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An Roinn
Bonneagair

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THE PRINCIPLES OF DECISION MAKING & THE CONCEPT OF PROPORTIONALITY

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GUIDANCE

1. This guidance is issued to assist the Department's Transport Regulation Unit (TRU) staff in the exercise of its statutory functions and in particular in relation to the principles of decision making & the concept of proportionality.
2. Where findings from the Upper Tribunal relate to traffic commissioners in GB, those findings and subsequent recommendations will be applied within Northern Ireland by the Head of Transport Regulation Unit ("Head of TRU") on behalf of the Department for Infrastructure ("the Department").

Basis of Guidance

3. This guidance is issued to provide information as to the way in which the Department believes the law should be interpreted in relation to the making of decisions, the holding of public inquiries and the fairness of proceedings. This Guidance may be subject to decisions of the courts and to subsequent legislation. The following principles have been extracted from existing legislation and case law.
4. The responsibility for taking action under the relevant legislation is vested in the Department and exercised by the Transport Regulation Unit in relation to each individual case. Section 32 of the Goods Vehicles (Licensing of Operators) Act (Northern Ireland) 2010 makes it clear that the Department may hold such inquiries as it thinks necessary for the proper exercise of its functions under the Act³. 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 role as a tribunal and will therefore need to exercise discretion with regard to the principle of proportionality as enshrined in British, European and human rights law⁴. The impartiality of the Department's decisions should be paramount at all times.
5. The legislation exists to ensure the promotion of road safety and fair competition and the Department will have regard to the relevant decisions of the courts and the principle of proportionality in deciding what intervention is commensurate with the circumstances of each individual case⁵. 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. This Guidance is mainly concerned with potential regulatory interventions against existing licences.

³ See Practice Guidance and Instructions on Case Management for further references regarding independence.

⁴ Human Rights Act 1998

⁵ 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).

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

6. Section 32 of the Act provides that it is for the Department to decide whether a public inquiry is necessary for the proper exercise of its functions under the Act and may decide to join two or more cases in one hearing⁶.
7. Any hearing will normally be in public subject to the circumstances arising set out below.
8. Paragraph 2 of Schedule 3 of the Goods Vehicles (Licensing of Operators) Regulations (Northern Ireland) 2012 provides the following:

“The Department may direct that the whole or any part of an inquiry be held in private if it is satisfied that by reason of –

- (a) the likelihood of disclosure of intimate personal or financial circumstances;*
- (b) the likelihood of disclosure of commercially sensitive information or information obtained in confidence; or*
- (c) exceptional circumstances not falling within sub-paragraphs (a) or (b),*

it is just and reasonable for it to do so.”

Where the hearing is in private the presiding officer may admit such persons as they consider appropriate.

Without prejudice to the above, where any question relating to the appropriate financial resources of any persons is to be or is being considered during an inquiry, the Department may exclude such persons as it thinks fit from the part of the inquiry during which that question is considered.

9. Regulation 18 of the Goods Vehicles (Licensing of Operators) Regulations (Northern Ireland) 2012 applies Schedule 3 of those Regulations in respect of an inquiry held by the Department. This allows the Department to determine the procedure at an inquiry. A person entitled to appear at an inquiry is entitled to give evidence, to call witnesses, to cross examine witnesses and to address the Department both on the evidence and generally. The Department, however, may refuse to permit (a) the giving or calling of evidence; (b) cross examination of persons giving evidence; or (c) the presentation of any other matter, which it considers to be irrelevant, repetitious, frivolous or vexatious. The Department may exclude a person who, in their opinion is behaving in a disruptive manner. It may also proceed with an inquiry in the absence of any person entitled to appear if it is satisfied that it is fair to do so, proper notice having been given. Any person present at an inquiry may submit any written evidence or other matter in writing before the close of the inquiry. The Department may not take into account any written evidence or other matter in writing received from any person before an inquiry opens or during any inquiry unless they disclose it.

⁶ 2011/364 Heart of Wales Bus & Coach Co Ltd and C Jones

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- 10.** Section 24 of the Act requires the Department to revoke a standard licence if at any time it appears that the licence-holder no longer meets the requirements of section 12A(2), i.e. (a) has an effective and stable establishment in Northern Ireland, (b) is of good repute, (c) has appropriate financial standing, and (d) is professionally competent; or the transport manager does not meet the requirements of section 12A(3), i.e. (a) is of good repute, (b) is professionally competent, and (c) is not prohibited from being appointed as a transport manager.
- 11.** Section 23 of the Act allows the Department to direct, at its discretion, that an operator's licence be revoked, suspended or curtailed for any reasonable cause including:

 - (a) use of an unauthorised site as an operating centre
 - (b) contravention of a licence condition
 - (c) failure to provide required and relevant information the Department
 - (d) making a false statement, or a statement of expectation that has not been fulfilled
 - (e) that any undertaking recorded in the licence has not been fulfilled
 - (f) being adjudged bankrupt or made the subject of a Debt Relief Order (individual) or, going into liquidation (a company) excluding voluntary liquidation
 - (g) that since the licence was issued or varied there has been a material change in the circumstances of the licence-holder that were relevant to the issue or variation
 - (h) that the licence is liable for revocation, suspension, curtailment following a direction under section 25(3)
- 12.** The information set out at (c) above includes:

 - (a) an offence under Article 69 of the Road Traffic (Northern Ireland) Order 1995 (goods vehicle test certificates)
 - (b) an offence committed in relation to a goods vehicle consisting in the contravention of any provision (however expressed) contained in or having effect under any enactment (including any enactment passed after this Act) including the following
 - (i) the maintenance of vehicles in a fit and serviceable condition;
 - (ii) limits of speed and weight laden and unladen, and the loading of goods vehicles; or
 - (iii) the licensing of drivers;
 - (c) an offence under:
 - (i) this Act
 - (ii) The Road Traffic (Northern Ireland) Order 1981
 - (iii) The Transport Act 1967; or
 - (iv) any other legislative provision
- 13.** The condition on the licence imposes an obligation on the licence holder to inform the Department of any change in the following requirements for a standard licence: transport manager, stable and effective establishment, financial standing. The Department has discretion to grant a period of grace in respect of each of these requirements.

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14. In the event of curtailment or suspension, the Department may order under section 23(5) that in effect any motor vehicle specified on the licence may not be used under any other operator's licence.
15. Section 25 of the Goods Vehicles (Licensing of Operators) Act (Northern Ireland) 2010 enables the disqualification of a person from holding an operator's licence to be varied or cancelled, and it is open to any such person to make application to the Department to vary an order. Regulation 15(2) of the Goods Vehicles (Qualifications of Operators) Regulations (Northern Ireland) 2012 provides that where the Department determines that the transport manager is no longer of good repute, it must order the disqualification of that transport manager. Regulation 16 allows the Department to cancel or (with the consent of the disqualified person) to vary the order and to specify measures with which the disqualified person must comply before the order can be cancelled or varied.
16. Regulations 4 & 5 of the Goods Vehicles (Community Licences) Regulations 2013 No 115 provides that, subject to the provision of relevant information, a person issued with a standard licence authorising international operations is entitled to be issued with a community licence by the Department as the competent authority. Regulation 6 provides that where the Department determines that the operator has lost their repute, it may order the permanent or temporary withdrawal of some or all of the certified copies or the community licence.

Case Law

General approach

17. In essence, the legal principle of proportionality requires the Department when exercising a statutory function, to make decisions which are commensurate with the circumstances of each individual case and the purposes of the legislation. The Upper Tribunal has stated as follows - *"There is a difference in the legal framework to be applied as between a refusal to grant an application for an operator's licence (on the one hand), and a subsequent revocation for loss of repute after a licence has been granted (on the other). At the application stage, the 'gatekeeper function' is of importance. Thereafter having granted a licence any regulatory action by the Department should not be punishment in itself, but designed to assist in the promotion and achievement of the legislation"*⁷. The primary factor then to be considered is the impact on road safety and fair competition arising from the alleged breaches of the legislation by the operator. The Department must also have regard to the impact upon an operator of any regulatory action which might be taken in cases of noncompliance. Inaccurate submissions may affect the fairness of the process and result in a procedural irregularity⁸. There is no "five-year rule' relating to previous public inquiries or regulatory action" and the Department is therefore entitled to go back as far as they need to in order to determine whether an operator can be trusted to comply in the future⁹.

⁷ 2013/046 Shearer Transport Ltd & James Shearer

⁸ 2014/071 W. Martin Oliver Partnership

⁹ 2014/008 Duncan McKee and Mary McKee

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18. A warning does not constitute a direction within the terms of the legislation and, whilst a direction may not be given without first holding a public inquiry if the holder of the licence requests this, the legislation imposes no requirement to hold a public inquiry before issuing a warning¹⁰. *“However, the significance of a formal warning is that if it is ignored it will become one of the factors to be taken into account at a future public inquiry should there be one. The purpose of a formal warning is to encourage the operator to avoid the need for any future public inquiry¹¹.”*
19. In the ordinary course of events, a withdrawal of a licence application might be determinative of the matter but where there is evidence to suggest a manipulation of the licensing system, unlawful operation or other conduct which would adversely affect the good repute of the applicant or of those involved with the application, the Department has jurisdiction to continue to consider that application¹². The Department is not limited to taking action against those directors in place at the date of the public inquiry but can take action against those persons who were in post as directors at the relevant time¹³.
20. The Department is not bound to accept the surrender of an operator’s licence. An operator can only be disqualified once an operator’s licence has been revoked, the power to accept surrender is therefore essential if the worst offenders are to be prevented from avoiding disqualification¹⁴.
21. The grant of an interim licence does not give rise to a legitimate expectation such that the Department is prevented from taking subsequent action, particularly if made clear that further intervention remains an option¹⁵.
22. The Department is mindful of the helpful guidance given by the Scottish Court of Session when considering the approach to be adopted regarding potential action against a licence holder. *“The underlying purpose for the power provided by Section 26(1) (25 (1) in the 2010 Act) (A discretionary power) can only be stated in very broad terms, namely that it is intended to be used, so far as may be appropriate, to achieve the objectives of the system. The proper question is whether in that context the direction is appropriate in the public interest. The objectives of the system plainly include the operator’s adherence to the various requirements of.. [12C in the 2010 NI Act]. In the case of prohibition and conviction it is plain that the protection of the public is a very important consideration.*

On the other hand, it does not follow that a traffic commissioner (GB) is prevented from taking into account, where appropriate, some considerations of a disciplinary nature and doing so in particular for the purpose of deterring the operator or other persons from failing to carry out their responsibilities under the legislation. However, taking such considerations into account would not be for the purpose of punishment per se, but in order to assist in the achievement of the purpose of the legislation. This is in addition to the obvious consideration that a direction may be used to provide direct protection to the public against dangers

¹⁰ 2008/268 Funstons Ltd

¹¹ 2012/023 JA & VC Fryer Farms

¹² 2002/8 Alkaline Limited

¹³ 2008/688 & 745 David Pritchard & Brian Smith

¹⁴ 2015/010 Cornwall Busways Ltd

¹⁵ 2006/149 A & C Nowell

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arising from the failure to comply with the basis on which the licence was granted. Whether or not such disciplinary considerations come into play must depend upon the circumstances of the individual case.

...We disagree with the implication which they drew from the legislation that the licensing authority could not reach a proper determination without distinguishing between fault on the part of the driver and fault on the part of the operator. This appears to suggest that the operator is not responsible when the driver is at fault. It is important, in our view, to observe a clear distinction between questions of responsibility and questions of culpability”¹⁶.

The Burden and standard of proof

- 23.** There is a difference in the statutory language between the provisions relating to applications for a new licence and action including suspension, curtailment or revocation of an existing licence. When making an application, the burden is on the applicant to satisfy the Department that the requirements are met but when taking action against an existing licence, the burden is on the Department to be satisfied that the requirements are no longer met. There is no requirement to point out that an operator or applicant has failed to supply material as requested¹⁷. Annex 3 sets out a suggested starting point for recommendations on applications.
- 24.** Section 23 of the Goods Vehicles (Licensing of Operators) Act (Northern Ireland) 2010 provides that the Department may direct that a licence be revoked on the grounds outlined above; and under section 24 of the Goods Vehicles (Licensing of Operators) Act (Northern Ireland) 2010 that the Department shall direct that a licence be revoked “if at any time it appears” that the licence holder “*no longer*” meets any of the fundamental requirements in contrast to the provisions relating to applications.
- 25.** For revocation to be possible under the discretionary or mandatory provisions, it is the official acting under delegated authority of the Department who must be satisfied of the ground of revocation¹⁸. On the standard of proof, the House of Lords has cited with approval the proposition that “*the more serious the allegation the more cogent is the evidence required to overcome the unlikelihood of what is alleged and thus to prove it*”¹⁹.

Proportionality

- 26.** An operator’s licence gives rise to limited benefits which are property for the purposes of human rights law. Deciding on the appropriateness of any action is therefore different from the sentencing exercise carried out by the criminal courts. Whilst there may be an element of deterrent effect, the discounting of penalties or other sentencing practices are discouraged²⁰. Nor is it a matter of just ensuring

¹⁶ Thomas Muir (Haulage) Limited v The Secretary of State for the Environment, Transport and the Regions [1998] Scot CS 13 (25 September, 1998); [1999] SC 86; [1999] SLT 666; (on appeal from 1997 J1)

¹⁷ 2014/033 Bulk Waste Management Ltd – operators must be able to understand what is required of them and must reply promptly and fully to requests made by the traffic commissioner or any other body entitled to require information from them

¹⁸ Muck It Ltd and Others v. Secretary of State for Transport (2005) EWCA Civ 1124 on appeal from 2004/314

¹⁹ Re Dellow’s Will Trusts [1964] 1 WLR 451 at p455 as approved in Re H and R (1996)(1) FLR 80 and Re L (1996)(1) FLR116

²⁰ 2003/300 Andrews (Sheffield)

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consistency with other individual cases²¹. The legislation provides no definition of good repute, and so when the Department is considering if an individual is of good repute the Department can have regard to any matter, but in considering a company's repute the Department can have regard to all *material evidence*²². In practice these may amount to the same considerations.

- 27.** Where the operator and/or the transport manager has been convicted of a serious offence or incurred a penalty for one of the 'most serious infringements' pursuant to Annex IV of Regulations (EC) 1071/2009 (see Annex 2) the Department is obliged to consider that conduct in so far as it relates to repute. Further to Article 6(2)(b) of Regulation (EC) 1071/2009 the European Commission has drawn up a list of serious infringements indicating categories, types and degrees of seriousness, in addition to the most serious infringements. Annex I of Regulations (EC) 403/2016 sets out the infringements in tables by type giving a seriousness for each offence and the maximum frequency any number of infringements can be committed in any rolling period²³.
- 28.** Article 6 of Regulation (EC) 1071/2009 also refers to where the operator and/or transport manager has been convicted of a serious criminal offence or incurred a penalty for a serious infringement of Community rules relating to:
- the driving time and rest periods of drivers, working time and the installation and use of recording equipment
 - the maximum weights and dimensions of commercial vehicles used in international traffic
 - the initial qualification and continuous training of drivers
 - the roadworthiness of commercial vehicles, including the compulsory technical inspection of motor vehicles
 - access to the market in international road haulage or, as appropriate, access to the market in road passenger transport
 - safety in the carriage of dangerous goods by road
 - the installation and use of speed-limiting devices in certain categories of vehicle
 - driving licences
 - admission to the occupation
 - animal transport
- 29.** The Department will be aware of the impact of the introduction of this legislation, which introduced a subtle change to the approach to good repute requiring a similarity of approach in reaching decisions on the repute of an operator and the repute of a transport manager²⁴. Consequently, the Department will have to balance the current guidance from the Upper Tribunal and the effect of Article 6 of Regulation (EC) 1071/2009. Whereas the Upper Tribunal has previously indicated that the ultimate question is not whether the conduct of an operator is so serious as to amount to a loss of repute, but whether it is so serious as to require revocation (put simply; "is the conduct such that the operator ought to be

²¹ 2003/327 The Fox (A1) Ltd

²² See Practice Guidance and Instructions on Legal Entities and Practice Guidance and Instructions on Good Repute and Fitness

²³ See Annex 1 below summarising the EU Regulation

²⁴ 2015/049 Matthew Reynolds

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put out of business?”²⁵). Article 6 of Regulation (EC) 1071/2009 requires that the Department *shall determine whether, due to specific circumstances, the loss of good repute would constitute a disproportionate response in the individual case. Any such finding shall be duly reasoned and justified.* If the Department *finds that the loss of good repute would constitute a disproportionate response, it may decide that good repute is unaffected.* If the Department comes to this conclusion the reasons have to be recorded in the national register.

30. There are some operators who are subject to other regulatory regimes where strict liability (“no fault”) offences or other enforcement action might result. The numbers of incidents involved may be significant, but the Department will be able to differentiate between those offences where there is an intent element and those which are strict liability. What is more important to this jurisdiction is how the operator approaches the management of risk both generally and with regard to the authorised fleet, reflecting the Legislation’s intent that the licensing system deliver road safety and fair competition through consistent application of the licence requirements.
31. The Upper Tribunal has stated two clear principles on the issue of proportionality:
 - (i) that in order to protect an operator’s rights under Article 1 of the First Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms there must be a fair balance between the right of the operator to the peaceful enjoyment of the operator licence and the interests which the licensing regime seeks to protect, and
 - (ii) that a fair balance can only be struck by having regard to what the regime is seeking to protect or achieve, the way in which it seeks to do that and the extent to which the operator can put forward relevant matters in the course of any proceedings²⁶.
32. Article 1 of the First Protocol is a qualified right. The operator’s licence is granted on acceptance by the applicant of certain restrictions and requirements. When considering regulatory action the Department will need to consider a number of factors, which are not limited to the impact on the operator. The decision has the potential to impact on the rights of others, for example:
 - protection from serious injury or worse under Article 2
 - where an operator uses a site as an operating centre without authority resulting in potential prejudice to the Article 1, First Protocol and Article 8²⁷ rights of local residents
 - the Article 1, First Protocol rights of other operators, where it is said that a commercial advantage has been gained (including the question of fair competition)
33. As stated above, the licensing regime exists to promote road safety and fair competition. *“The jurisdiction of traffic commissioners is ‘preventative’ in nature...traffic commissioners are not required to wait and then react after some*

²⁵ 2002/217 Bryan Haulage (no.2)

²⁶ 2011/060 Nolan Transport & Others, by reference to Air Canada v UK (1995) 20 EHRR 150 and Lindsay v Commissioners for Customs & Excise [2002] EWCA Civ 267

²⁷ Huang & Kashmiri v Secretary of State for the Home Department [2007] UKHL 11: must always involve the striking of a fair balance between the rights of an individual and the interests of the community which is inherent in the whole of the Convention

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serious event has occurred”²⁸. “Other operators, with knowledge of the case, might be tempted to look at the circumstances and say to themselves that the operator in question appears to be getting away with it so why should we bother to incur the expenditure of time, trouble and money to run a compliant operation. It only needs one or two operators to adopt this approach to lead to a greater risk that the operator licensing system, which contributes to road safety, being fatally undermined”²⁹.

- 34.** There may be cases where it is only necessary to set out the conduct in question to make it apparent that an operator ought to be put out of business. Standard licence holders are required to employ a transport manager. On an application if the applicant fails to meet the statutory requirement of professional competence it will fail to obtain a licence. If there is already a licence and an employee does not meet the requirements of a transport manager, the operator will not be meeting the requirement to be of professional competence and the Department has the power to revoke. Whilst issues of proportionality come into play in determining whether there has been a loss of repute, those principles have limited application in a case where the operator has failed to have a transport manager as required by the legislation³⁰. However, it is open to the holder of a standard licence to request a period of grace³¹ and the Department should consider the potential impact of not allowing a period of grace.
- 35.** The Department should consider all the relevant negatives and positives when balancing the relevant factors and so should also carry out an assessment of the weight to be given to all the various competing elements. This also applies to consideration of a transport manager’s repute. The Upper Tribunal has imported a preliminary question, namely: how likely is it that this operator will, in future, operate in compliance with the operator’s licensing regime? If the evidence demonstrates that it is unlikely then that will, of course, tend to support a conclusion that the operator ought to be put out of business. If the evidence demonstrates that the operator is very likely to be compliant in the future then that conclusion may indicate that it is not a case where the operator ought to be put out of business. Promises are easily made, what matters is whether those promises will be kept: actions speak louder than words³². Conditions may be imposed but the Department may also seek undertakings e.g. as to training, which might be added to the licence and weighed into the balancing exercise. Where an operator has clearly failed to act upon previous advice and/or findings the Department is under no obligation to allow further undertakings to be complied with³³.
- 36.** In cases involving poor maintenance, for example, DVA may have carried out a recent and/or follow-up compliance audit before a public inquiry takes place. Findings must be made as at the date of the public inquiry and should take into account the improvements made by the operator and any operator’s good compliance record. Balancing all these matters against the consequences of

²⁸ 2013/022 David James Root t/a Orange Coach Travel

²⁹ Stay decision in Highland Car Crushers Ltd. A similar approach was adopted in 2013/047 Dundee Plant Company Ltd & 2014/072 Ian Russell Nicholas t/a Wigan Container Services and Secretary of State for Transport

³⁰ Anglorom Trans (UK) Ltd v Secretary of State for Transport [2004] EWCA Civ 998 (30 July 2004 on appeal from 2003/343), see Practice Guidance and Instructions on Transport Managers

³¹ See Practice Guidance and Instructions on Case Management at paragraph 67

³² 2009/225 Priority Freight Ltd & Paul Williams

³³ 2010/076 Premier Beds Ltd

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losing the licence, the Department has to conclude what is proportionate. Revocation is not disproportionate where, in the absence of any objective justification and excuse, there have been long term, sustained, repetitive deficiencies³⁴. Although action must be considered as at the date of the decision, that does not mean that the past becomes irrelevant. In many cases the present is simply the culmination of past events³⁵. There may be cases where revocation is justified even at the first public inquiry, as the operator has already had opportunity to put things right by the date of the hearing³⁶.

37. If there has been no balancing exercise, or if the challenged decision lacks either intelligible or adequate reasoning, or those elements that are regarded as the essential ingredients of a written decision are missing, or if there is an apparent and material error in the Department's understanding of the law or the key facts, then an appellate tribunal will be bound to consider whether it should intervene on the ground that the Department's decision is plainly wrong. But an assertion that a decision is "*disproportionate*" is often little more than an assertion that the appellant disagrees with the Department's findings of fact, or thinks that the action taken was too severe. This does not, however, mean that an error of law has occurred, or that reason and the law require the tribunal to take a different view³⁷.
38. The Tribunal has emphasised the requirement for rigorous evidential assessment, sufficient fact-finding, the balancing exercise and judicious decision making and the requirements that the reasons which are adequate to explain why a decision-maker arrived at a decision in a regulatory matter. These reasons are not necessary just for the operator or applicant affected by the decision but also for the appellate authorities that may be required to review the validity of that decision³⁸. The Upper Tribunal has also recognised that the Department is entitled to draw reasonable inferences from primary facts³⁹.
39. There may be occasions where there is a need to make an example of the operator so as to send a warning to the industry as a whole⁴⁰. In cases of deception the Department is entitled to ask: would other operators who have heard of this ruse consider the perpetrator to be of good repute⁴¹?
40. A statutory undertaking requires that the operator should set up adequate systems and not allow them to run themselves: what is required is constant supervision and monitoring to ensure that the systems work⁴². The Upper Tribunal expressly dissented from the proposition that the Department must invariably set out all the criteria that they have considered, as each case turns on its own facts. Factors such as the wish to protect employees and the setting of priorities might be relevant. However, the undertakings given in order to enjoy

³⁴ 2009/410 Warstone Motors t/a The Green Bus Service

³⁵ 2014/059 Randolph Transport Ltd & Catherine Tottenham

³⁶ 2011/041 Taroq Mahmood t/a TM Travel

³⁷ 2011/046 Eurofast (Europe) Ltd, 2011/360 Professional Transport Ltd

³⁸ NT/2017/027 Easy Go Transport Ltd, 2016/003 Ian Lambert t/a IKL Transport, 2015/072 Rose Transport Ltd, Jacqueline Walters and Gilchrist Walters, 2015/068 Malcolm George Millard t/a M&M Haulage, 2004/439 Surrey CC v Ripley

³⁹ 2016/026 J Campbell t/a Vision Travel

⁴⁰ 2007/459 KDL European Ltd & Kevin Lumsden, 2010/035 S & A Curtis Transport

⁴¹ 1996/H46 Mark Anthony Browne t/a Brownes Transport Appeal, as approved in 2002/009 George Gollop & Direct Movement Services Ltd

⁴² 1999/L56 Alison Jones t/a Jones Motors as approved 2000/45 Martin Jolly Transport Ltd, 2005/236 Neil Alldritt t/a Maple Motors

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the benefits of a licence are explicit (e.g. in relation to drivers' hours and tachographs⁴³). The applicable requirements are often intended to protect other road users. The operator should take reasonable steps to prevent contraventions. Whilst it would be an overstatement to describe an undertaking as imposing absolute liability⁴⁴, it is part of the operator's duty to see that they are informed of the relevant facts. Tachograph offences must always be viewed seriously but also in perspective⁴⁵ to the particular case. In cases of persistent breaches it will be difficult for an operator to contend that they have complied with their undertaking. An undertaking requires a rigorous regime of checks⁴⁶. Where there are repeated infringements there is likely to be some degree of recklessness on the part of an operator and it may be difficult for an operator to contend that its systems are either appropriate or reasonable⁴⁷.

41. Where there have been serious failures in maintenance and/or repeated failures to ensure the roadworthiness of vehicles and/or trailers, the Department is not required to give an operator more time to put systems in place which should have been effective from the outset of operation. An operator is expected to react to indications of shortcomings, such as repeated test failures or prohibitions, and to address weaknesses in the management of the transport operation⁴⁸.
42. In certain cases it may be appropriate to separately consider the position of a company holding a licence from that of its director(s) and/or officers. The correct approach in those circumstances may be to give the operator an opportunity, for instance, to nominate an alternative transport manager or allow the resignation of a particular director or to take alternative action so as to avoid revocation thereby allowing the operator to retain its good repute⁴⁹.
43. Whilst revocation results in loss of the property right described above it does not prevent the operator from enjoying similar rights by reapplying for a new licence. The Department might, as the case requires, consider all matters (including disqualification) holistically, in order to avoid a disproportionate outcome. When considering repute generally the Department should remind itself that the opportunity for rehabilitation through the completion of specified measures is only available to transport managers, which allows the decision to be tempered⁵⁰. That said, the Upper Tribunal does not appear to place significant weight on this difference when it comes to the issue of suspension of a CPC⁵¹. A more detailed examination of the case law as it applies to the repute of transport managers is set out in the relevant Practice Guidance and Instructions on transport managers.

Procedure

⁴³ Vehicle Inspectorate v Nuttall (1999) RTR 264 HL

⁴⁴ 2008/413 Al-Le Logistics Ltd

⁴⁵ 2008/780 South Lincs Plant Hire

⁴⁶ 2001/007 Alkaline UK

⁴⁷ 2001/049 Norbert Dentressangle

⁴⁸ 2003/194 Smith's Distribution

⁴⁹ 2003/107 R A Meredith & Son (Nurseries) Ltd and Article 13 Regulation (EC) 1071/2009

⁵⁰ 2012/071 Silvertree Transport Ltd

⁵¹ 2014/050 Andrew Harris t/a Harris of Leicester, Randolph Transport Ltd & Catherine Tottenham (As above)

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44. The Department is entitled to determine the structure of a public inquiry and the evidence that is to be called provided that the rules of natural justice are safeguarded⁵².
45. If the Department intends to take action it is desirable to give a warning or at least indicate the likely options to enable the operator to make representations about the possible effect on the business⁵³. There will be cases where the process of making representations will be assisted by a provisional indication of what the Department has in mind. In this situation, the Department should use a form of words which clearly demonstrates that it retains an open mind. The Department can then proceed to conduct a balancing exercise following the receipt of representations⁵⁴. The Department should consider the weight to be attached to the operator's explanations for any shortcomings and give credit for steps taken to improve systems⁵⁵. These matters are particularly important when considering the balancing exercise to be undertaken before making a direction under section 23 of the Act. The Department may attach more weight to be given to cogent evidence provided by the licence holder intended to show the likely effect of an order that the Department is considering and that less weight may be given to mere assertions on the part of the licence holder.
46. For standard licences where the Department reaches a negative decision, including final rejection of an application, the suspension or revocation of an existing licence and a finding against the repute or competency of a transport manager, full reasons must be given⁵⁶. The Department should, where necessary, explain why a particular direction is more appropriate than another and/or the length of time of that direction. A specified period might assist an operator to focus their mind and allow the operator to take further steps to improve the systems in question⁵⁷. It might be self-evident that financial consequences will follow from a direction. Good practice indicates that evidence and submissions on consequences should be invited before an order is made⁵⁸.
47. An attempt to ascertain the likely consequences of action will not give rise to a legitimate expectation as to the outcome. As until all evidence and submissions have been considered, and there has been time for reflection, the Department will have an open mind⁵⁹. The question of the likely effect upon the operator should be properly examined and advocates are expected to assist in this exercise. The actuarial evidence should be specific, comprehensive and compelling⁶⁰. The Department will be unable to consider new material, which could have been obtained with reasonable diligence in advance of the hearing, at a later date⁶¹. It might also take a view on when a particular direction might be implemented⁶². A

⁵² 2003/094 Dawlish Coaches, see See Practice Guidance and Instructions on Case Management

⁵³ 1997/J37 Galloway Refrigerated Transport Ltd as approved in 2002/167 A Cooper

⁵⁴ 2002/197 Mason Haulage

⁵⁵ NT 2017/042 Mark Lyons v Driver & Vehicle Agency and Department for Infrastructure

⁵⁶ See Article 15 Regulation (EC) 1071/2009

⁵⁷ 2004/036 G Jenkins

⁵⁸ 2002/167 A Cooper

⁵⁹ Professional Transport Ltd (see above), 1997/J37 Galloway Refrigerated Transport Ltd

⁶⁰ It is for the operator to submit evidence of the financial impact of any action which might be taken – 2013/047 Dundee Plant Hire Ltd, J O'Doherty Haulage Ltd (as above), 2016/039 Daren Michael Smith t/a DMS Scaffolding

⁶¹ 2002/040 Thames Materials

⁶² 2003/287 Malco Freight

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decision not to disqualify (see below) might also be used to indicate credit for any positive features identified⁶³.

48. On findings that an operator has failed to meet the standards required it is proportionate for the Department to refuse a variation application until such time as it can be satisfied that everything is functioning properly and to request further checks on any assurances given at public inquiry⁶⁴.

Rehabilitation and Disqualification

49. The above case law must be interpreted so as to give effect to Article 14 of Regulation (EC) 1071/2009. There was previously no power to disqualify a transport manager for any period⁶⁵ but that has now changed. Article 14 provides that where the Department finds that a transport manager has lost their repute, it is obliged to declare that transport manager unfit to manage the transport activities of any transport operation. That transport manager's certificate of professional competence (CPC) will no longer be valid until a specified rehabilitation measure has been completed. As indicated above Regulation 16 of the Goods Vehicles (Qualifications of Operators) Regulations (Northern Ireland) 2012 allows the Department to cancel or (with the consent of the disqualified person) to vary the order and to specify measures with which the disqualified person must comply before the order can be cancelled or varied. There is no case law relating to rehabilitation beyond the general guidance, which might be drawn on those cases relating to disqualification.
50. An order for disqualification can only be against the operator or a director/equivalent of the corporate body (but not for instance a company secretary⁶⁶) or a transport manager (under different legislation). Disqualification cannot be imposed without an order for revocation⁶⁷ (and can be made following revocation of an interim licence⁶⁸) but an order for disqualification should not necessarily follow revocation. Disqualification is a potentially significant infringement of rights⁶⁹ and the Upper Tribunal has indicated that whilst there is no 'additional feature' required to order disqualification, it is not a direction that should be routinely ordered⁷⁰. There may be cases in which the seriousness of the operator's conduct is such that the Department may properly consider that both revocation and disqualification are necessary for the purposes of enforcing the legislation⁷¹. The provisions are in general terms, consistent with the concept of deterrence, but assessment of culpability and use of words such as penalty should be avoided. The case law indicates a general principle that at the time the disqualification order is made that the operator cannot be trusted to comply with the regulatory regime and that the objectives of the system, the protection of the public and fairness to other operators, requires that the operator be disqualified⁷².

⁶³ 2010/073 Paul Anthony Faulkner

⁶⁴ Malco Freight (as above)

⁶⁵ 2008/315 LC Mistry

⁶⁶ 2002/094 BKG Transport

⁶⁷ 2009/498 G Sunderland & J Warburton

⁶⁸ 2012/013 Russet Red Ltd

⁶⁹ 2000/006 K Jaggard

⁷⁰ 2002/030 Steven Lloyd t/a London Skips

⁷¹ 2001/074 Brian Edward Clark applying 2000/005 Marilyn Williams and 2000/018 Euroline Transport Ltd

⁷² 2009/011 Katherine Oliver and J W Swan & Partners

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A clear example of this is when an operator fails to attend a public inquiry after an application to adjourn the hearing has been refused⁷³.

51. In certain circumstances the Department may order that an individual is not only disqualified from holding or obtaining an operator's licence, but also from being involved in management, administration or control of the transport operations of an entity that holds or obtain such a licence in the United Kingdom⁷⁴. The Upper Tribunal had regard to a decision of the Transport Tribunal and in particular that the regulatory body must "*ensure that the purpose of an order is not undermined or defeated by a disqualified person becoming involved with the management of another operator's licence*"⁷⁵. This will be even more important where the Department is concerned about the risk of "*fronting*"⁷⁶.
52. Section 25(1) of the Goods Vehicles (Licensing of Operators) Act (Northern Ireland) 2010 permits disqualification to be ordered either indefinitely or for such period as the Department thinks fit. The periods are expressed to be in the alternative, with there being no power to impose a minimum period as section 25(5) expressly empowers the Department to cancel an order for disqualification at any time⁷⁷.
53. The Department is reminded that consideration of the period of any order for disqualification will always turn upon the facts of the individual case. The guidance from the Upper Tribunal reflects this⁷⁸. "*It is only on those rare occasions on which the facts are exactly the same that another decision is likely to be of any assistance on the question of the appropriate length of disqualification*"⁷⁹. It is clear that each case must be considered on its own merits⁸⁰ and relies on the Department to assess what is necessary to balance the objectives of the legislation including the protection of the public and ensuring fairness to the legitimate licensed transport industry against the potentially significant infringement of the licence holder's or individual's rights.
54. In imposing a disqualification there should be an assessment of the evidence in setting the appropriate length of the order⁸¹. Once the period of time is determined, the Department is required to set out the relevant findings of fact, the analysis of the relevant actions of those concerned and to conduct the appropriate balancing exercise, so that the licence holder is aware of the material used to justify disqualification⁸². Good practice dictates that if the decision is issued orally, that written confirmation of the oral decision is sent to those subject to the disqualification and it is likely that the majority of orders for disqualification will be encompassed in the Department's full written reasons accompanying the order for revocation. In some cases it may be appropriate, having indicated a view on the evidence, to seek written representations at the end of a hearing before deciding on whether disqualification is appropriate⁸³.

⁷³ 2014/084 Timothy Robinson t/a Robinsons' Removals & Stuart Robinson

⁷⁴ 2015/078 Black Velvet Travel Ltd, Western Greyhound Ltd and Michael John Bishop

⁷⁵ 2005/457 Leslie John Ings

⁷⁶ See Practice Guidance and Instructions on Good Repute and Fitness. 2012/071 Silvertree Transport Ltd

⁷⁷ 2001/006 M-Line

⁷⁸ 2014/040&41 C G Cargo Ltd and Sukhwiunder Singh Sandhu

⁷⁹ 2012/044 Highland Car Crushers Ltd, 2012/56 & 57 Deep Transport Ltd & Midland Transport Ltd

⁸⁰ Katherine Oliver (as above) - see paragraph 12

⁸¹ 2005/426 K S Oakhal

⁸² 2004/373 Rai Transport (Midlands) Ltd

⁸³ 2005/367 K Jaggard

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- 55.** Where a former licence holder or individual applies to cancel an order for disqualification the burden lies with the applicant and the test is what is appropriate in the public interest; the Department will need to consider all relevant aspects. Each case turns on its own facts. Protection of the public⁸⁴ is just one of several factors to be taken into account when deciding what is necessary⁸⁵.

Active Case Management

- 56.** The Department considers that by following these principles in hearings it will be able to actively manage the case whilst ensuring that cases are dealt with justly, so far as is practicable by:
- ensuring that all evidence is served by the Department in a timely manner
 - ensuring that any written evidence and representations, from the operator and/or its representative, are provided to the Department sufficiently in advance of the hearing so that it can be read and considered by the presiding officer in advance
 - ensuring that operators provide the documents requested by the Department in advance of the public inquiry where requested to do so
 - identifying the issues for determination by the Department at an early stage
 - ensuring value for money in the use of time and resources (including considering the need to call witnesses whose evidence may be agreed)
 - 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
 - ensuring that the public inquiry is listed expeditiously and that an appropriate time estimate is allocated⁸⁶

Communicating the decision

- 57.** The letter communicating the Department's decision to revoke should, as a matter of natural justice, include reasons for the decision or refer to a document containing the written reasons or a written decision⁸⁷.

⁸⁴ 2007/61 RD Land

⁸⁵ 2008/593 Martin John Graves

⁸⁶ see Practice Guidance and Instructions on Case Management

⁸⁷ 2009/204 Verrechia, see Guidance on Written Reasons, Decisions and Publication and Article 15 of Regulation (EC) 1071/2009 regarding standard licences

INSTRUCTIONS

Basis of Instructions

58. These instructions are issued to provide practical advice on the administrative arrangements to those who support the Department in fulfilling its statutory functions and the procedure to be adopted by it in conducting hearings under the legislation set out in the attached Guidance.
59. The criminal courts are concerned with punishing those who have committed criminal offences, whereas the Department is concerned with promoting the objectives of the relevant legislation in seeking to ensure that operators who can and will comply retain their licences whilst ensuring that operators who cannot or will not comply do not retain their licences. Consequently questions of what action is proportionate will vary in each individual case.
60. Even the most organised operator may occasionally make a genuine mistake and, unless this is serious, formal 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.
61. If the measures imposed at an earlier public inquiry appear to have been effective and/or the relevant suspension or curtailment has expired, it will not normally be appropriate to call a further public inquiry if the operator applies for the licence to be restored to the previous authorisation, or even further increased after an appropriate period, provided that the Department is satisfied that standards have been restored and maintained. If appropriate, the DVA will be asked to carry out checks to establish suitability. A case submission should be made to this effect.
62. Allegations or matters of fact relating to the potential exercise of powers under sections 23 and 24 of the Act 2010 will need to be considered by the Department and reference should be made to the relevant Practice Guidance and Instructions.
63. Members of staff should anticipate, when preparing written submissions, that the Department will wish to consider formal regulatory action where:
 - protection from serious injury or worse is required under Article 2
 - the operator and/or driver does not appear to heed a warning and non-compliance continues; or
 - the initial report is so serious that a public inquiry 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
64. At any stage, either prior to a decision being made whether to call an operator or applicant to a hearing or during the hearing, further undertakings can be offered in which the operator or applicant legally promises to do something in order to satisfy the Department that a statutory requirement will be met. Operators occasionally offer an undertaking to carry out a full systems audit to test the robustness of new systems put in place. Staff on behalf of the Department will usually supply a pro-forma detailing the headings which should be covered in an audit (as a minimum) to ensure sufficient detail. While the Department cannot

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recommend or endorse a particular auditor, operators will need to ensure that the quality of the audit is of a high enough standard.

Alternative disposals to a public inquiry

- 65.** As the case law makes clear, there is no requirement on the Department 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 or audit. 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 to a public inquiry.
- 66.** If the Department feels the issues are sufficiently serious to warrant a formal meeting with the applicant, operator and/or transport manager they can call the relevant party to formal 'in-chambers' meeting (ICH) to discuss the issues of concern. This may be sufficient to formally highlight the Department's concerns and may be able to be resolved at the meeting or through an action plan to address the issues of concern. However, subject to the level of seriousness of the issues taking cognizance of all the relevant factors will dictate any recommended actions. If the presiding officer, normally the Deputy Head of TRU, determines the issues are sufficiently serious or pose a significant risk to road safety, fair competition or undermine the licensing process a report will be escalated with a recommendation of the appropriate steps required to further consider the case, which may include a public inquiry recommendation. The presiding officer at ICH does not have the scope to impose any additional undertakings or conditions on the applicant, operator or transport manager as these can only be imposed at a public inquiry. Any additional undertakings necessary to address the issues of concern must be proposed and agreed by the relevant party.
- 67.** Subject to the relevant facts of the case and the risk posed it is open for the Department to agree an action plan with the relevant person, which may include compliance audits or other appropriate actions to illustrate compliance.
- 68.** However, complex cases or cases where there is an element of doubt must be escalated to the Head of TRU for direction or decision.
- 69.** The Head of TRU will undertake an assessment of the relevant case including the relevant evidence, risk to road safety, impact on fair competition and make a balanced and proportionate written decision on the way forward. If the decision is for a preliminary hearing or public inquiry the Head of TRU will assume

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responsibility to manage the case from that point forward, or allocate to a presiding officer acting under delegated authority from the Department.

- 70.** The public inquiry process has been shown to be effective in ensuring compliance by inviting operators to attend before the Department to explain their actions and outline how alleged failures occurred in the first instance. This can enable the Department to hear details of the remedial action being taken and to seek and receive assurances as to future compliance. It also enables a proper assessment to be made of the fitness of the individual witness. The Upper Tribunal has repeatedly emphasised the value of the presiding officer meeting the operator/witness and hearing the evidence first hand. The Department is clear that those benefits should be maintained.
- 71.** The Department can decide to hold a formal preliminary hearing with the applicant, operator or transport manager to enable issues to be clarified or to crystallise issues. This may negate the need for a public inquiry (PI); however, the format of the preliminary hearing will be exactly the same as a PI with the hearing being recorded etc.
- 72.** The public inquiry process is intended to deliver a swift method of ensuring operator licence compliance as reflected in the statutory notice periods: 21 days for goods operators. However, pressure on limited tribunal resources may delay the hearing of cases. As the tools and mechanisms available to the enforcement agencies (particularly DVA) have become ever more sophisticated and as those agencies become better at targeting those operators and drivers who pose the greatest risk to road safety and fair competition, it is appropriate to target the Department's tribunal resources at those same operators and to divert the less serious cases away from the formal public inquiry process to preliminary hearings or formal hearings (in-chambers hearings (ICH)).
- 73.** The final decision as to whether to formally convene a preliminary hearing or public inquiry or to find an alternative method of disposal sits with the Head of TRU or their nominated delegate. Any decision must be a considered one with all the relevant considerations and risk analysis recorded with a proper risk based approach adopted to ensure transparency, consistency of approach and any perceived risks are managed. Any alternative disposals for cases which may not require serious intervention and where compliance might be achieved without convening a public inquiry should be identified.
- 74.** There are a number of options available to the Department when considering whether to deal with non-compliant operators without convening a formal public inquiry:

 - an established method is to issue warning letters to operators. There is limited evidence that this results in sustained compliance
 - in suitable cases, where it is considered that compliance might be achieved without convening a public inquiry, the Department may determine by means of a written decision on a submission, that the operator attend a formal meeting (ICH)
 - in more complex or borderline cases where a public inquiry may be necessary, the Department may decide to call an operator to a formal preliminary hearing. This can be beneficial in narrowing or crystallising the issues or assurances as to future compliance or, alternatively, might result

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in the Department concluding that they can deal with the matter by some other method

75. When one or more warning letters have been issued in the past five years, it is anticipated that the Department will wish to consider regulatory action. It may; however, also consider a 'final' warning letter. In appropriate cases the Department may request DVA to carry out a routine check to ensure compliance.
76. The purpose of a meeting with the Department at ICH is to allow the operator to explain themselves and how any failures occurred. The meeting allows opportunity to hear details of any remedial action being taken and to seek and receive assurances as to future compliance. It also enables the Department to make an assessment of the operator's approach to future compliance.
77. The procedure for determining the types of cases that are suitable for an ICH is at Annex 5. In the event that the operator fails, without good reason, to respond to the meeting invitation, the Department will recommend that the operator be called to public inquiry.
78. In more borderline cases where a public inquiry looks to be required, the Department may decide to call an operator to a preliminary hearing in order to determine whether that public inquiry is necessary and therefore whether the matter can be dealt with by another method. Many cases appear to be serious and warrant a public inquiry on the papers yet when the operator provides a full explanation and accompanying supporting documents the Department can determine the matter without use of its regulatory powers.
79. The same principles that apply to the convening of public inquiries and ICH apply to the convening of preliminary hearings. The appearance of the operator before the Department enables the operator to explain their actions and how the failures happened in the first instance, to allow the Department to hear details of the remedial action being taken and to seek and receive assurances as to future compliance. A preliminary hearing also enables the Department to make an assessment of the operator and any witness at the hearing. The advantage of the preliminary hearing is that it can be listed more quickly than a full public inquiry and it makes good use of the Department's time in determining whether a public inquiry is really necessary.
80. The type and number of cases (together with the outcome) that are dealt with by way of a preliminary hearing or an ICH will be recorded in the same way as public inquiries and statistics will be kept for annual reports.

The public inquiry

81. The value of hearing all of the relevant evidence and submissions at public inquiry is long established and the Department will be careful to ensure that each case is dealt with on its own facts. The Department notes that a case that may appear to be very serious from an initial reading of the brief can in fact turn out not to require severe regulatory action once all the evidence and submissions has been

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heard and conversely that a case that initially appears not to be serious can then in fact require severe regulatory action.

- 82.** To ensure a consistency of approach at the hearing or the public inquiry itself Annex 4 sets out some suggested starting points. (It does not deal with when a matter might be called to a hearing.) However, the Department retains absolute discretion to move up or down from the suggested starting points as and when the particular facts and circumstances of a case justify it. There are many variables in the types of case before the Department. Annex 4 refers to the most common occurring concerns. The Department will take into account any other concerns that are raised and take whatever action appears to be appropriate in the individual circumstances.
- 83.** Annex 4 considers common areas of negative conduct experienced and the balancing factors relevant when considering the conduct of operators. The tables contain lists which are neither exhaustive nor prescriptive. Each case must turn on its facts.
- 84.** The term “infringement” has been deliberately adopted although this is not a punitive exercise. Any breach of relevant rules, regulations or legislation that is admitted, or determined on the balance of probabilities, is regarded as an infringement regardless of whether or not the subject matter in question has been prosecuted and/or a penalty imposed.
- 85.** The type of regulatory action that an operator might receive has been categorised under four broad headings to encapsulate the most serious types of regulatory action down to the least serious, with a degree of overlap between each category. Each category details the various types of regulatory action that might be considered as proportionate and appropriate to a particular case. Having balanced the evidence heard at a public inquiry, and the negative and positive features that are present, the Department should be able to arrive at a starting point within one of the four broad categories of regulatory action.

The Role of the Public Inquiry Clerk

- 86.** The role of a public inquiry clerk (caseworker) is to provide administrative support to the Department to allow it to carry out its statutory duties in relation to public inquiries. They are not responsible for identifying which operators/applicants should be called to public inquiries nor are they responsible for the decisions taken at public inquiries but will assist the Department with general enquiries.

Mandatory requirements

- 87.** Operators who are called to public inquiry will be required to demonstrate that they continue to meet the requirement to be of appropriate financial standing or, in the case of restricted goods licenses to have sufficient financial resources. This is because it has frequently been found that other shortcomings are caused by lack of adequate finance. The evidential basis for this request should always be stated in the letter calling an operator to a public inquiry⁸⁸.

⁸⁸ See Practice Guidance and Instructions on Finance

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- 88.** Holders of standard goods licences and transport managers are required to be of good repute. Holders of all standard licences are required to be professionally competent and this may be the licence holder or the licence holder may employ a transport manager who can demonstrate that they meet the professional competence requirement⁸⁹.
- 89.** When considering whether the mandatory requirements are met, the Department may only make an adverse finding if there is sufficient evidence to satisfy it on the balance of probabilities, i.e. a fact is more likely than not. For instance, evidence might suggest that the nominated transport manager has not been exercising continuous and effective responsibility or there is information to suggest that the transport manager may not be capable of exercising this level of control. In those circumstances the presiding officer may need to consider whether the relevant acts or omissions call in to question the repute of the transport manager⁹⁰.
- 90.** For standard licences, Regulation (EC) 1071/2009 (Article 13) allows but does not require the Department to provide a period 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 Department decides whether to allow time for rectification and for what period. The maximum periods allowed under the legislation are as follows:

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>

- 91.** A failure to appoint a replacement transport manager after a period of grace or to communicate with the Department can amount to serious misconduct on the part of the operator. 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 Department⁹¹. If a period of grace expires without the mandatory requirement being met then the Department is obliged to revoke the operator licence

Action to be considered at public inquiries

- 92.** In deciding what action is proportionate the Department will wish to carry out a balancing exercise. Invariably this involves consideration of the seriousness of any breaches which the Department has found to have occurred, and what has

⁸⁹ See Practice Guidance and Instructions on Transport Managers

⁹⁰ See Practice Guidance and Instructions on Good Repute and Fitness

⁹¹ 2018/011 Sky rider Ltd

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been done to remedy those transgressions (and when such action was taken), with reference being made to the size of the fleet and its history. As the operator was trusted to ensure compliance from the date of grant, promises of future action will carry less weight. It is neither practical nor desirable to lay down fixed criteria because every case will be different, but the following paragraphs represent a guideline. The revocation of standard operator licences is mandatory if the holder is found to be no longer of good repute, of appropriate financial standing or professionally competent, subject to a period of grace which might apply in respect of financial standing or professional competence. Failures to meet the requirements of the operator's licence may place the repute of the operator and/or the transport manager at issue. The principles set out in the attached Guidance will then apply.

New operators

- 93.** Notwithstanding the above, new operators are more likely to be called to a public inquiry if, during their first year, there are grounds to suggest (possibly from a DVA new operator check) that the systems required and the operator has recently undertaken to implement, are not functioning as required by the licence or the operator is not committed to ensuring compliance. In giving these directions, the Department is mindful of the principles outlined in the Code of Practice on Guidance on Regulations⁹². A public inquiry or preliminary hearing may provide an important educational as well as regulatory opportunity, particularly for restricted licence holders, who are not required to employ anyone of professional competence. Where allegations, however, of non-compliance appear to have impacted on road safety such as the issue of an immediate prohibition on a vehicle, or tachograph records have not been produced, it is more likely that the Department will wish to consider taking action against that licence

Disqualification

- 94.** Section 25 of the Goods Vehicles (Licensing of Operators) Act (Northern Ireland) 2010 enables the disqualification of a person from holding an operator's licence and for that order to be varied or cancelled. In the event of the revocation of an operator's licence the Department will wish to consider disqualification of the licence holder and any director of a company or partner (as appropriate). Careful consideration of disqualification and of its effects upon the licence holder and any linked licence holders is required and Section 25 of the Goods Vehicles (Licensing of Operators) Act (Northern Ireland) 2010 is set out at Annex 6. It is important to note that any disqualified person will be subject to subsection (4). The effect of this is that if that person is either a director of or holds a controlling interest⁹³ in another company that holds an operator's licence, that licence shall be liable to regulatory action under Section 24.
- 95.** Taking account of the guidance from the Upper Tribunal that each case must be looked at on its merits, the Department may wish to use as a starting point for a first public inquiry, consideration of a disqualification period of between one and three years. However, serious cases, where, for example, the operator deliberately puts life at risk and/or knowingly operates unsafe vehicles or allows drivers to falsify records, may merit disqualification of between five to 10 years;

⁹² Refer to <https://www.executiveoffice-ni.gov.uk/code-practice-guidance-regulations>

⁹³ See Practice Guidance and Instructions on Persons of Significant Control in Legal Entities

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or in certain cases for an indefinite period. It is always open to a disqualified person to make application for removal or reduction of the order. Unless there are exceptional circumstances, a disqualification of less than two years will not normally be reduced, and disqualification for longer or indefinite periods will not normally be reviewed until half the period or five years of the disqualification have elapsed as applies.

96. There are different provisions relating to the disqualification of a transport manager. Where a transport manager has been disqualified it will be necessary to notify all operators who rely on that transport manager to meet the requirement for professional competence in order to allow that operator to nominate a new CPC holder and/or to request a period of grace in order to obtain a replacement transport manager. It is good practice to notify the related operator of the reasons for the Department's decision.

Rehabilitation

97. Northern Ireland has not enacted the provisions of Article 6.3 of Regulation (EC) 1071/2009 into national law and there is therefore no power for the Department to order an operator to undertake rehabilitation measures in order to regain their good repute. They can, as indicated above, order measures to be taken by a disqualified transport manager, for instance re-taking and passing the examinations to obtain a Certificate of Professional Competence. However, there is nothing to prevent the Department from giving an indication to an operator who has lost its repute of the steps that may be taken in the future to regain that repute.

Decisions

98. After giving due consideration to the evidence and any submissions, the decision of the Department may either be communicated to the operator/applicant orally at the end of the inquiry or be reserved, with the decision being notified in writing at a later date⁹⁴.
99. All letters notifying operators/applicants of decisions should provide details of the decision or refer to an attached document and advice on actions to be taken by an operator / applicant and contain information about rights of appeal. Other relevant parties at the inquiry should receive notification of the decision. The decision will also be published in Applications and Decisions in accordance with legislative requirements.

Transport Regulation Unit

01 May 2020

⁹⁴ See Practice Guidance and Instructions on Written Reasons, Decisions and Publication

ANNEX 1: 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.

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 4th 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
- (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 6 - Conditions relating to the requirement of good repute

1. Subject to paragraph 2 of this Article, Member States shall determine the conditions to be met by undertakings and transport managers in order to satisfy the requirement of good repute laid down in Article 3(1)(b).

In determining whether an undertaking has satisfied that requirement, Member States shall consider the conduct of the undertaking, its transport managers and any other relevant person as may be determined by the Member State. Any reference in this Article to convictions, penalties or infringements shall include convictions, penalties or infringements of the undertaking itself, its transport managers and any other relevant person as may be determined by the Member State.

The conditions referred to in the first subparagraph shall include at least the following:

(a) that there be no compelling grounds for doubting the good repute of the transport manager or the transport undertaking, such as convictions or penalties for any serious infringement of national rules in force in the fields of:

- (i) commercial law
- (ii) insolvency law
- (iii) pay and employment conditions in the profession
- (iv) road traffic
- (v) professional liability
- (vi) trafficking in human beings or drugs; and

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(b) that the transport manager or the transport undertaking have not in one or more Member States been convicted of a serious criminal offence or incurred a penalty for a serious infringement of Community rules relating in particular to:

- (i) the driving time and rest periods of drivers, working time and the installation and use of recording equipment
- (ii) the maximum weights and dimensions of commercial vehicles used in international traffic
- (iii) the initial qualification and continuous training of drivers
- (iv) the roadworthiness of commercial vehicles, including the compulsory technical inspection of motor vehicles
- (v) access to the market in international road haulage
- (vi) safety in the carriage of dangerous goods by road
- (vii) the installation and use of speed-limiting devices in certain categories of vehicle
- (viii) driving licences
- (ix) admission to the occupation
- (x) animal transport

2. For the purposes of point (b) of the third subparagraph of paragraph 1:

(a) where the transport manager or the transport undertaking has in one or more Member States been convicted of a serious criminal offence or incurred a penalty for one of the most serious infringements of Community rules as set out in Annex IV, the competent authority of the Member State of establishment shall carry out in an appropriate and timely manner a duly completed administrative procedure, which shall include, if appropriate, a check at the premises of the undertaking concerned.

The procedure shall determine whether, due to specific circumstances, the loss of good repute would constitute a disproportionate response in the individual case. Any such finding shall be duly reasoned and justified.

If the competent authority finds that the loss of good repute would constitute a disproportionate response, it may decide that good repute is unaffected. In such case, the reasons shall be recorded in the national register. The number of such decisions shall be indicated in the report referred to in Article 26(1).

If the competent authority does not find that the loss of good repute would constitute a disproportionate response, the conviction or penalty shall lead to the loss of good repute;

3. The requirement laid down in Article 3(1)(b) shall not be satisfied until a rehabilitation measure or any other measure having an equivalent effect has been taken pursuant to the relevant provisions of national law.

ANNEX 2 – INFRINGEMENTS

Regulation (EC) 1071/2009 - ANNEX IV⁹⁵

Most serious infringements for the purposes of Article 6(2)(a)

1. (a) Exceeding the maximum 6-day or fortnightly driving time limits by margins of 25% or more.

(b) Exceeding, during a daily working period, the maximum daily driving time limit by a margin of 50% or more without taking a break or without an uninterrupted rest period of at least 4,5 hours.
2. Not having a tachograph and/or speed limiter, or using a fraudulent device able to modify the records of the recording equipment and/or the speed limiter or falsifying record sheets or data downloaded from the tachograph and/or the driver card.
3. Driving without a valid roadworthiness certificate if such a document is required under Community law and/or driving with a very serious deficiency of, inter alia, the braking system, the steering linkages, the wheels/tyres, the suspension or chassis that would create such an immediate risk to road safety that it leads to a decision to immobilise the vehicle.
4. Transporting dangerous goods that are prohibited for transport or transporting such goods in a prohibited or non-approved means of containment or without identifying them on the vehicle as dangerous goods, thus endangering lives or the environment to such extent that it leads to a decision to immobilise the vehicle.
5. Carrying passengers or goods without holding a valid driving licence or carrying by an undertaking not holding a valid Community licence.
6. Driving with a driver card that has been falsified, or with a card of which the driver is not the holder, or which has been obtained on the basis of false declarations and/or forged documents.
7. Carrying goods exceeding the maximum permissible laden mass by 20% or more for vehicles the permissible laden weight of which exceeds 12 tonnes, and by 25% or more for vehicles the permissible laden weight of which does not exceed 12 tonnes.

⁹⁵ <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A32009R1071>

Regulation (EC) 2016/403⁹⁶

Serious infringements for the purposes of Article 6(2)(b)

Annex I establishes a common list of categories, types and degrees of serious infringements of the Union rules in commercial road transport which, in addition to those set out in Annex IV of Regulation (EC) 1071/2009, may lead to the loss of good repute of a road transport operator. The tables divide the infringements into three categories of seriousness according to their potential to create a risk of fatalities or serious injuries. The tables cover the following areas:

1. Driving and resting time - Groups of infringements against Regulation (EC) No 561/2006 of the European Parliament and of the Council (1)
2. Tachograph - Groups of infringements against Regulation (EU) No 165/2014 of the European Parliament and of the Council (1)
3. Working time rules - Groups of infringements against Directive 2002/15/EC of the European Parliament and of the Council (1)
4. Weight and dimension rules - Groups of infringements against Council Directive 96/53/EC (1)
5. Technical roadside inspection - Groups of infringements against Directive 2014/45/EU of the European Parliament and of the Council (2) (Periodic roadworthiness tests) and Directive 2014/47/EU of the European Parliament and of the Council (3)
6. Speed limitation devices - Groups of infringements against Council Directive 92/6/EEC (1)
7. Initial qualification and periodic training of drivers - Groups of infringements against Directive 2003/59/EC of the European Parliament and of the Council (2)
8. Driving licences requirements - Groups of infringements against Directive 2006/126/EC of the European Parliament and of the Council (1)
9. Transport of dangerous goods by road - Groups of infringements against Directive 2008/68/EC of the European Parliament and of the Council (2)
10. Access to the international road haulage market - Groups of infringements against Regulation (EC) No 1072/2009 of the European Parliament and of the Council (1)
11. Access to the market for coach and bus services - Groups of infringements against Regulation (EC) No 1073/2009 of the European Parliament and of the Council (2)
12. Animal transport - Groups of infringements against Council Regulation (EC) No 1/2005 (1)

⁹⁶ <https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1524048792673&uri=CELEX:32016R0403>

Commission Directive 2004/112/EC⁹⁷

Adapting Council Directive 95/50/EC⁹⁸ on uniform procedures for checks on the transport of dangerous goods by road, contains in its Annex II a detailed classification of infringements against the relevant provisions, divided, according to their level of severity, into three risk categories: risk category I, risk category II, risk category III.

The level of infringements against the provisions shall reflect the risk categories provided in Annex II to Directive 2004/112/EC, in such a way that risk category I = VSI (except those infringements which are already defined as MSI in Annex IV to Regulation (EC) No 1071/2009); risk category II = SI. Risk category III is equal to the level of minor infringement.

The level of liability of a carrier for the infringement is for the Member State to determine.

Annex II provides the maximum frequency of occurrence beyond which repeated serious infringements shall be regarded as more serious, by taking into account the number of drivers used for the transport activities managed by the transport manager, as set out below:

1. The serious (SI) and very serious (VSI) infringements listed in Annex I, when committed repeatedly shall be regarded as more serious by the competent authority of a Member State of establishment. When calculating the frequency of occurrence of repeated infringements Member States shall take into account the following factors:

- (a) seriousness of infringement (SI or VSI);
- (b) time (at least one rolling year from the date of a control);
- (c) number of drivers used for the transport activities managed by the transport manager (average per year)

2. Taking into account the potential of creating a risk to road safety the maximum frequency of serious infringements beyond which they should be considered as more serious shall be established as follows:

3 SI/per driver/per year = 1 VSI

3 VSI/per driver/per year = launch of a national procedure on good repute

3. The number of infringements per driver per year is an average figure calculated by dividing the total number of all infringements of the same level of seriousness (SI or VSI) by the average number of drivers employed during the year. The frequency formula provides for a maximum threshold for occurrence of serious infringements beyond which they shall be considered more serious. Member States may establish stricter thresholds if envisaged in their national administrative procedure for assessing good repute.

Annex III replaces the list of infringements at Annex III of Directive 2006/22/EC.

⁹⁷ <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32004L0112>

⁹⁸ <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:01995L0050-20080711>

ANNEX 3 - SUGGESTED STARTING POINTS FOR RECOMMENDATIONS ON APPLICATIONS

The following derives from an analysis of the available Upper Tribunal case law.

Each application must be dealt with on its own facts. In determining an application the Department must be satisfied that all of the requirements are met. The Department will also exercise the gatekeeper function to promote fair competition within the industry. Similar to regulatory matters, there are many variables in applications and a variety of different variations in applicants failing to satisfy the Department. What appears on the face of the papers to be very serious may not in fact be a barrier to grant. As a result, whilst the following guidance can provide for consistency in approach by suggesting starting points for recommendations, this Annex cannot be used to predict the outcome of an application or give rise to a legitimate expectation. The Department retains absolute discretion.

It should be noted that the burden of proof on an application differs from an existing licence holder. An applicant has the onus of satisfying the Department that the statutory criteria are met whereas when taking action against an operator the burden is on the Department to be satisfied that the requirements are no longer met.

Requirements for different Application Types

Standard Goods	Restricted Goods
Stable and effective establishment – operating centre and available vehicle	Operating centre
Good repute	Fitness
Financial standing	Availability of financial resources to support maintenance
Professional competence	N/A
Satisfactory facilities	Satisfactory facilities

The applicant must satisfy the Department that on the balance of probabilities all of the above requirements are met for the type of licence they are applying for. No other test applies.

Interims

Interim licences/directions can be granted for applications and are always at the discretion of the Department. The Department should only grant an interim licence/direction where there is prima facie evidence that all of the requirements are met. Should there be any evidence to cast doubt on the fulfilment of any of the requirements the decision maker will be unable to grant of an interim until the applicant provides evidence to satisfy the Department that the requirement is met.

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Content of the application

An application for an operator's licence must be made digitally unless there are exceptional reasons for requiring a paper form; in both cases, the applicant must sign the application⁹⁹. The application is submitted to the NI Central Licensing Office (NICLO) so that it may be processed by a caseworker and considered by the Department. Staff processing applications on behalf of the Department make recommendations as to whether the application should be granted based on the statutory criteria being met and the ability of the applicant to meet the undertakings on the licence. Staff in NICLO may grant applications in certain circumstances without referral in line with delegations set out in Practice Guidance Document no.7.

Withdrawal

An applicant is free at any time to withdraw an application subject to them forfeiting their fee, any outstanding matters will be considered on any future application. Once any regulatory process has begun, such as a public inquiry, an applicant is unable to withdraw the application in an effort to avoid negative findings. The starting point in this situation is to refuse the request and consider whether the applicant meets the statutory criteria.

Non-chargeable variations

When an applicant is applying to increase the total vehicle/trailer authorisation, in line with the vehicle/trailer authorisation across all operating centres, provided the applicant satisfies all of the requirements, the caseworker should grant the increase in line with delegations. When an applicant is seeking to change operating centre address to one on the same Industrial Estate/road, vehicles will generally be entering and exiting the new site via the same route and there are no previous environmental issues, the caseworker should grant.

Operating without authority

It is understood that an applicant who submits an application following a vehicle encounter may wish to legalise their position; however, it is likely that their fitness to hold a licence may be called into question. They will need to demonstrate the steps they have taken since the incident to equip themselves with the range of knowledge to implement satisfactory arrangements.

Financial review

In some cases applicants are only able to demonstrate the availability of finances by way of an opening or closing balance. These applicants can agree to submit further financial evidence within six months of grant showing that on an average the requirement is met. When there is no other adverse information and the application is out of objection, the caseworker should recommend that the application is granted subject to the review. It is ultimately a matter of discretion whether to grant on that basis.

⁹⁹ See Practice Guidance and Instructions on Operating Centres, Stable Establishments and Addresses for Service for guidance on adverts

Schedule 1 transfer of operating centre

Where an applicant applies for a Schedule 1¹⁰⁰ transfer the caseworker will need to pay regard to the location of the operating centre and any likely impact of extension of the review. Where there are no regulatory concerns the transfer may be approved under delegation; however, where there is history of opposition at the site further detailed consideration will be required.

At sites where conditions and/or undertakings have been attached the applicant will need to agree for them to be transferred. It may be the case that they are no longer relevant and the caseworker could then make a recommendation for their removal. This is ultimately a matter of discretion for the TRU.

Surrenders

A caseworker might recommend that surrender of a licence is accepted, without the need for a completed SUR1 form, upon receipt of all licensing documentation and discs (or confirmation of their destruction) provided that there are no outstanding compliance issues. It follows in the case of administration, liquidation or receivership that (where there are no current compliance issues and no associated applications or additional linked licences) acceptance of surrender can be dealt with under delegation upon receipt of all licensing documentation and discs (or confirmation of their destruction) from the insolvency practitioner.

Insolvency

When an applicant has previously been declared bankrupt they should, in the first instance, provide a copy of their discharge certificate. When an individual has been involved in an entity that has entered insolvency they should provide a copy of the insolvency report. Upon receipt of the above and satisfactory financial evidence where there has been no previous licensing or compliance history, the caseworker should recommend grant of the application.

Regulation 29

Where an application to invoke Regulation 29 is received following the death of the licence holder, and when that licence is not subject to compliance proceedings, the NICLO team leader may grant the application for a period up to six months¹⁰¹. Applications to invoke Regulation 29 where the licence is subject to compliance proceedings should be notified to the Head of TRU.

¹⁰⁰ Goods Vehicle (Licensing of Operators) Act (NI) 2010. A Schedule 1 transfer, applicable to goods only, allows the transfer of an operating centre from one licence to another. See Practice Guidance and Instructions on Operating Centres, Stable Establishments and Addresses for Service.

¹⁰¹ See Practice Guidance and Instructions on Legal Entities

ANNEX 4 – SUGGESTED STARTING POINTS FOR CONSIDERATION OF REGULATORY ACTION

The following guidance derives from the Department’s consideration of the GB Senior Traffic Commissioner’s analysis of the available Upper Tribunal case law, however, the decision maker should also note Annex 2 above and the Department has adopted these guidelines.

Each case must be dealt with on its own facts. In determining how to dispose of most cases, the Department will not only consider the alleged infringements but also the potential impact on the operator. A case may involve many variables including different variations of alleged breaches, negative and balancing features. What appears on the face of the papers to be very serious may not in fact warrant severe regulatory action. As a result, whilst the following guidance can provide for consistency in approach by suggesting starting points for regulatory action this Annex cannot be used to predict the outcome of a public inquiry or give rise to a legitimate expectation. The Department retains absolute discretion to move up or down from the suggested starting points.

SEVERE	<ul style="list-style-type: none"> ●Revocation with detailed consideration of disqualification ●Revocation ●Suspension that materially affects the transport operation ●Significant indefinite curtailment that materially affects the transport operation
SERIOUS	<ul style="list-style-type: none"> ●Revocation with consideration of disqualification ●Suspension for up to 28 days ●Significant time limited curtailment that may materially affect the transport operation
MODERATE	<ul style="list-style-type: none"> ●Suspension for up to 14 days ●Indefinite or time limited curtailment that does not materially affect the transport operation e.g. removal of the margin
LOW	<ul style="list-style-type: none"> ●Formal warning that attendance at a further public inquiry will be likely to lead to regulatory action being taken against the licence

Note –

(a) curtailment includes attachment of a condition limiting the number of vehicles on the licence

(b) nothing in the above precludes the Department from recording further undertakings and/or statements of intent from the operator

(c) none of the lists in this Annex below are intended to be exhaustive

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POSITIVE FEATURES OF CONDUCT

- no operator fault, recklessness or negligence with no undue risk to road safety or unfair commercial advantage
- isolated incident and/or driver deliberately disregarding appropriate instruction and/or legislation
- effective management control and appropriate systems and procedures in place to prevent operator licence failings
- effective analysis procedures in place to detect falsification, drivers' hours (EC & domestic) and/or Working Time Directive infringements
- proper and effective driver/maintenance staff training with appropriate monitoring and disciplinary procedures in place
- isolated incident with no previous offending history
- sufficient and effective changes made, with tangible evidence in support, to ensure compliance
- driver deliberately disregarding appropriate instruction from employer Operator co-operated with enforcement investigation
- no road safety critical defects or immediate marked prohibitions
- low prohibition rate
- above average first time pass rate at MOT
- evidence of effective driver daily walk round check training & driver defect reporting system

NEGATIVE FEATURES OF CONDUCT

- deliberate and/or reckless act/s by operator and/or drivers that led to undue risk to road safety or unfair commercial advantage
- persistent offending
- substantial number of previous prohibitions, or fixed penalty notices or convictions and/or failure to notify the Department within 28 days
- ineffective management control and insufficient or no systems and procedures in place to prevent operator licence compliance failings
- ineffective or no analysis procedures in place to detect falsification, drivers' hours (EC & domestic) and/or Working Time Directive infringements
- ineffective or insufficient driver training with insufficient or ineffective monitoring and disciplinary procedures in place e.g. no training with regard to the conduct of the driver walk round check and the completion of the driver defect report
- insufficient and/or ineffective changes made to ensure future compliance
- operator failed to co-operate with or deliberately obstructed enforcement investigation e.g. failure to produce maintenance records or driver records
- evidence of tampering with tachograph recording equipment or use of devices (e.g. magnet or interrupter switch) and insufficient action by operator to detect the same
- insufficient procedures in place to ensure appropriate use of tachograph or manual records (including digicards) by drivers
- road safety critical defects on any vehicle or trailer in service or any Immediate prohibition or prohibitions issued during vehicle annual roadworthiness tests
- high prohibition rate
- low average first time pass rate at annual roadworthiness tests or multiple failure items at annual roadworthiness tests
- evidence of previous unsatisfactory maintenance investigations, warning letters or public inquiries

This list is not exhaustive

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STARTING POINTS FOR REGULATORY ACTION

CONDUCT	REGULATORY STARTING POINT
Deliberate or reckless act(s) that compromised road safety and/or gave the operator a clear commercial advantage and/or operator caused or permitted driver offending and/or any attempt by the operator to conceal offences or failings	SEVERE
Persistent operator licence failures with inadequate response or previous public inquiry history	SEVERE to SERIOUS
Two or more negative features not already detailed under "Conduct" above and some positive feature	SERIOUS to MODERATE
Limited negative feature(s) not already detailed under "Conduct" above and several positive features	MODERATE TO LOW

ANNEX 5 - ALTERNATIVE DISPOSALS TO A PUBLIC INQUIRY

Procedure for in-chambers hearings (ICH) and preliminary hearings (PH)

Introduction

Some cases might appear on the papers to require the convening of a public inquiry but they may, in fact, be dealt with by an alternative disposal. Operators, applicants and/or transport managers can submit written representations in response to reports of non-compliance or other adverse information. There is no requirement on the Department to engage with applicants, operators, transport managers or other parties immediately prior to a hearing or during those proceedings. ICH or PH between the Department and operator are intended to offer an alternative to a public inquiry where the issues are less serious. If an operator requests a public inquiry, following on from a proposal to revoke letter, the Department may still determine that an ICH or PH is required and the operator will be advised that the hearing or meeting is a preliminary matter to determine how a public inquiry might proceed.

In borderline cases, where a public inquiry looks to be required, the Department may decide to call an operator to a PH. In situations that fall short of an obvious need to call an operator and/or transport manager, the Department may request an ICH. This Annex sets out a consistent approach to the administration and purpose of these alternatives to public inquiry.

During an ICH the Department will normally be represented by the Deputy Head of TRU and, and represented at PH by the Head of TRU. Where the need arises these officials may be replaced by appropriately qualified officers under delegated authority¹⁰².

Submissions

In general, any regulatory submission will seek to identify what has gone wrong and, for example, if it is a repeat issue and, if so, from when; has anything else changed; whether the transport manager was seen (standard licences); what was the response to these issues; and whether further information might be required.

The Deputy Head of TRU has limited authority to impose restrictions, add additional undertakings or conditions or take regulatory action against an operator or transport manager. They can discuss matters, seek clarification, ask questions, highlight concerns and suggest options for the operator to consider adopting to address issues of concern. If an operator proposes additional undertakings in an attempt to eliminate the need for a public inquiry, these will be need to be agreed by the Head of TRU prior to inclusion on an operator's licence. However, if an operator proposes remedial action and this isn't actually added onto the licence the Deputy Head is free to agree this process.

¹⁰² See Practice Guidance and Instructions on Delegation of Authority

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An ICH is unlikely to be appropriate in the following circumstances:

- the operator is operating more vehicles than it has authority for
- the operator was abusive to the DVA Examiner/investigating officer or failed to stop when requested to do so
- there are real concerns about reputation, professional competence or financial standing or establishment
- the failings are across a number of areas required by the operator licence
- there are large scale failures on compliance – i.e. with the drivers' hours' rules, tachograph regulations, maintenance, vehicle weights, operating licensing etc.

When considering if an ICH is appropriate the following approach is to be adopted.

Consideration must be given to the following:

- nature and seriousness of the infringements
- frequency of infringements
- evidence available
- issues under consideration
- fleet size
- previous compliance history
- previous hearing/inquiries
- links to other companies
- any other relevant information

Consideration must be given to what regulatory action is likely to be taken based on consideration of the above and taking cognizance of the practice guidance and legislative provisions:

- no further action (NFA)
- formal warning
- the recording of further undertakings
- the receipt of assurances from the operator
- suspension, curtailment or revocation

If the action is not likely to involve additional undertakings, suspension, curtailment or revocation, the Deputy Head of TRU can proceed to consider whether the case falls within the following criteria:

1. The failings of the operator are specific to one area, such as brake failures or small extensions of preventative maintenance inspection frequencies. If they are limited or specific to one particular matter an ICH meeting might be considered.

2. If the shortcomings identified by the DVA investigation are dated, the Deputy Head of TRU may not have a full picture that is sufficiently up to date to allow them to make a valid decision. If the DVA report is old they may convene an ICH where the operator can provide up to date records so that they can be assessed to enable the Department to make an up to date informed decision. Post the assessment of this additional evidence this may necessitate a submission to the Head of the TRU to enable them to provide direction on what action is appropriate or if a PH or public inquiry is appropriate.

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3. If there is an immediate risk to road safety the Department will need to consider how best to address that risk, either through early assurances or whether to convene an urgent public inquiry.

4. How serious and extensive were the prohibitions issued; are any immediate? If the prohibition notices were delayed and not extensive, an ICH might allow an opportunity to examine how the operator has responded. The presence of an immediate prohibition is not a barrier to an ICH.

5. Did the operator co-operate with the DVA investigation? For example, did the operator respond quickly and was it positive? If so, an ICH meeting might be considered.

6. In considering if an ICH is appropriate, the Deputy Head of TRU should consider actions which might assist to ensure future compliance and therefore act as a framework for the proposed interview. A non-exhaustive sample list of the suggested actions is set out below:

- an audit to be carried out in six, nine or 12 months and the report and the remedial action taken to be sent to the TRU within a month of completion of the audit
- transport manager training such as attendance on a recognised CPC refresher course within six, nine or 12 months with evidence of attendance to be sent to the Department no later than a month from attendance
- driver training on matters such as: a) how to conduct the driver daily walk round check and/or the completion of the driver daily defect report; b) the EC drivers' hours' rules and tachograph regulations, or the domestic drivers' hours' rules of the working time directive rules; c) the safe loading of vehicles and vehicle security generally
- any other undertakings relevant to the identified shortcomings. Undertakings cannot be imposed by the Department at ICH and should not be suggested if they do not directly concern the identified issues. However, it may suggest that to overcome the issue the operator may consider a course of action. If this course is not agreed to then the option is open for the case to be heard at a full public inquiry. Examples might include: that all vehicles will be subject to roller brake tests four times a year, once to include the annual test, or that the operator will change its maintenance arrangements, or that the operator will implement a new tachograph analysis system

The Department can then make an early neutral evaluation of the case and indicate a possible disposal. They may indicate specific matters by way of an agenda to be discussed at the ICH, such as prohibitions, annual roadworthiness failure rate, finances etc. Examples of the suggestions of the type of outcome that the operator might be invited to agree at an ICH are set out below. The list is not exhaustive. The Head of TRU does not have to specifically approve the holding of an ICH, however, if the Deputy Head of TRU is in any doubt, formal written guidance should be sought from the Head of TRU on their directions for the case. If they accept that an ICH is appropriate, they must record this on the submission and their rationale for the

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decision. This will provide a clear picture of the decision making process should the case ultimately be heard at public inquiry or appealed to the Upper Tribunal.

The comments by the Head of TRU may include instructions such as:

- if the operator agrees to accept the proposed outcome then the matter can be concluded without further reference to the Head of TRU, or
- if the meeting with the operator leads the Deputy Head of TRU to a different conclusion or the operator is not prepared to agree the proposed outcome, the matter must be referred back to the Head of TRU, by way of submission, for further consideration

Attendance by the operator

The letter inviting the operator to an ICH or PH will advise the operator of the purposes of the invitation and the matters to be considered. Those issues will be identified again at the commencement of the ICH or preliminary hearing. There is no requirement to publish a statutory notice as a PH is generally not held in public. Similar protocol applies to PH as with a public inquiry; however, an ICH does not need to be recorded but good practice dictates comprehensive notes must be taken by the clerk of the hearing and formally written up as an official record. These must be made available to the operator/applicant/transport manager if a copy is requested. They can be redacted if deemed necessary.

They should both follow a consistent structure:

- prior to an ICH or PH (and at least 14 days in advance) the Department will write to the operator identifying the operator licence failures either in summary form or by the inclusion of any reports that have been put before the Department
- the operator will be asked to attend with documentary evidence of current compliance such as maintenance records and tachograph or domestic hours' legislation compliance (see above)
- the person attending may be asked for written confirmation of their authority to bind the operator to any undertakings etc.
- in the event that the operator does not attend or does not request an alternative date any initial recommendation for regulatory action will stand
- a PH will always be clerked; at an ICH the Deputy Head of TRU must always be accompanied by another member of staff who will make notes
- the parties who attend are entitled to be accompanied by a legal or other representative as if they were attending a public inquiry
- within 14 days of a formal hearing the Deputy Head of TRU will make, if appropriate, a final recommendation to the Head of TRU as to the type of regulatory action that they might like to consider

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As appropriate, the Department may direct that certain documents are to be brought to a PH or an ICH, such as:

- the last three inspection records for each vehicle; if there are more than 10 vehicles then the Department may direct a sample of records
- tachograph analysis records and details of infringement action taken (if related to drivers' hours' issues)
- driver's employment contracts, training records etc.
- any other relevant documentation

Outcome

A PH is held to determine whether a public inquiry is necessary or can result in the case being concluded or to crystallise issues. An operator will usually be notified of that decision at the conclusion of the hearing or within a reasonable timeframe thereafter. The grounds for a public inquiry will be communicated subsequently in the call-up letter.

Depending upon what was agreed by the presiding officer, or what the objectives of the ICH where, the hearing will conclude with either:

- the operator being advised of the outcome, i.e. you have agreed to these undertakings and proposed outcome (e.g. voluntary outcome) and a warning letter will be issued; or
- the operator being advised that the matter will be referred back to the Head of TRU for further consideration and the operator will be notified of the outcome in due course

In both instances a formal warning can be issued without the consent of the operator; this is not regulatory action and therefore does not give rise to a right of appeal. An operator can ask the Head of TRU to reconsider the issue of a warning issued by Deputy Head of TRU.

Apart from the above very limited circumstances, if the discussions with the operator lead the Deputy Head of TRU to conclude that a different outcome is required, the matter must be referred back to the Head of TRU for further consideration. The Deputy Head of TRU can therefore:

1. issue the warning letter and make a note on the record. If the Head of TRU was involved in setting the direction of the ICH they may need to be consulted to agree closure/disposal.

Potential disposals to be agreed by the Head of TRU might include:

- a voluntary curtailment of the fleet/variation of the condition for the number of vehicles to be operated under it
- withdrawal of the application for or variation of a licence
- withdrawal of the application by a specified transport manager

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- the voluntary resignation of the transport manager from this or other licence(s) and a period of grace for an alternative to be identified and named on the operator licence
 - additional undertakings in accordance with those suggested to the Head of TRU
2. If the Head of TRU has been involved in the case and has not agreed a course of action prior to the interview, or the interview outcome is different from that identified prior to the interview (the operator considering an undertaking to be inappropriate, for example), the Deputy Head of TRU will update the submission and refer it back to the Head of TRU with an amended recommendation. This might include alternative undertakings that the operator has indicated that it is willing to give or a public inquiry as further issues have been uncovered or other courses of action.
 3. If, as a result of the evidence produced by the operator at the ICH the Deputy Head of TRU decides that no further action (NFA) is required, or that no undertakings are required (because remedial action has already been completed by the operator), but that a warning should still be issued, then they can do so without further reference back to the Head of the TRU.

The outcome of either a PH or an ICH must be recorded on the operator's record.

ANNEX 6 – DISQUALIFICATION

SECTION 25 – THE GOODS VEHICLES (LICENSING OF OPERATORS) ACT (NORTHERN IRELAND) 2010

25. (1) Where, under section 23(1) or 24(1), the Department directs that an operator's licence be revoked, the Department may order the person who was the holder of the licence to be disqualified (either indefinitely or for such period as the Department thinks fit) from holding or obtaining an operator's licence; and so long as the disqualification is in force, notwithstanding anything in section 12 or 21, no operator's licence may be issued to that person.

(2) If a person applies for or obtains an operator's licence while disqualified under subsection (1)

- (a) the person is guilty of an offence and liable on summary conviction to a fine not exceeding level 4 on the standard scale, and
- (b) any operator's licence issued on the application, or (as the case may be) the operator's licence obtained by that person, shall be void.

(3) Where the Department makes an order under subsection (1) in respect of any person, the Department may direct that if that person, at any time or during such period as the Department specify

- (a) is a director of, or holds a controlling interest in
 - (i) a company which holds a licence of the kind to which the order in question applies, or
 - (ii) a company of which such a company is a subsidiary, or
- (b) operates any goods vehicles in partnership with a person who holds such a licence, that licence of that company or, as the case may be, of that person, shall be liable to revocation, suspension or curtailment under section 23.

(4) The powers conferred by subsections (1) and (3) in relation to the person who was the holder of a licence shall be exercisable also

- (a) where that person was a company, in relation to any director of that company, and
 - (b) where that person operated vehicles under the licence in partnership with other persons, in relation to any of those other persons;
- and any reference in this section or in section 23 or 26 to subsection (1) or (3) includes a reference to that subsection as it applies by virtue of this subsection.

(5) Where the Department makes any order disqualifying a person under subsection (1), it may at any time—

- (a) cancel that order together with any direction that was given under subsection (4) when the order was made;
- (b) cancel any such direction; or
- (c) with the consent of the person disqualified, vary the order or any such direction (or both the order and any such direction).

(6) Where an operator's licence is suspended under this section, the licence remains in force during the time of its suspension subject to the limitation that no vehicles are authorised to be used under it.

(7) For the purposes of this section a person holds a controlling interest in a company if the person is the beneficial owner of more than half its equity share capital (as defined in section 548 of the Companies Act 2006 (c. 46)).

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