissible evidence, which has been disclosed to all relevant parties
- a party should know the case it has to meet
- a notice must state the grounds on which the Department is considering that action
- there is no obligation to set all of this out in the call-up letter and it can be disclosed in a number of ways
- it would be impracticable to disclose everything which the Department has ever seen relevant to the case
- the disclosure should identify the evidence which is to be considered at the hearing to ensure that the party is given proper notice so that the party can prepare for the hearing
- where it emerges that the evidence has not been disclosed the presiding officer should order an adjournment to allow time for preparation. The length of the adjournment will depend on the particular case
- the deliberate tactic of some parties/representatives of waiting to see what evidence the Department has before making admissions or representations is not advised and may impact on repute or fitness
- it is legitimate for the presiding officer to pursue a relevant line of enquiry when it arises. The presiding officer will need to consider whether there should be an adjournment to allow time to consider the new material

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- any request for further material should be referred to a presiding officer to apply the principles outlined in the overriding objective as set out in the Statutory Guidance and to decide on its potential relevance
- the TRU and DVA may receive anonymised complaints and information but as a matter of fairness a party must know the case against them and be afforded the opportunity to challenge that evidence
- any allegations can always be passed to DVA for investigation

### **Bundle**

The TRU will prepare a presiding officer brief (or bundle of papers) which should include all information proposed to be considered by them at the hearing.

That bundle will usually contain material under the following standard headings:

#### **Section One – Licence details**

Operator / Licence details  
Case summary  
Vehicle List  
Call-up letter  
Transport Manager call-up letter  
Most recent application form  
Maintenance Agreement  
Application form Transport Manager  
Original application form  
Any Companies House documentation  
Supplementary and re-schedule letters

#### **Section Two - Statements**

#### **Section Three – Enforcement history**

Roadworthiness prohibition notices  
Driver prohibition notices  
Overloading prohibition notices  
Fixed Penalty Notices  
Convictions Previous  
Public Inquiry letters  
Previous warning letters  
HMRC information  
Any other relevant evidence

#### **Section Four – Correspondence**

Objections/opposition/complaints  
Correspondence related to public inquiry (adjournment requests, representations from operator, etc.)  
Historical correspondence (CLO, etc.)  
Call-up letter and Annexes

#### **Section Five – Finances**

Copy of finances

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### Financial calculation

Some of the information considered may come from enforcement officers, for example traffic examiners or vehicle examiners employed by DVA/DVSA, other enforcement agencies. Further information may come from the parties themselves, for example financial evidence and/or company records.

It is open to a party to submit other documents and to make representations as to the scope of a hearing for the Department to rule on.

### **Non-Compliance**

A failure to ensure that the applicant is not fully informed of the substance of any uncopied representation will be a breach of natural justice that may give grounds for successful appeal leading to a decision being over-turned and probably remitted for rehearing, but this can be remedied through careful case management.

## DOCUMENT CONTROL HISTORY

<b>Version 1.0 (published 01/10/2019)</b>	<b>Version 1.1 (published 01/05/2020)</b>
Paragraph 81:	Inclusion of hearings relating to applications within prioritisation list