

**This guidance has been  
superseded by  
Traffic commissioners: the  
principles of decision making  
and the concept of  
proportionality, January 2017**



# SENIOR TRAFFIC COMMISSIONER

Statutory Document No. 10

## THE PRINCIPLES OF DECISION MAKING & THE CONCEPT OF PROPORTIONALITY

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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*Beverly Bell*

Senior Traffic Commissioner

## **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 in relation to the principles of decision making and the concept of proportionality.<sup>1</sup>

### **Basis of Guidance**

2. This Guidance may be subject to decisions of the higher courts and to subsequent legislation. The Senior Traffic Commissioner has extracted the following principles and examples from existing legislation and case law.
3. The responsibility for taking action under the relevant legislation is vested in the individual traffic commissioner dealing with a case. That responsibility cannot properly be fettered, and the Public Passenger Vehicles Act 1981 and the Goods Vehicles (Licensing of Operators) Act 1995 both make it clear that a presiding commissioner may hold such an inquiry as he or she thinks necessary for the proper exercise of his or her functions.<sup>2</sup> 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. Traffic commissioners act as a single person tribunal. They therefore exercise their discretion with regard to the principle of proportionality as enshrined in British, European and human rights law.<sup>3</sup> The independence and impartiality of traffic commissioners is guaranteed as part of the obligations on the State.<sup>4</sup>
4. The legislation exists to ensure the promotion of road safety and fair competition and traffic commissioners will have regard to the relevant decisions of the higher courts and the principle of proportionality in deciding what intervention is commensurate with the circumstances of each individual case.<sup>5</sup> Where there has been non-compliance traffic commissioners 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.

### **Goods Vehicles Legislation: The Goods Vehicles (Licensing of Operators) Act 1995**

5. Section 35 of the Act provides that it is for the traffic commissioner to decide whether a public inquiry is necessary for the proper exercise of the

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<sup>1</sup> See also specific guidance etc: Statutory Guidance and Statutory Directions on Impounding; Statutory Guidance and Statutory Directions on Vocational Driver Conduct.

<sup>2</sup> See Statutory Guidance and Statutory Directions on Case Management for further references regarding independence.

<sup>3</sup> Human Rights Act 1998

<sup>4</sup> Al-Le Logistics Limited etc [2010] EWHC 134 (Admin) paragraph 92 and 2000/065 AM Richardson

<sup>5</sup> 2002/217 Bryan Haulage (No 2) (Transport Tribunal Appeal), Muck It Limited and Others v Secretary of State for Transport [2005] EWCA Civ 1124 and Crompton v Department for Transport North West Area [2003] EWCA Civ 64, Priority Freight Limited and Paul Williams (Transport Tribunal appeal 2009/225).

commissioner's functions under the Act and may decide to join two or more cases in one hearing.<sup>6</sup>

6. Any hearing will normally be in public subject to the circumstances arising set out below.
7. Paragraph 2 of Schedule 4 of the Goods Vehicles (Licensing of Operators) Regulations 1995 provides the following:

*The traffic commissioner may direct that the whole or any part of an inquiry be held in private if he 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 him to do so.*

*Where the hearing is in private the traffic commissioner may admit such persons as he considers 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 traffic commissioner may exclude such persons as he thinks fit from the part of the inquiry during which that question is considered.*

*Notwithstanding the foregoing provisions of this paragraph, a member of the Council on Tribunals or the Scottish Committee of that Council may be present in his capacity as such notwithstanding that the inquiry or part of an inquiry is not in public and such a person shall not be excluded under sub-paragraph (4).*

8. Regulation 20 of the Goods Vehicles (Licensing of Operators) Regulations 1995 applies Schedule 4 of those Regulations in respect of an inquiry held by a traffic commissioner. This allows the presiding traffic commissioner 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 traffic commissioner both on the evidence and generally. The traffic commissioner, 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 the traffic commissioner considers to be irrelevant, repetitious, frivolous or vexatious. The presiding traffic commissioner may exclude a person who, in the opinion of the traffic commissioner, is behaving in a disruptive manner. A traffic commissioner may proceed with an inquiry in the absence of any person entitled to appear if the traffic commissioner 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. A traffic commissioner may not take into account any written evidence or other matter in writing

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

received by him from any person before an inquiry opens or during any inquiry unless the traffic commissioner discloses it.

9. Section 27 of the Act requires a traffic commissioner to revoke a standard licence if at any time it appears that the licence-holder no longer meets the requirements of section 13A(2) (i.e. (a) has an effective and stable establishment in Great Britain, (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 13A(3) (i.e. (a) is of good repute, (b) is professionally competent, and (c) is not prohibited from being appointed as a transport manager).
10. Section 26 of the Act allows a traffic commissioner to direct, at his or her discretion, that an operator's licence be revoked, suspended or curtailed on grounds that can be summarised as follows:
  - (a) use of an unauthorised site as an operating centre;
  - (b) contravention of a licence condition;
  - (c) that during the last five years there has been;
    - (i) a relevant conviction<sup>7</sup> of the licence-holder;
    - (ii) a relevant conviction of a servant or agent of the licence holder<sup>8</sup>;
    - (iii) a prohibition in respect of an unfit or overloaded vehicle;
  - (ca) fixed penalty or conditional offer issued
  - (d) that during the last five years, there have been numerous convictions of the licence-holder or a servant or agent of his of offences set out in paragraph 5(j) of Schedule 2<sup>9</sup>;
  - (e) that the licence-holder made, or procured to be made, for the purposes of his application, an application for the variation of the licence, or a Schedule 4 application, a statement of fact that, whether to his knowledge or not, was false, or has not been fulfilled;
  - (f) that any undertaking recorded in the licence has not been fulfilled;
  - (g) that an individual licence-holder has been adjudged bankrupt or made the subject of a Debt Relief Order or, a company holding a licence has gone into liquidation (excluding voluntary liquidation);
  - (h) 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;
  - (i) that the licence is liable for revocation, suspension, curtailment following a direction under section 28 (4).
11. The offences set out at (d) above are –
  - (a) an offence under section 53 of the Road Traffic Act 1988 (plating certificates and 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) relating to –
    - (i) the maintenance of vehicles in a fit and serviceable condition;

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<sup>7</sup> See Statutory Guidance and Statutory Directions on Good Repute and Fitness.

<sup>8</sup> As above.

<sup>9</sup> See Annex 5.

- (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) Part V of the Transport Act 1968 or section 233 or 235 of the Road Traffic Act 1960 so far as applicable (by virtue of Schedule 10 to the 1968 Act) to licences or means of identification under that Part.

12. The condition on the licence imposes an obligation on the licence holder to inform the traffic commissioner of any change in the following requirements for a standard licence: transport manager, stable and effective establishment, financial standing. The traffic commissioner has discretion to grant a period of grace in respect of each of these requirements.
13. In the event of curtailment or suspension, the traffic commissioner may make a direction under section 26(6) that in effect any motor vehicle specified on the licence may not be used under any other operator's licence.
14. Section 28 of the Goods Vehicles (Licensing of Operators) Act 1995 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 traffic commissioner to vary an order. Paragraph 16(2) of Schedule 3 of the Goods Vehicles (Licensing of Operators) Act 1995 provides that where a traffic commissioner determines that the transport manager is no longer of good repute the traffic commissioner must order the disqualification of that transport manager but paragraph 17 allows the traffic commissioner 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.
15. Regulation 6 of the Goods Vehicles (Community Licences) Regulations 2011 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 competent authority (in this case traffic commissioners). Regulation 7 provides that where a traffic commissioner determines that the operator has lost their repute, s/he may order the permanent or temporary withdrawal of some or all of the certified copies or the community licence.

### **Passenger Carrying Vehicles Legislation: The Public Passenger Vehicles Act 1981**

16. Section 54 of the Act enables traffic commissioners to hold such public inquiries as they think fit in connection with the exercise of their functions. It also gives traffic commissioners discretion as to where to hold such public inquiries and to join two or more cases in one hearing. It imposes a requirement in respect of proper notification of a hearing and provides that public inquiries shall be held in public subject to the circumstances set out below.

- 17.** Paragraph 7 of The Public Service Vehicles (Traffic Commissioners: Publication and Inquiries) Regulations 1986 provides the following:

*A traffic commissioner may restrict in such manner as he directs attendance of the public at any inquiry so far as that inquiry relates to the financial position of any person, provided that a member of the Council on Tribunals or its Scottish Committee shall be entitled to attend notwithstanding that attendance is restricted.*

- 18.** Regulation 6 of the Public Service Vehicles (Operators' Licences) Regulations 1995 provides that a traffic commissioner shall not refuse an application for a licence, or grant it other than as requested, without giving the applicant an opportunity to state his or her case at an inquiry, save where the application or the applicant's conduct in relation to it is frivolous or unreasonable.
- 19.** Section 17(1) of the Act requires a traffic commissioner to revoke a standard licence if at any time it appears that the licence-holder no longer meets the requirements of section 14ZA(2) (i.e. (a) has an effective and stable establishment in Great Britain, (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 14ZA(3) (i.e. (a) is of good repute, (b) is professionally competent, and (c) is not prohibited from being appointed as a transport manager).
- 20.** Section 17(2) allows a traffic commissioner to direct that an operator's licence be revoked, suspended or curtailed on the grounds in section 17(3) that can be summarised as follows:
- (a) that the licence-holder made, or procured to be made, for the purposes of his application, an application for the variation of the licence, or a Schedule 4 application, a statement of fact that, whether to his knowledge or not, was false, or has not been fulfilled;
  - (aa) that any undertaking recorded in the licence has not been fulfilled;
  - (b) that there has been a contravention of any condition attached to the licence;
  - (c) that there has been a prohibition issued under section 69 of the Road Traffic Act 1988 or that the licence holder has been convicted of an offence under section 71(1)(a) or (b);
  - (d) that a restricted licence-holder no longer satisfies the requirements of Section 14ZB (i.e. to be of good repute and/or to be of appropriate financial standing);
  - (e) 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;
  - (f) that the licence is one where a traffic commissioner has made an order for disqualification pursuant to Section 28(4) of the Transport Act 1985.
- 21.** The condition on the licence imposes an obligation on the licence holder to inform the traffic commissioner of any change in the following requirements for a standard licence: transport manager, stable and effective establishment, financial standing. Section 26 of the Transport Act 1985 provides the power for a traffic commissioner to require an operator to notify which vehicles will be used under the licence. The traffic commissioner has discretion to grant a

period of grace in respect of each of these requirements, see paragraph 62 below.

22. Section 28 of the Transport Act 1985 provides for the disqualification of a person from holding an operator's licence and for that disqualification to be varied or cancelled on application to the traffic commissioner. Section 7B of the Public Passenger Vehicles Act 1981 provides that where a traffic commissioner determines that the transport manager is no longer of good repute the traffic commissioner must order the disqualification of that transport manager but section 7C allows the traffic commissioner 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.
23. Regulation 6 of the Public Passenger Vehicles (Community Licences) Regulations 2011 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 competent authority (in this case traffic commissioners). Regulation 7 provides that where a traffic commissioner determines that the operator has lost their repute, he/she may order the permanent or temporary withdrawal of some or all of the certified copies or the community licence

## Case Law

### General Approach

24. In essence, the legal principle of proportionality requires a traffic commissioner 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 traffic commissioner should not be punishment in itself, but designed to assist in the promotion and achievement of the legislation"*.<sup>10</sup> 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. Traffic commissioners must also have regard to the impact upon an operator of any regulatory action which might be taken in cases of non-compliance.
25. 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 warning.<sup>11</sup> 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 inquiry*.<sup>12</sup>

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<sup>10</sup> Shearer Transport Ltd & James Shearer

<sup>11</sup> 2008/268 Funstons Ltd

<sup>12</sup> 2012/023 JA & VC Fryer Farms

26. 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 could adversely affect the good reputation of the applicant or of those involved with the application, the traffic commissioner has jurisdiction to continue to consider that application.<sup>13</sup> The traffic commissioner is not limited to taking action against those directors (or partners) 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 time.<sup>14</sup>
27. The grant of an interim licence does not give rise to a legitimate expectation such that a traffic commissioner is prevented from taking subsequent action, particularly if made clear that further intervention remains an option.<sup>15</sup>
28. Traffic commissioners are reminded 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) [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 section 13(5). 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 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 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.”<sup>16</sup>*

### *The Burden and Standard of Proof*

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<sup>13</sup> 2002/8 Alkaline Limited

<sup>14</sup> 2008/688 & 745 David Pritchard & Brian Smith

<sup>15</sup> 2006/149 A & C Nowell

<sup>16</sup> 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)

29. Traffic commissioners are reminded that 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 traffic commissioner that the requirements are met but when taking action against an existing licence, the burden is on the traffic commissioner 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 requested.<sup>17</sup>
30. Section 26 of the Goods Vehicles (Licensing of Operators) Act 1995 and section 17(2) of the Public Passenger Vehicles Act 1981 both provide that a traffic commissioner may direct that a licence be revoked on the grounds outlined above; and under section 27 of the Goods Vehicles (Licensing of Operators) Act 1995 and section 17(1) of the Public Passenger Vehicles Act 1981 that a traffic commissioner 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<sup>18</sup> in contrast to the provisions relating to applications<sup>19</sup>.
31. Paragraph 6 of the Public Service Vehicles (Operators’ Licences) Regulations 1995 allows a traffic commissioner to refuse an application for a PSV licence where s/he finds the application or the applicant’s conduct to be frivolous or unreasonable.<sup>20</sup> For revocation to be possible under the discretionary or mandatory provisions it is the traffic commissioner who must be satisfied of the ground of revocation.<sup>21</sup> 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”*.<sup>22</sup>

### Proportionality

32. 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 discouraged.<sup>23</sup> Nor is it a matter of just ensuring consistency with other individual cases.<sup>24</sup> The legislation provides no definition of good repute, and so when a traffic commissioner is considering if an individual is of good repute the traffic commissioner can have regard to any matter, but in considering a company’s repute the traffic commissioner can

<sup>17</sup> 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.*

<sup>18</sup> Subject to Article 6 Regulations (EC) 1071/2009 for standard licences.

<sup>19</sup> Stay decision in Travel Express Ltd – a licence will be at risk and there are consequent public safety issues from the lack of a competent transport manager

<sup>20</sup> 2013/083 Ahmad Yusuf Kasam. The Oxford Dictionary definition of *frivolous* refers to an adjective with the following meaning: “not having any serious purpose or value”; *unreasonable* is defined as: “not guided by or based on good sense; beyond the limits of acceptability or fairness”

<sup>21</sup> Muck It Ltd and Others v. Secretary of State for Transport (2005) EWCA Civ 1124 on appeal from 2004/314

<sup>22</sup> 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

<sup>23</sup> 2003/300 Andrews (Sheffield)

<sup>24</sup> 2003/327 The Fox (A1) Ltd

have regard to all *material evidence*.<sup>25</sup> In practice these may amount to the same considerations.

33. 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 traffic commissioner is obliged to consider that conduct in so far as it relates to repute. Article 6(2)(b) of Regulation (EC) 1071/2009 indicates that the European Commission will draw up a further list of serious infringements indicating categories, types and degrees of seriousness, in addition to the most serious infringements. In the interim, Annex 3 contains useful starting points drawn from Upper Tribunal cases.
34. 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.
35. Traffic commissioners 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 manager. Consequently traffic commissioners 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 put out of business?”<sup>26</sup>). Article 6 of Regulation (EC) 1071/2009 requires that the traffic commissioner *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 traffic commissioner *finds that the loss of good repute would constitute a disproportionate response*, the traffic

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<sup>25</sup> See Statutory Guidance and Statutory Directions on Legal Entities and Statutory Guidance and Statutory Directions on Good Repute and Fitness.

<sup>26</sup> 2002/217 Bryan Haulage (no.2) – there is no material difference to the approach taken to proportionality in other jurisdictions, see the Upper Tribunal decision in 2013/026 Vince Larking Ltd by reference to R (Daly) v SoS for the Home Department [2001] 2 AC 532 and Bank Mellat v HM Treasury [2013] UKSC 39

commissioner may decide that good reputation is unaffected. If the traffic commissioner comes to this conclusion the reasons have to be recorded in the national register.

36. 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 traffic commissioners are 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 Parliament’s intent that the licensing system deliver road safety and fair competition through consistent application of the licence requirements.
37. 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 proceedings.<sup>27</sup>
38. 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 traffic commissioners 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 8<sup>28</sup> 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).
39. 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 serious event has occurred*”.<sup>29</sup> “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

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<sup>27</sup> 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

<sup>28</sup> 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.*

<sup>29</sup> 2013/022 David James Root t/a Orange Coach Travel

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".<sup>30</sup>

- 40.** 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.<sup>31</sup> All licence holders are required to have available the specified sum<sup>32</sup> of money. 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 traffic commissioner has the power to revoke. Whilst issues of proportionality come into play in determining whether there has been a loss of reputation those principles have limited application in a case where the operator has failed to have a transport manager as required by the legislation.<sup>33</sup> However it is open to the holder of a standard licence to request a period of grace<sup>34</sup> and a traffic commissioner should consider the potential impact of not allowing a period of grace.
- 41.** A traffic commissioner 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 reputation. 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?<sup>35</sup> 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 words.<sup>36</sup> Conditions may be imposed but traffic commissioners 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 a traffic commissioner is under no obligation to allow further undertakings to be complied with.<sup>37</sup>
- 42.** In cases involving poor maintenance, for example, DVSA may have carried out a recent and/or follow-up inspection before a public inquiry takes place. Findings must be made as at the date of the public inquiry and should take into

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<sup>30</sup> Stay decision in Highland Car Crushers Ltd

<sup>31</sup> 2012/034 Martin Joseph Formby T/a G&G Transport, 2012/020 A+ Logistics Ltd

<sup>32</sup> See Statutory Guidance and Statutory Directions on the Finance. In 2012/005 AND Haulage Ltd the Upper Tribunal avoided criticism of a suspension pending final determination in order to ensure protection for the public.

<sup>33</sup> Anglorom Trans (UK) Ltd v Secretary of State for Transport [2004] EWCA Civ 998 (30 July 2004 on appeal from 2003/343), see Statutory Guidance and Statutory Directions on Transport Managers

<sup>34</sup> See Statutory Guidance and Statutory Directions on Case Management at paragraph 63

<sup>35</sup> Redsky Wholesalers Ltd, Vince Larkin Ltd (As above)

<sup>36</sup> 2009/225 Priority Freight Ltd & Paul Williams, limited weight may be attached to untested promises - 2013/057 T Henderson Transport Ltd, NT/2013/082 Arnold Transport & Sons Ltd, in 2015/002 Shoretime Limited (later Leigh Rushworth Ltd) the Upper Tribunal concluded that if an individual carried on acting in a way he knew to be illegal, it is difficult to be confident that he would never adopt a similar approach again.

<sup>37</sup> 2010/076 Premier Beds Ltd

account the improvements made by the operator and any operator's good compliance record. Balancing all these matters against the consequences of losing the licence, traffic commissioners have 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 deficiencies.<sup>38</sup> 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 events.<sup>39</sup> 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 hearing.<sup>40</sup>

43. *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 commissioner'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 commissioner'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 commissioner'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 view.*<sup>41</sup>
44. 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 whole.<sup>42</sup> In cases of deception traffic commissioners are entitled to ask: would other operators who have heard of this ruse consider the perpetrator to be of good repute?<sup>43</sup>
45. 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 so as to ensure that the systems work.<sup>44</sup> The Transport Tribunal expressly dissented from the proposition that a traffic commissioner 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 the benefits of a licence are explicit (e.g. in relation to drivers' hours and tachographs<sup>45</sup>). 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 liability<sup>46</sup> it is part of the operator's duty to see that the traffic commissioner is informed of the relevant facts. Tachograph offences must always be viewed seriously but also in

<sup>38</sup> 2009/410 Warstone Motors t/a The Green Bus Service

<sup>39</sup> 2014/059 Randolph Transport Ltd & Catherine Tottenham

<sup>40</sup> 2011/041 Tarooq Mahmood t/a TM Travel

<sup>41</sup> 2011/046 Eurofast (Europe) Ltd, 2011/360 Professional Transport Ltd

<sup>42</sup> 2007/459 KDL European Ltd & Kevin Lumsden, 2010/035 S & A Curtis Transport, 2015/021 J O'Doherty Haulage Ltd refers to the corrosive effect on the operator licensing regime.

<sup>43</sup> 1996/H46 Mark Anthony Browne t/a Brownes Transport Appeal, as approved in 2002/009 George Gollop & Direct Movement Services Ltd

<sup>44</sup> 1999/L56 Alison Jones t/a Jones Motors as approved 2000/45 Martin Jolly Transport Ltd, 2005/236 Neil Alldritt t/a Maple Motors

<sup>45</sup> Vehicle Inspectorate v Nuttall (1999) RTR 264 HL

<sup>46</sup> 2008/413 Al-Le Logistics Ltd

perspective<sup>47</sup> to the particular case. In cases of persistent breaches it will be difficult for an operator to contend that it has complied with its undertaking. An undertaking requires a rigorous regime of checks.<sup>48</sup> 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 reasonable.<sup>49</sup>

46. Where there have been serious failures in maintenance and/or repeated failures to ensure the roadworthiness of vehicles and/or trailers a traffic commissioner 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 operation.<sup>50</sup>
47. 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 repute.<sup>51</sup>
48. 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. In that case the position of a goods operator, who might seek interim authority to continue operating may differ from that of a PSV operator where that opportunity is not available under the legislation. Traffic commissioners might, as the case requires, consider all matters (including disqualification) holistically, in order to avoid a disproportionate outcome. When considering repute generally traffic commissioners should remind themselves that the opportunity for rehabilitation through the completion of specified measures is only available to transport managers, which allows the decision to be *tempered*.<sup>52</sup> 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 CPC.<sup>53</sup> A more detailed examination of the case law as it applies to the repute of transport managers is set out in the relevant Statutory Guidance and Statutory Directions on Transport Managers.

### *Procedure*

49. The traffic commissioner 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 safe-guarded.<sup>54</sup>
50. If a traffic commissioner intends to take action at public inquiry it is desirable to give a warning or at least indicate the likely options to enable the operator to

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<sup>47</sup> 2008/780 South Lincs Plant Hire

<sup>48</sup> 2001/007 Alkaline UK

<sup>49</sup> 2001/049 Norbert Dentressangle

<sup>50</sup> 2003/194 Smith's Distribution

<sup>51</sup> 2003/107 R A Meredith & Son (Nurseries) Ltd and Article 13 Regulation (EC) 1071/2009

<sup>52</sup> 2012/071 Silvertree Transport Ltd

<sup>53</sup> 2014/050 Andrew Harris t/a Harris of Leicester, Randolph Transport Ltd & Catherine Tottenham (As above)

<sup>54</sup> 2003/094 Dawlish Coaches, see Statutory Guidance and Statutory Directions on Case Management

make representations about the possible effect on the business.<sup>55</sup> There will be cases where the process of making representations will be assisted by a provisional indication of what the traffic commissioner has in mind. In this situation the traffic commissioner should use a form of words which clearly demonstrates that he or she retains an open mind. The traffic commissioner can then proceed to conduct a balancing exercise following the receipt of representations.<sup>56</sup> Traffic commissioners should consider the weight to be attached to the operator's explanations for any shortcomings and give credit for steps taken to improve systems. These matters are particularly important when considering the balancing exercise to be undertaken before making a direction under section 26 or 27 of the Act. Traffic commissioners are reminded that more weight may be given to cogent evidence provided by the licence holder intended to show the likely effect of an order that the traffic commissioner is considering and that less weight may be given to mere assertions on the part of the licence holder.

- 51.** For standard licences where a traffic commissioner 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 given.<sup>57</sup> Traffic commissioners 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 that operator's mind and allow further steps to be taken to improve the systems in question.<sup>58</sup> 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 made.<sup>59</sup> 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 a traffic commissioner will have an open mind.<sup>60</sup> The question of the likely effect upon the operator should be properly examined and advocates are expected to assist in this exercise<sup>61</sup>. The traffic commissioner might also take a view on when a particular direction might be implemented.<sup>62</sup> A decision not to disqualify might also be used to indicate credit for any positive features identified.<sup>63</sup>
- 52.** On findings that an operator has failed to meet the standards required it is proportionate for a traffic commissioner to refuse a variation application until such time as the traffic commissioner can be satisfied that everything is functioning properly and to request further checks on any assurances given at public inquiry.<sup>64</sup>

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<sup>55</sup> 1997/J37 Galloway Refrigerated Transport Ltd as approved in 2002/167 A Cooper

<sup>56</sup> 2002/197 Mason Haulage

<sup>57</sup> See Article 15 Regulation (EC) 1071/2009

<sup>58</sup> 2004/036 G Jenkins

<sup>59</sup> 2002/167 A Cooper

<sup>60</sup> Professional Transport Ltd (see above), 1997/J37 Galloway Refrigerated Transport Ltd

<sup>61</sup> 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)

<sup>62</sup> 2003/287 Malco Freight

<sup>63</sup> 2010/073 Paul Anthony Faulkner

<sup>64</sup> Malco Freight (as above)

- 53.** The above case law must be interpreted so as to give effect to Article 14 of Regulation (EC) 1071/2009. There is now power to disqualify a transport manager. Article 14 provides that where a traffic commissioner finds that a transport manager has lost his or her reputation the traffic commissioner 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 unless and until a specified rehabilitation measure has been completed. That may be a specific period of disqualification or, for instance, the obtaining of a new Certificate of Professional Competence<sup>65</sup>. As indicated above paragraph 17 of Schedule 3 of the Goods Vehicles (Licensing of Operators) Act 1995 and Section 7C of the Public Passenger Vehicles Act 1981 allow the traffic commissioner 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 from those cases relating to disqualification.
- 54.** An order for disqualification can only be made against the operator or a director/equivalent of the corporate body (but not for instance a company secretary<sup>66</sup>) or a transport manager (under different provisions). Disqualification of an operator cannot be imposed without an order for revocation<sup>67</sup> (and can be made following revocation of an interim licence<sup>68</sup>) but an order for disqualification does not necessarily follow revocation. Disqualification is a potentially significant infringement of rights<sup>69</sup> and the Upper Tribunal has indicated that whilst there is no 'additional feature' required to order disqualification it is not a direction which should be routinely ordered.<sup>70</sup> There may be cases in which the seriousness of the operator's conduct is such that a traffic commissioner may properly consider that both revocation and disqualification are necessary for the purposes of enforcing the legislation.<sup>71</sup> 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 disqualified.<sup>72</sup>
- 55.** Section 28(1) of the Goods Vehicles (Licensing of Operators) Act 1995 permits disqualification to be ordered either indefinitely or for such period as the traffic commissioner thinks fit. The periods are expressed to be in the alternative, with there being no power to impose a minimum period as section 28(6) expressly

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<sup>65</sup> Silvertree Transport Ltd (As above)

<sup>66</sup> 2002/094 BKG Transport

<sup>67</sup> 2009/498 G Sunderland & J Warburton

<sup>68</sup> 2012/013 Russet Red Ltd

<sup>69</sup> 2000/006 K Jaggard

<sup>70</sup> 2002/030 Steven Lloyd t/a London Skips

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

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

empowers traffic commissioners to cancel an order for disqualification at any time.<sup>73</sup>

56. Traffic commissioners are 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 this.<sup>74</sup> *“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”*.<sup>75</sup> It is clear that each case must be considered on its own merits<sup>76</sup> and relies on the traffic commissioner 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.
57. In imposing a disqualification there should be an assessment of the evidence in setting the appropriate length of the order.<sup>77</sup> Once the period of time is determined traffic commissioners are reminded of the need to set out the relevant findings of fact, the analysis of the relevant actions of those concerned and the appropriate balancing exercise, so that the licence holder is aware of the material used to justify disqualification.<sup>78</sup> Good practice dictates that if the decision is issued orally that written confirmation of the oral decision is sent to those the subject of the disqualification but it is likely that the majority of orders for disqualification will be encompassed in traffic commissioners’ 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 (and the period) is appropriate.<sup>79</sup>
58. Where a former licence holder or individual applies to vary or cancel an order for disqualification the burden lies with the applicant and the test is what is appropriate in the public interest, and the traffic commissioner will need to consider all relevant aspects. Each case turns on its own facts. Protection of the public<sup>80</sup> is just one of several factors to be taken into account when deciding what is necessary.<sup>81</sup>

### Active Case Management

59. The Senior Traffic Commissioner considers that by following these principles in hearings traffic commissioners will be able to actively manage the case whilst ensuring that cases are dealt with justly, so far as is practicable by –
- (a) ensuring that all evidence is served by the Office of the Traffic Commissioner in a timely manner;
  - (b) ensuring that any written evidence and representations from the operator and/or its representative is provided to the presiding traffic commissioner

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<sup>73</sup> 2001/006 M-Line

<sup>74</sup> 2014/040&41 C G Cargo Ltd and Sukhwinder Singh Sandhu

<sup>75</sup> 2012/044 Highland Car Crushers Ltd, 2012/56 & 57 Deep Transport Ltd & Midland Transport Ltd

<sup>76</sup> Katherine Oliver (as above) - see paragraph 12

<sup>77</sup> 2005/426 K S Oakhal

<sup>78</sup> 2004/373 Rai Transport (Midlands) Ltd, 2013/042 Project Movements Ltd

<sup>79</sup> 2005/367 K Jaggard

<sup>80</sup> 2007/61 RD Land

<sup>81</sup> 2008/593 Martin John Graves

- sufficiently in advance of the hearing so that it can be read and considered by the commissioner in advance;
- (c) ensuring that operators provide the documents requested by the Office of the Traffic Commissioner in advance of the public inquiry where requested to do so;
  - (d) identifying the issues for determination by the traffic commissioner at an early stage;
  - (e) ensuring value for money in the use of time and resources (including considering the need to call witnesses whose evidence may be agreed);
  - (f) dealing with the case in ways which are proportionate to –
    - (i) the size and type of licence/s involved
    - (ii) the nature and scale of the breaches
    - (iii) the complexity of the issues
    - (iv) the likely orders and directions to be made
    - (v) the likely effect upon the operator of the proposed orders and directions; and
  - (g) ensuring that the public inquiry is listed expeditiously and that an appropriate time estimate is allocated.<sup>82</sup>

### *Communicating the Decision*

- 60.** The letter communicating the traffic commissioner'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 decision.<sup>83</sup>

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<sup>82</sup> See Statutory Guidance and Statutory Directions on Case Management.

<sup>83</sup> 2009/204 Verrechia, see Statutory Guidance on Written Reasons, Decisions and Publication and Article 15 of Regulation (EC) 1071/2009 regarding standard licences.

## DIRECTIONS

- 61.** The Senior Traffic Commissioner for Great Britain issues the following Directions to traffic commissioners under section 4C(1) of the 1981 Act (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 in relation to the principles of decision making and the concept of proportionality.

### Basis of Directions

- 62.** The criminal courts are concerned with punishing those who have committed criminal offences, whereas traffic commissioners are 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.
- 63.** It has also long been the case that members of the Office of the Traffic Commissioner and Licensing have prepared detailed submissions to the traffic commissioners about operators and whether to grant applications (outside permitted delegations<sup>84</sup>) or whether to convene public inquiries. Recognised senior staff members have extensive knowledge of the regulatory framework, the legislation and the issues that concern traffic commissioners.
- 64.** 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.
- 65.** 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 traffic commissioner is satisfied that standards have been restored and maintained. If appropriate, DVSA will be asked to carry out checks to establish suitability. A case submission should be made to the traffic commissioner to this effect.
- 66.** Allegations or matters of fact relating to the potential exercise of powers under section 17 of the Public Passenger Vehicles Act 1981, the Road Traffic Act 1988, and/or sections 26 and 27 of the Goods Vehicles (Licensing of Operators) Act 1995 will need to be considered by the traffic commissioner and reference should be made to the relevant Statutory Guidance and Statutory Directions.
- 67.** Members of staff should anticipate, when preparing written submissions, that the traffic commissioner will wish to consider formal regulatory action where:

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<sup>84</sup> See Statutory Guidance on Delegations.

- 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.

### **Alternative Disposals to a Public Inquiry**

- 68.** As the case law makes clear there is no requirement on traffic commissioners 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 DVSA investigation. It may, however, be appropriate to request further comments on the first occasion when operators are found to have incurred a small number of prohibitions; minor failings in their maintenance system; a small number of tachograph errors; vehicle excise duty offences; minor convictions and any other offences not proceeded with. In these cases a letter can be sent to the operator requesting an explanation within a given timetable as to the reasons for the shortcomings and the steps being taken to overcome them, and to seek further assurances. In the event of convictions, the operator will be asked to confirm whether any further offences are outstanding. A satisfactory reply might result in a recommendation for an alternative disposal to a public inquiry.
- 69.** The public inquiry process has been shown to be effective in ensuring compliance by inviting operators to attend before the traffic commissioner to explain their actions and outline how alleged failures occurred in the first instance. This can enable the traffic commissioner 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 (and its predecessor) has repeatedly emphasised the value of the presiding traffic commissioner meeting the operator/witness and hearing the evidence firsthand. The Senior Traffic Commissioner is clear that those benefits should be maintained.
- 70.** 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 and 14 days for PSV operators. However, pressure on limited tribunal resources may delay the hearing of cases. As the tools and mechanisms available to the enforcement agencies (particularly DVSA) 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 traffic commissioners' tribunal resources at those same operators and drivers and to divert the less serious cases away from the formal public inquiry process.
- 71.** The decision as to whether to convene a public inquiry or to find an alternative method of disposal always remains with the traffic commissioner, but the Senior Traffic Commissioner encourages the use of alternative disposals for cases which may not require serious intervention and where compliance might be achieved without convening a public inquiry.

- 72.** There are a number of options available to the traffic commissioner 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 (and in certain cases their drivers). 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, a senior staff member (not below the grade of senior team leader) may recommend, by way of submission, that the operator attend a meeting with that senior team leader at the Office of the Traffic Commissioner;
  - in more complex or borderline cases where a public inquiry may be necessary, the traffic commissioner 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 in the traffic commissioner concluding that they can deal with the matter by some other method.
- 73.** When one or more warning letters have been issued in the past five years, it is anticipated that the traffic commissioner will wish to consider regulatory action. The traffic commissioner, however, might also consider a ‘final’ warning letter. In appropriate cases the traffic commissioner may request DVSA to carry out a routine check to ensure compliance.
- 74.** The purpose of a meeting with a senior member of staff 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 senior member of staff to make an assessment of the operator’s approach to future compliance.
- 75.** The procedure for determining the types of cases that are suitable for a meeting with the senior team leader is at Annex 4. The senior member of staff has no authority to act outside the direction of the traffic commissioner, (as provided for in the protocol). In the event that the operator fails, without good reason, to respond to the meeting invitation, the senior member of staff must refer the case back to the traffic commissioner forthwith, with a recommendation that the operator be called to public inquiry.
- 76.** In more borderline cases where a public inquiry looks to be required, a traffic commissioner 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 traffic commissioner can determine the matter without use of their regulatory powers.
- 77.** The same principles that apply to the convening of public inquiries and meetings with the senior team leader apply to the convening of preliminary hearings. The appearance of the operator before the traffic commissioner enables the operator to explain their actions and how the failures happened in the first instance, to allow the traffic commissioner 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 presiding traffic commissioner 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 traffic commissioner's time in determining whether a public inquiry is really necessary.

78. The type and number of cases (together with the outcome) that are dealt with by way of a preliminary hearing or a meeting with a senior member of staff will be recorded in the same way as public inquiries and statistics will be kept for inclusion in the traffic commissioner's annual reports.

## **The Public Inquiry**

79. As indicated above, the value of hearing all of the relevant evidence and submissions at public inquiry is long established and traffic commissioners will be careful to ensure that each case is dealt with on its own facts. Traffic commissioners will note 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 heard and conversely that a case that initially appears not to be serious can then in fact require severe regulatory action.
80. To ensure a consistency of approach at the hearing of the public inquiry itself Annex 3 sets out some suggested starting points. It does not deal with when a matter might be called to a hearing. However the presiding traffic commissioner 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 a traffic commissioner. Annex 3 refers to the most common occurring concerns. Traffic commissioners will take into account any other concerns that are raised and take whatever action appears to be appropriate in the individual circumstances.
81. Annex 3 considers common areas of negative conduct experienced and the positive 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.
82. 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.
83. 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, a traffic commissioner 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**

- 84.** The role of a public inquiry clerk (caseworker) is to provide administrative support to the traffic commissioner to allow him/her to carry out their statutory duties in relation to public inquiries and/or driver conduct hearings. 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 traffic commissioner with general enquiries. If a caseworker is in any doubt as to the traffic commissioner's intentions they should make the appropriate enquiries of the traffic commissioner.

## **Mandatory Requirements**

- 85.** 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 licences 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 inquiry.<sup>85</sup>
- 86.** Holders of standard goods and PSV 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 he or she meets the professional competence requirement.<sup>86</sup>
- 87.** When considering whether the mandatory requirements are met the traffic commissioner may only make an adverse finding if there is sufficient evidence to satisfy him or her 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 traffic commissioner may need to consider whether the relevant acts or omissions call in to question the repute of the transport manager.<sup>87</sup>
- 88.** For standard licences Regulation (EC) 1071/2009 (at Annex 1) allows but does not require the traffic commissioner 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 traffic commissioner decides whether to allow time for rectification and for what period. The maximum periods allowed under the legislation are as follows:

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<sup>85</sup> See Statutory Guidance and Statutory Directions on Finance.

<sup>86</sup> See Statutory Guidance and Statutory Directions on Transport Managers.

<sup>87</sup> See Statutory Guidance and Statutory Directions on Good Repute and Fitness.

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>

## Action to be Considered at Public Inquiries

- 89.** In deciding what action is proportionate traffic commissioners will wish to carry out a balancing exercise. Invariably, this involves consideration of the seriousness of any breaches which the traffic commissioner has found to have occurred and what has 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 no longer be 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 Statutory Guidance will then apply.

## New Operators

- 90.** 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 DVSA 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 Senior Traffic Commissioner is mindful of the principles outlined in the Regulators' Code.<sup>88</sup> 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 'S' endorsed prohibition of a vehicle or tachograph records have not been produced, it is more likely that the traffic commissioner will wish to consider taking action against that licence.

<sup>88</sup>[www.gov.uk/government/publications/regulators-code](http://www.gov.uk/government/publications/regulators-code)

## Multiple Licence Holders and the Lead Traffic Commissioner

- 91.** The legislation enables an operator's licence to be subject to revocation, suspension or curtailment (or in the case of public service vehicle (PSV) operators, a reduction in the number of authorised vehicles). It is for the traffic commissioner who hears the case to decide, with regard to the nature and circumstances of each case, what action is appropriate. A multiple licence holder may face regulatory action against one or more of its operator licences, and any determination which is made may only relate to those operators' licences which fall to be considered by the traffic commissioner.<sup>89</sup>

## Disqualification

- 92.** Section 28 of the Transport Act 1985 and section 28 of the Goods Vehicles (Licensing of Operators) Act 1995 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 a commissioner 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 28 of the Goods Vehicles (Licensing of Operators) Act 1995 and section 28 of the Transport Act 1985 are set out at Annex 5.
- 93.** Taking account of the guidance from the Upper Tribunal that each case must be looked at on its merits, traffic commissioners may wish to use as a starting point for a first public inquiry consideration of a disqualification period of between 1 and 3 years. 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 5 to 10 years or in certain cases for an indefinite period. It is always open to a disqualified person to make application for to vary or cancel an 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 5 years of the disqualification have elapsed as applies.
- 94.** 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 traffic commissioner's decision.

## Rehabilitation

- 95.** Great Britain has not enacted the provisions of Article 6.3 of Regulation (EC) 1071/2009 into national law and there is therefore no power for traffic commissioners 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

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<sup>89</sup> See Statutory Guidance on Delegations and Multiple Licence Holders.

Competence. However there is nothing to prevent the presiding traffic commissioner from giving an indication to an operator who has lost its reputé of the steps that may be taken in the future to regain that reputé.

## **Decisions**

- 96.** After giving due consideration to the evidence and any submissions, the decision of a traffic commissioner 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 date.<sup>90</sup>
- 97.** 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 must also be published in the Notices and Proceedings or Applications and Decisions in accordance with legislative requirements.

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<sup>90</sup> See Statutory Guidance and Statutory Directions on Written Reasons, Decisions and Publication.

## **ANNEX 1: EU LEGISLATION**

Regulation 5 of the Road Transport Operator Regulations 2011 states that a standard licence constitutes an authorisation to engage in the occupation of road transport operator for the purposes of:

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

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

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

(a) have an effective and stable establishment in a Member State;

(b) be of good repute;

(c) have appropriate financial standing; and

((d) have the requisite professional competence.

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

### **Article 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 maybe 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

(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 or, as appropriate, access to the market in road passenger transport;
- (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 reputation 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 reputation would constitute a disproportionate response, it may decide that good reputation 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 reputation would constitute a disproportionate response, the conviction or penalty shall lead to the loss of good reputation;

(b) the Commission shall draw up a list of categories, types and degrees of seriousness of serious infringements of Community rules which, in addition to those set out in Annex IV, may lead to the loss of good reputation. Member States shall take into account information on those infringements, including information received from other Member States, when setting the priorities for checks pursuant to Article 12(1).

Those measures, designed to amend non-essential elements of this Regulation by supplementing it and which relate to this list, shall be adopted in accordance with the regulatory procedure with scrutiny referred to in Article 25(3).

To this end, the Commission shall:

- (i) lay down the categories and types of infringement which are most frequently encountered;
- (ii) define the degree of seriousness of infringements according to their potential to create a risk of fatalities or serious injuries; and
- (iii) provide the frequency of occurrence beyond which repeated 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.

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 IV**

#### **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.

## **ANNEX 3 – SUGGESTED STARTING POINTS FOR CONSIDERATION OF REGULATORY ACTION**

The following derives from the Senior Traffic Commissioner's analysis of the available Upper Tribunal case law but please also note Annex 2 above.

Each case must be dealt with on its own facts. In determining how to dispose of most cases the traffic commissioners 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 positive 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 presiding traffic commissioner retains absolute discretion to move up or down from the suggested starting points.

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

Note –

- (a) curtailment includes attachment of a condition limiting the number of PSVs on the licence
- (b) nothing in the above precludes the traffic commissioner 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.

### **POSITIVE FEATURES**

- 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 "S" 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**

- 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 to the traffic commissioner 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 "S" marked prohibition or prohibitions issued at MOT
- High prohibition rate
- Low average first time pass rate at MOT or multiple failure items at MOT
- Evidence of previous unsatisfactory maintenance investigations, warning letters or public inquiries

This list is not exhaustive

<b>STARTING POINTS FOR REGULATORY ACTION</b>
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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 features	SERIOUS to MODERATE
Limited negative feature(s) not already detailed under "Conduct" above and several positive features	MODERATE TO LOW

## **ANNEX 4 – ALTERNATIVE DISPOSALS TO A PUBLIC INQUIRY**

### **Procedure for STL and Operator Interviews**

#### **Introduction**

Some cases might appear on the papers to require the convening of a public inquiry but they may, in actual fact, be dealt with by an alternative disposal. Operators, applicants and/or drivers can submit written representations in response to reports of non-compliance or other adverse information. There is no requirement on traffic commissioners to engage with applicants, operators, drivers or other parties immediately prior to a hearing or during those proceedings. Preliminary Hearings and meetings between senior staff and operator (“STL interviews”) are intended to offer an alternative to a public inquiry. If an operator requests a public inquiry, following on from a Proposal to Revoke letter, the traffic commissioner may still determine that an STL interview or Preliminary Hearing 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, a traffic commissioner may decide to call an operator to a preliminary hearing. In situations which fall short of an obvious need to call an operator and/or transport manager, the traffic commissioner may request an STL interview. This Annex sets out a consistent approach to the administration and purpose of these alternatives to public inquiry.

#### **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 TM was seen (standard licences); what was the response to these issues; and whether further information might be required.

The STL enjoys delegated power on behalf of the traffic commissioner within defined parameters. An STL interview 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 DVSA Examiner/investigating officer or failed to stop when requested to do so;
- there are real concerns about repute, professional competence or financial standing;
- the failings are across a number of areas required by the operator licence;
- there are large scale failures to comply with the drivers’ hours’ rules and tachograph regulations.

When recommending an STL interview to the traffic commissioner, the following approach is to be adopted. The submission must first address what regulatory action the traffic commissioner is likely to take by reference to this and other Statutory Guidance and Statutory Directions, e.g. no further action (NFA), formal warning, the recording of further undertakings or the receipt of assurances from the operator, suspension, curtailment or revocation. If the action is not likely to involve suspension,

curtailment or revocation, the STL 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 PMI frequencies. If they are limited or specific to one particular matter an STL meeting might be considered.
2. The shortcomings identified by the DVSA investigation are now dated. The STL must consider whether or not the traffic commissioner has got a picture that is sufficiently up to date to allow them to make a valid decision. If the DVSA report is old the STL may recommend an STL meeting where the operator provides records so that they can be assessed with a further submission to the TC after they have been evaluated at the STL meeting.
3. If there is an immediate risk to road safety the traffic commissioner will need to consider how best to address that risk, either through early assurances or whether to convene an urgent PI. It is anticipated that these types of cases will be the exception and they will require careful consideration by the STL and TC.
4. How serious and extensive were the prohibitions that were issued; are any S marked? If the prohibition notices were delayed and not extensive an STL meeting might allow an opportunity to examine how the operator has responded. The presence of an S marked prohibition is not a barrier to an STL interview.
5. Did the operator co-operate with the DVSA investigation? For example, did the operator respond quickly and was it positive? If so, an STL meeting might be considered.

In making a submission for an STL interview, the caseworker should identify actions which might assist to ensure future compliance and therefore act as a basis for the proposed STL interview. A non exhaustive list of the suggested actions is set out below:

- an audit to be carried out in 6, 9 or 12 months and the report and the remedial action taken to be sent to the OTC within a month of completion of the audit.
- transport manager training such as attendance on a recognised CPC refresher course within 6, 9 or 12 months with evidence of attendance to be sent to the OTC 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 should not be suggested if they do not directly concern the identified issues failings. Examples might include: that all vehicles will be subject to roller brake tests 4 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 traffic commissioner can then make an early neutral evaluation of the case and indicate a possible disposal. The traffic commissioner may indicate specific matters by way of an agenda to be discussed at the STL interview, such as prohibitions, MOT failure rate, finances etc. Examples of the suggestions of the type of outcome that the operator might be invited to agree at an STL interview are set out below. The list is not exhaustive. If the traffic commissioner accepts that an STL interview is appropriate s/he should record and may indicate that:

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

### **Attendance by the operator**

The letter inviting the operator to a Preliminary Hearing or an STL interview 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 Preliminary Hearing or STL interview. There is no requirement to publish a statutory notice but a Preliminary Hearing is generally held in public. Both Preliminary Hearings and STL interviews will be recorded. They should both follow a consistent structure:

- prior to a Preliminary Hearing or STL interview (and at least 14 days in advance) the Traffic Area Office 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 traffic commissioner;
- 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 Preliminary Hearing will always be clerked; at an STL interview the senior member of staff 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 or driver conduct hearing;

- within 14 days of an STL interview the senior member of staff will make a final recommendation to the traffic commissioner as to the type of regulatory action that they might like to consider.

In all cases the traffic commissioner may direct that certain documents are to be brought to a Preliminary Hearing or STL interview, such as:

- the last 3 inspection records for each vehicle; if there are more than 10 vehicles then the traffic commissioner may direct a sample of records;
- tachograph analysis records and details of infringement action taken (if related to drivers' hours' issues).

## Outcome

A Preliminary Hearing is held to determine whether a Public Inquiry is necessary. An operator will usually be notified of that decision at the conclusion of the hearing. The grounds for a public inquiry will be communicated subsequently in the calling in letter.

Depending upon what was agreed by the traffic commissioner prior to an STL interview it 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 traffic commissioner 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 traffic commissioner to reconsider the issue of a warning issued by a senior member of staff.

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

1. issue the warning letter and make a note on the record provided that the traffic commissioner has already indicated this is an acceptable potential disposal. Potential disposals to be agreed by the traffic commissioner 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;
  - 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 traffic commissioner.
2. If the traffic commissioner 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 STL will update the submission and refer it back to the traffic commissioner 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 meeting the STL 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 TC.

The outcome of either a Preliminary Hearing or an STL interview must be recorded and may be made public.

## **ANNEX 5 – DISQUALIFICATION**

### **SECTION 28 – THE GOODS VEHICLES (LICENSING OF OPERATORS) ACT 1995**

28. (1) Where, under section 26(1) or 27(1), a traffic commissioner directs that an operator's licence be revoked, the commissioner may order the person who was the holder of the licence to be disqualified (either indefinitely or for such period as the commissioner thinks fit) from holding or obtaining an operator's licence; and so long as the disqualification is in force –
- (a) any operator's licence held by him at the date of the making of the order (other than the licence revoked) shall be suspended, and
  - (b) notwithstanding anything in section 13 or 24, no operator's licence may be issued to him.
- (2) If a person applies for or obtains an operator's licence while he is disqualified under subsection (1) –
- (a) he 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 to him on the application, or (as the case may be) the operator's licence obtained by him, shall be void.
- (3) An order under subsection (1) may be limited so as to apply only to the holding or obtaining of an operator's licence in respect of one or more specified traffic areas and, if the order is so limited –
- (a) paragraphs (a) and (b) of that subsection and subsection (2) shall apply only to any operator's licence to which the order applies, but
  - (b) notwithstanding section 5(4)(b), no other operator's licence held by the person in question shall authorise the use by him of any vehicle at a time when its operating centre is in a traffic area in respect of which he is disqualified by virtue of the order.
- (4) Where the traffic commissioner makes an order under subsection (1) in respect of any such person, the commissioner may direct that if that person, at any time or during such period as the commissioner may 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) operators 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 26.

- (5) The powers conferred by subsections (1) and (4) 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 26 or 29 to subsection (1) or (4) above includes a reference to that subsection as it applies by virtue of this subsection.

- (6) The traffic commissioner by whom any order disqualifying a person was made under subsection (1) may at any time –
  - (a) cancel that order together with any direction that was given under subsection (4) when the order was made<sup>4</sup>;
  - (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).
- (7) 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.
- (8) For the purposes of this section a person holds a controlling interest in a company if he is the beneficial owner of more than half its equity share capital (as defined in section 744 of the Companies Act 1985).

## SECTION 28 – THE TRANSPORT ACT 1985

- (1) Where the traffic commissioner for any traffic area revokes a PSV operator's licence, he may order the former holder to be disqualified, indefinitely or for such period as he thinks fit, from holding or obtaining a PSV operator's licence.
- (2) So long as a disqualification imposed under subsection (1) above is in force with respect to any person,
  - (a) any PSV operator's licence held by him at the date of the making of the order under subsection (1) above (other than the licence revoked) shall be suspended (that is, shall remain in force subject to the limitation that no vehicles are authorised to be used under it); and
  - (b) notwithstanding section 14(4) of the 1981 Act, no PSV operator's licence may be granted to him.
- (2A) If a person obtains a PSV operator's licence while he is disqualified under subsection (1) above, the licence shall be void.
- (3) An order under subsection (1) above may be limited so as to apply only to the holding or obtaining of a PSV operator's licence in respect of the area of one or more specified traffic commissioners and, if the order is so limited, subsection (2) above shall apply only to any PSV operator's licence to which the order applies.
- (4) Where a traffic commissioner makes an order under subsection (1) above with respect to any person, he may direct that if that person, at any time during such period as he may 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 applies; or
    - (ii) a company of which a company which holds such a licence is a subsidiary; or
  - (b) operates any public service vehicles in partnership with a person who holds such a licence;

the powers under section 17(2) of the 1981 Act (revocation, suspension, etc., of PSV operators' licences) shall be exercisable in relation to that licence by the traffic commissioner by whom it was granted.
- (5) The powers conferred by this section 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 officer of that company; and
  - (b) where that person operated the vehicles used under the licence in partnership with other persons, in relation to any of those other persons and any reference in subsection (6A) below to subsection (1) above or to subsection (4) above includes that subsection as it applies by virtue of this subsection.
- (6) A traffic commissioner shall not make any such order or give any such direction without first holding an inquiry if any person affected by the proposed order or direction requests him to do so.
- (6A) The traffic commissioner by whom any order disqualifying a person was made under subsection (1) above may at any time—
  - (a) cancel that order together with any direction that was given under subsection (4) above 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).
- (7) For the purposes of this section a person holds a controlling interest in a company if he is the beneficial owner of more than half its equity share capital.