



# SENIOR TRAFFIC COMMISSIONER

Statutory Document No. 0

## INTRODUCTION

### INCLUDING HOW TO USE THE STATUTORY GUIDANCE AND STATUTORY DIRECTIONS

This document is issued pursuant to section 4C of the Public Passenger Vehicles Act 1981 (as amended). Representative organisations have been consulted in accordance with that provision.

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Senior Traffic Commissioner

## Introduction

- a) The Documents containing the Senior Traffic Commissioner's Statutory Guidance and Statutory Directions ("Statutory Documents") were first issued in December 2011 to coincide with the implementation of EU Regulations.
- b) The construction of the Statutory Documents reflects the different powers of the Senior Traffic Commissioner and how they impact those that fall within the traffic commissioners' jurisdictions. I am grateful for the extremely valuable dialogue that traffic commissioners continue to have with industry and other stakeholders. I am also indebted to the traffic commissioners who have made a significant contribution to the development of the attached.
- c) The application of the Regulators' Code is limited in terms of the traffic commissioners' duties and not relevant to judicial decision making. However, I am obliged to have regard to it when developing policies and procedures. The Statutory Documents describe the application of legal discretions and indicate a proportionate approach to the imposition of regulatory burdens and in doing so provide guidance and advice to those operators and drivers who are regulated by traffic commissioners. In developing the guidance, account is taken of the general duty to promote growth. This fits well with the stated intention to ensure fair competition through a consistent approach to the regulatory requirements.
- d) The Statutory Documents therefore provide greater transparency to the way in which traffic commissioners approach their judicial duties and the licensing and other work conducted outside the tribunal room. They also set the framework for instructions to members of staff acting in support of the traffic commissioners.
- e) The Statutory Documents are clearly defined. They are published as an available resource for all applicants, operators, transport managers, vocational drivers, and other interested parties. The other Statutory Documents are as follows:
  - 1. Good Repute and Fitness
  - 2. Finance
  - 3. Transport Managers
  - 4. Operating Centres, Stable Establishments and Addresses for Service
  - 5. Legal Entities (including Insolvency and Regulation 31 & Section 57 Applications)
  - 6. Vocational Driver Conduct
  - 7. Impounding
  - 8. Delegation of Authority (in terms of Staff and Multiple Licence Holders)
  - 9. Case Management
  - 10. Principles of Decision Making & the Concept of Proportionality
  - 11. Format of Decisions (including Publication, Written Reasons and Decisions)
  - 12. Appeals
  - 13. PSV Operations
  - 14. Local Bus Services in England (outside London) and Wales

## GUIDANCE

1. The Senior Traffic Commissioner for Great Britain issues the following Guidance under section 4C(1) of the Public Passenger Vehicles Act 1981 (as amended) to provide information as to the way in which the Senior Traffic Commissioner believes that traffic commissioners should interpret the law relating to the application of the Statutory Documents. This Guidance may be subject to decisions of the higher courts and to subsequent legislation.
2. Traffic commissioners are appointed by the Secretary of State under section 4 of the Public Passenger Vehicles Act 1981. One of the traffic commissioners is appointed by the Secretary of State to act as the Senior Traffic Commissioner under section 4A of the 1981 Act. Section 4B of the 1981 Act confers powers on the Senior Traffic Commissioner to deploy any traffic commissioner or deputy traffic commissioner as they may determine. Schedule 2 of the 1981 Act provides for deputy traffic commissioners who are deployed as deputy traffic commissioners for Great Britain, whilst a deputy traffic commissioner for the Scottish Traffic Area is able to undertake reserved matters within the meaning of the Scotland Act 1998. Administrative arrangements for both traffic commissioners and deputy traffic commissioners, including terms of appointment and provision for training, are detailed in the Traffic Commissioners Administrative Policy Guidelines.<sup>1</sup>

### Relevant Powers of the Senior Traffic Commissioner

3. Section 4(4) of the Public Passenger Vehicles Act 1981 requires that traffic commissioners act under general directions of the Senior Traffic Commissioner and, in contrast, that they shall have regard to any guidance issued by the holder of that office.
4. Therefore the Senior Traffic Commissioner has two relevant powers:
  - section 4C(1)(a), the power to issue guidance; and
  - section 4C(1)(b), the power to issue general directions.
5. Whilst both provisions are directed at traffic commissioners, they are separate powers and the statutory documents are therefore separated in to Statutory Guidance and Statutory Directions. Subsection (2) of the 1981 Act provides an indication of what might be the subject of guidance, and subsection (3) in respect of general directions. Whilst these lists are not exhaustive there is a clear implication that Parliament intended that those matters covered by subsection (2) i.e. guidance, should not be the subject of directions and vice versa. It is therefore through Statutory Guidance that the Senior Traffic Commissioner can indicate the meaning and operation of any enactment or instrument.
6. The Upper Tribunal has recognised that the Statutory Documents provide a useful starting point.<sup>2</sup> They are intended to provide a consistent basis for decision making and have been developed with regard to the Regulator's Code. As the Upper Tribunal has made clear, in considering regulatory action a traffic commissioner needs to reflect on what is required as a deterrent, not only to the

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<sup>1</sup> <https://www.gov.uk/government/publications/administrative-policy-guidance-for-the-traffic-commissioners>

<sup>2</sup> e.g. [2014/013 MM Telford Ltd & RMT Transport Ltd](#)

individual party but to others within the industry.<sup>3</sup> However that Code has limited application to individual tribunal decisions.<sup>4</sup> The Upper Tribunal (and its predecessor) has made clear on many occasions that each case must be considered on its own merits. Consistency of approach should not be mistaken for uniformity of decisions.<sup>5</sup> Inevitably the legal concept of proportionality (which requires traffic commissioners to weigh the facts as they find them from the evidence before them and to determine what is the appropriate direction to make based on the objects of the legislation) means that each case will involve a collection of different and variable factors. This is not always well understood, even within the regulated industries, and its effect is that the Statutory Guidance and Statutory Directions provide starting points for anticipated action by traffic commissioners.

## Use of Case Law

7. The post of traffic commissioner was created by statute and traffic commissioners can only carry out those functions permitted by the law.
8. Any interpretation of the law can only be current as at the date of publication. Annex 1 summarises the position following the United Kingdom's withdrawal from the European Union. In the absence of definitions within the legislation the Statutory Guidance relies on case law to assist traffic commissioners. The nature of appeals from the decisions of traffic commissioners means that points of law are not always fully argued before the Upper Tribunal. Where the appeal is fully argued, for instance where the Secretary of State or another party has been permitted to be represented, that case provides a potentially binding precedent. In other cases, the Senior Traffic Commissioner has sought to identify and apply principles or an approach to an issue which might also assist traffic commissioners in their deliberations. Inevitably the footnotes cannot provide an exhaustive list of the relevant provisions and case law, for which it may be best to refer to the digest of the Administrative Appeals Chamber of the Upper Tribunal.<sup>6</sup> Where it may be necessary to refer to another Statutory Document this is also indicated.
9. In referring to the decisions of the Upper Tribunal the citations relied upon throughout the Statutory Guidance and Statutory Directions are those which accord with the search facility provided on the HM Courts and Tribunal Service web site<sup>7</sup>, so as to ensure accessibility.
10. There are long established common law duties on tribunals to ensure the sufficiency of reasons.<sup>8</sup> The Supreme Court has held that the duty to give reasons may go beyond the tribunal.<sup>9</sup> The Statutory Guidance in particular should assist traffic commissioners in identifying useful case law. The Statutory Directions

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<sup>3</sup> [2013/047 Dundee Plant Co. Ltd](#) and [2014/024 LA & Z Leonida trading as ETS](#)

<sup>4</sup> Section 32 of the Legislative and Regulatory Reform Act 2006, under which Act the Regulations Code is issued, makes clear that the Code does not apply to civil proceedings, which includes a Public Inquiry

<sup>5</sup> [2003/327 The Fox \(A1\) Ltd](#)

<sup>6</sup> <http://administrativeappeals.decisions.tribunals.gov.uk/Decisions/trafficCommissioners.htm>

<sup>7</sup> Post January 2016 decisions:

[www.gov.uk/administrative-appeals-tribunal-decisions?tribunal\\_decision\\_categories%5B%5D=transport-traffic-commissioner-and-doe-ni-appeals](http://www.gov.uk/administrative-appeals-tribunal-decisions?tribunal_decision_categories%5B%5D=transport-traffic-commissioner-and-doe-ni-appeals)

Pre January 2016 decisions: <http://transportappeals.decisions.tribunals.gov.uk//Aspx/Default.aspx>

<sup>8</sup> See Statutory Guidance and Statutory Directions on the Format of Decisions

<sup>9</sup> [Ghandi Nawaf Mallak v Minister for Justice, Equality and Law Reform \[2012\] IESC 59](#)

should give confidence to staff members to make prompt decisions, particularly when acting under delegations.

## DIRECTIONS

11. The Senior Traffic Commissioner for Great Britain issues the following Directions to traffic commissioners under section 4C(1) of the Public Passenger Vehicles Act 1981 (as amended). These Directions are addressed to the traffic commissioners in respect of the approach to be taken by staff acting on behalf of individual traffic commissioners and dictate the operation of delegated functions.

### Basis of Directions

12. The following direction is issued under section 4C(1)(b) of the 1981 Act particularly to assist support staff and in the interests of adopting a consistent approach to decision making.
13. The statutory provisions require traffic commissioners to act under general directions of the Senior Traffic Commissioner but to only have regard to Statutory Guidance. As with any statutory power it must be exercised in accordance with public law principles. Accordingly, the power under section 4C(1)(b) must be used for the stated intention of Parliament and cannot be used to circumvent those intentions. The Senior Traffic Commissioner acknowledges that Statutory Guidance and Statutory Directions cannot anticipate any legal changes and may therefore be subject to decisions of the higher courts and to subsequent legislation.
14. Members of staff are obliged to follow the Statutory Directions unless specifically directed to do otherwise by a traffic commissioner. Whenever the Statutory Directions, as published, are exceeded then an exception report to the Head of the Office of the Traffic Commissioner must be prepared. Where a traffic commissioner finds legal grounds not to follow the current Statutory Guidance, the Senior Traffic Commissioner directs that the individual traffic commissioner must record detailed reasons for departing from the published Statutory Guidance in writing.
15. The Court of Appeal has considered the question of whether there is a general requirement as to the sufficiency of reasons<sup>10</sup>. *The giving of reasons may among other things concentrate the decision-maker's mind on the right questions; demonstrate to the recipient that this is so; show that the issues have been conscientiously addressed and how the result has been reached or alternatively alert the recipient to a justiciable flaw in the process. On the other side of the argument, it may place an undue burden on decision makers; demand an appearance of unanimity where there is diversity; call for the articulation of sometimes inexpressible value judgments; and offer an invitation to the captious to comb the reasons for previously unsuspected grounds of challenge.*
16. The Upper Tribunal has two guiding principles: a party is entitled as a matter of law to know why an adverse decision has been reached, and the decision-maker is obliged to demonstrate that they have conducted the appropriate balancing exercise and reached a decision based only on relevant matters<sup>11</sup>. The Upper

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<sup>10</sup> [R \(Asha Foundation\) v Millennium Commission \[2003\] EWCA Civ 88](#) and adopted the same approach outlined by Sedley J in [R v The Universities Funding Council Ex parte The Institute of Dental Surgery \[1993\] EWHC Admin 5](#)

<sup>11</sup> See Statutory Guidance and Statutory Directions on the Principles of Decision Making

Tribunal expects an adequate and intelligible statement of reasons, whether delivered in writing or in person (*ex tempore*).

17. It is accepted that the interactive nature of a public inquiry may require a traffic commissioner to engage with an operator in order to test the evidence and to encourage adherence to high standards and the regulatory regime. Different considerations might apply to a decision on the papers but any decision must communicate sufficient reasons to satisfy the law and any appellate body. There is no need to set out every trivial factor or combination that has no influence on the decision. There are generally three main elements to the balancing exercise. First, the relevant factors should be identified; second, each relevant factor should be assessed; and third, the analysis must indicate the weight or significance that has been attached to the relevant factors with reasons<sup>12</sup>. Submissions need to be accurate and any decision must be adequately explained by staff acting on their behalf<sup>13</sup>.

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<sup>12</sup> [2007/459 KDL European Ltd & Kevin Lumsden](#), [2002/001 Bryan Haulage Ltd \(No1\)](#), [2013/080 Graham William Smith trading as Smiths Coaches](#), [2000/057 Yorkshire Rider Ltd & 062 First Bristol Buses](#), [2008/130 Lorna Eddie trading as Lorn Freight](#), [2004/439 Surrey CC v Ripley](#), [2005/466 Nijar Dairies Ltd](#), [2006/147 Castleton Turf and Topsoil Supplies Ltd](#), [2009/008 William Ball trading as Severn Valley Transport](#)

<sup>13</sup> [2016/018 Eric Leslie Brown](#)

## ANNEX 1 - WITHDRAWAL FROM THE EUROPEAN UNION

The European Union (Withdrawal) Act 2018, as amended by The European Union (Withdrawal Agreement) Act 2020, makes legal provision ratifying the Withdrawal Agreement with the European Union.

Section 1 repeals the European Communities Act 1972 but saves EU-derived provisions (English Language version only) into domestic legislation and allows for the incorporation of direct EU legislation.

Direct EU legislation, so far as operative immediately before exit day, forms part of domestic law on and after exit day. “Direct EU legislation” includes any EU regulation, EU decision or EU tertiary legislation, as it has effect in EU law immediately before exit day and so far as:

- (i) it is not an exempt EU instrument (section 20(1) and Schedule 6),
- (ii) it is not an EU decision addressed only to a member State other than the United Kingdom, and
- (iii) its effect is not reproduced in an enactment to which section 2(1) applies.

The legislation saves rights, powers, liabilities, obligations, restrictions, remedies and procedures which, immediately before exit day:

- (a) were recognised and available in domestic law by virtue of section 2(1) of the European Communities Act 1972, and
- (b) were enforced, allowed and followed accordingly,

and allows for them to continue on and after exit day, and to then be available in domestic law (and to be enforced, allowed and followed accordingly).

That provision does not apply to any rights, powers, liabilities, obligations, restrictions, remedies or procedures so far as they:

- (a) form part of domestic law by virtue of section 3, or
- (b) arise under an EU directive (including as applied by the EEA agreement) and are not of a kind recognised by the European Court or any court or tribunal in the United Kingdom in a case decided before exit day (whether or not as an essential part of the decision in the case).

The principle of the supremacy of EU law does not apply to any enactment or rule of law, passed or made on or after exit day.

A court or tribunal is not bound by any principles laid down, or any decisions made, on or after exit day by the European Court, and cannot refer any matter to the European Court on or after exit day. A court or tribunal may have regard to anything done on or after exit day by the European Court, another EU entity or the EU so far as it is relevant to any matter before the court or tribunal.

The Act allows a Minister to make regulations to prevent, remedy or mitigate any failure of retained EU law to operate effectively, or any other deficiency in retained EU law, arising from the withdrawal of the United Kingdom from the EU. In the event of any argument as to the application of EU-derived provisions made prior to the UK’s exit



from the EU and in particular during the transition period to 1<sup>st</sup> January 2021, traffic commissioners should refer to the full legislation.