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# SENIOR TRAFFIC COMMISSIONER

## Statutory Document No.5

### LEGAL ENTITIES

### INCLUDING INSOLVENCY & REGULATION 31 & SECTION 57 APPLICATIONS

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

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Senior Traffic Commissioner  
2013

# GUIDANCE

1. The Senior Traffic Commissioner for Great Britain issues the following Guidance under section 4C(1) of the Public Passenger Vehicles Act 1981.

## Basis of Guidance

2. This guidance is issued under section 4C(1)(a) of the 1981 Act to provide information as to the way in which the Senior Traffic Commissioner believes that traffic commissioners should interpret the law in relation to different legal entities, changes in those entities and correspondence with them. This Guidance may be subject to decisions of the higher courts and to subsequent legislation. The Senior Traffic Commissioner, however, has extracted the following principles from existing legislation and case law:

## Legal entities

3. It is important that traffic commissioners are satisfied as to the legal status of an applicant or operator. By way of example, the Upper Tribunal has stressed that *in the eyes of the law a sole trader and a limited company are quite different legal 'people' or legal entities. It is the legal entity which operates the vehicles which must hold an operator's licence*<sup>1</sup>. A company or other corporate body has a distinct legal personality from its members (shareholders), officers or directors. In other cases, it may be necessary to determine the individual(s) responsible for the undertaking, for example the partners in a partnership, where restrictions might apply<sup>2</sup> or the relationship with another corporate body<sup>3</sup>. Regulation 6 of the Road Transport Operator Regulations 2011 makes it a condition of a standard licence for operators to inform the traffic commissioner within 28 days of any change in the name or legal form of the undertaking and the address of establishment.

### *Individuals - Sole Traders*

4. This, as the name suggests, is an individual trading on his or her own account. Whilst the individual may use a trading name, for legal purposes the correct entity is the individual.

### *Companies*

5. A company has a legal personality distinct as from its members (shareholders), owners, directors or officers. The company can therefore hold an operator's licence in its own name. The licensing legislation refers to a company. In the Companies Act 2006 the term company is usually defined as a body formed under that legislation but it can in limited circumstances include other bodies<sup>4</sup>.

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<sup>1</sup> 2012/008 Brian Richards t/a B Richards

<sup>2</sup> Regulation 29 of The Goods Vehicle (Licensing of Operators) Regulations 1995 states that a 'firm' (partnership) shall be treated as separate to an individual partner

<sup>3</sup> Regulation 30 of The Goods Vehicle (Licensing of Operators) Regulations 1995.

<sup>4</sup> See sections 104 and 103 of the Companies Act 2006, for instance a body incorporated or registered under a general Act of Parliament.

6. The name of a private limited company must end with the word "limited" or the abbreviation "Ltd" and this should be on all company correspondence and documents. A private company need not have any employees but it must have at least one director. It need not have a company secretary unless its articles of association stipulate otherwise.
7. The name of a public limited company must end with the words "public limited company" or the abbreviation "plc"<sup>5</sup>. A public limited company is required to have a company secretary. A public limited company is one whose shares are traded, as opposed to the simple limited company whose shares cannot be so transferred.
8. A limited company may own subsidiaries that are private limited companies. It is the company that is operating the vehicles that must hold the operator's licence<sup>6</sup>.
9. A limited company must be registered with the Registrar at Companies House and is given a unique company number. Whenever a company changes its name, the legal entity remains the same and this is reflected by the same company number. A company must of course notify the traffic commissioner, via the Central Licensing Office (CLO), of any change. If there is a change in company number then this represents a new entity and a new Licence will be required.
10. A company is required to have at least one director<sup>7</sup>. Any new application must satisfy the traffic commissioner as to the identity of the director(s), and must show that the company has adequate financial resources. A traffic commissioner might infer that a person is exercising authority as if they were a director and may proceed to make further findings on that basis<sup>8</sup>.
11. Directors have a legal duty to act in good faith, exercise independent judgment and act with skill, care and diligence. There is also a duty to avoid conflicts (see regulation 31/section 57 below). The statutory responsibilities pursuant to section 172 Companies Act 2006 are summarised as follows:
  - Duty to act within the powers conferred by the company's constitution (i.e. its Memorandum and Articles of Association),
  - Duty to promote the success of the company for the benefit of its members (i.e. its shareholders),
  - Duty to exercise independent judgement,
  - Duty to exercise reasonable care, skill and diligence
  - Duty to avoid conflicts of interest,
  - Duty not to accept benefits from third parties,
  - Duty to disclose any interest in a proposed transaction or arrangement with the company.
12. Directors have collective responsibility for the company which they manage and it is therefore their responsibility to set the standards which employees are

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<sup>5</sup> Companies Act 1985 ss.25 & 27A

<sup>6</sup> Regulation 30 as above, under which the subsidiary is deemed to be the user

<sup>7</sup> Section 154 Companies Act 2006

<sup>8</sup> 2011/361 Springwood Trading Ltd, 2006/056 Paul Oven Transport Services Ltd

expected to meet and to ensure that those standards are met. Persons who control an entity which operates heavy goods or public service vehicles must have sufficient knowledge to exercise proper oversight<sup>9</sup>. In the United Kingdom directors have the same legal duties, responsibilities and potential liabilities regardless of whether they are full-time or non-executive directors. Traffic commissioners are therefore entitled to assume that directors are all equally responsible for the management of a company and therefore equally culpable for any non-compliance<sup>10</sup>. A director may be able to demonstrate to the contrary by, for example, reference to minutes of Board meetings. It may be that individual directors have well-defined roles, so that one or more director(s) is more responsible for maintenance and road safety than others. It is for the traffic commissioner to assess the culpability of directors on the basis of the evidence in each case<sup>11</sup>. The jurisdiction of traffic commissioners is not limited to the directors current at the date of the determination of matters and a traffic commissioner may take action against a director who was in post at the time of any relevant conduct<sup>12</sup>.

13. Section 251 of the Companies Act 2006 recognises that a person may be treated as a “shadow director” where the company or the nominated directors are accustomed to act in accordance with the instructions of that person. In other words a traffic commissioner may treat that person as if they were nominated as a director and may hold them responsible for any resulting failures<sup>13</sup>. However another company is not to be regarded as a shadow director of any of its subsidiaries for the purposes of the general duties on Directors under the Companies Act merely because the directors of the subsidiary are accustomed to act in accordance with its directions or instructions.
14. *A company may in many ways be likened to a human body. It has a brain and nerve centre which controls what it does. It also has hands which hold the tools and act in accordance with directions from the centre. Some of the people in the company are mere servants and agents who are nothing more than the hands to do the work and cannot be said to represent the mind and will. Others are directors and managers who represent the directing mind and will of the company, and control what it does. The state of mind of these managers is the state of mind of the company and is treated by the law as such*<sup>14</sup>.
15. The Upper Tribunal has indicated that where the corporate entity is in effect an extension of an individual director(s) then the ‘corporate veil’ can be lifted so

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<sup>9</sup> 2012/025 First Class Freight Ltd

<sup>10</sup> 2010/071 Eurofast

<sup>11</sup> 1999/G36 Greylands Waste Ltd as approved in 2001/068 Dukes Transport

<sup>12</sup> 2008/688 David Pritchard

<sup>13</sup> In *VOSA v FM Conway Ltd* [2012] EWHC 2930 the Administrative Court held that a company will not be guilty of a criminal offence of allowing someone to use its goods operator’s licence with intent to deceive (section 38) unless a director or someone who could be described as having general direction of the company, in effect a ‘shadow director’, knew about that use.

<sup>14</sup> *HL Bolton (Engineering) Co. Ltd v TJ Grahams & Sons Ltd* [1957] 1 QB 169. The Supreme Court and its predecessor have since further defined the term ‘controlling mind’ in cases such as *Tesco Supermarkets Ltd v Nattrass* [1971] All ER 127 as the directors under the memorandum and articles of association or those in actual control who are able to bind the company. In cases where the company has been charged with criminal offences the courts have declined to find that a company had the necessary intent without the involvement of an individual holding a sufficiently senior position in the company who could be identified with the company as its ‘directing mind and will’ – *VOSA v FM Conway Ltd* [2012] 290 Admin. The principle might be extended to the act of applying for a licence.

that the individual cannot hide behind limited liability status to reveal the reality of the structure and the operation of the transport undertaking<sup>15</sup>.

16. Another form of corporate entity is a Community Interest Company. This is different to a limited company, with special additional features, as it is created for the use of people who want to conduct a business or other activity for community benefit, and not purely for private advantage. This is achieved by a "community interest test" and "asset lock", which ensures that the company is established for community purposes and that the assets and profits are dedicated to those purposes. They must be registered as a community interest company with the Regulator. The CIC Regulator has supervisory powers under sections 41 to 51 of the Companies (Audit, Investigations and Community Enterprise) Act 2004. The investigation powers are similar to the powers under the Companies Act 1985 used by the Companies Investigation Branch but are limited to the CIC status. They do not prevent other investigations into the general activities of the company. However the regulator has additional powers to intervene in the affairs of a community interest company, including the power to remove directors.

### *Partnerships*

17. A partnership is created by a legally binding agreement (written or unwritten) between two or more legal persons to work together. In a partnership, each partner is jointly (together) and severally (individually) liable for the acts of the partnership. Compliance with an operator's licence is therefore the responsibility of all the partners. Partnerships must not be confused with a newer type of body known as a limited liability partnership (LLP).
18. Any two or more individuals can be partners. In England and Wales where a new partner joins the business or where an existing partner leaves the business the partnership is terminated in law unless specifically allowed for in the written partnership deed (agreement). Similarly when one or more partners leave a partnership this may mean that there has been a change in entity and CLO must be notified. Where a partner dies there are particular provisions under regulation 31 of the Goods Vehicles (Licensing of Operators) Regulations 1995 and section 57 of the Public Passenger Vehicles Act 1981 (see below). Where one or more new partners join a new partnership may be created and again there is a change in entity. CLO must be informed and a new application may be required. When a partner leaves a business whether through death, expulsion or retirement and that partnership is to continue, the outgoing partner must receive payment from the others for his/her share.
19. Two or more companies might combine their resources to carry out what is termed a Joint Venture. This can take different forms. Each individual company carries out a separate contract, although they may cooperate for administrative or organisational purposes. Each company would be liable for its own contraventions and could therefore be prosecuted in its own name without reference to any of the other companies involved. The companies involved contribute resources to the formation of a new company for the purpose of the joint venture. This separate company is a legal person, which can be prosecuted in its corporate name. The companies involved conduct the venture

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<sup>15</sup> 2011/397 P Plant Ltd & PGC Skip Hire Ltd, 2004/036 George Jenkins Transport Ltd

under a business name without forming a new company. This will constitute a partnership in which the companies are the partners. They will be jointly and severally liable for contraventions arising from the venture.<sup>16</sup>

20. In Scotland a partnership is an association between 2 and 20 persons formed to carry on a common business (excluding practising solicitors, accountants and members of a recognised stock exchange). Scottish law allows a partnership, or a firm, to be set up without any written or oral agreement between the partners although a written agreement is usual<sup>17</sup>. Partnerships can operate under the names of the partners or under another name. In Scotland a partnership is a separate legal entity and legal proceedings can be instituted against that partnership under its trading name. Scottish law also allows for a limited partnership consisting of one or more "general partners", who are liable for all debts and obligations of the firm, and one or more "limited partners", who are liable upon terms of limited liability to the firm's creditors. Limited partners play no part in the management of the partnership. A limited partnership, like a general partnership, is a legal entity. As limited partners play no part in the management of the business, a traffic commissioner might decide in certain circumstances to proceed against the general partners only. All limited partnerships must be registered with the Registrar of Companies.

#### *Limited Liability Partnerships*

21. Limited Liability Partnerships<sup>18</sup> are known as "LLPs" and are a relatively new form of business entity.
22. For licensing purposes, they share nearly all the features of a company. An LLP must register at Companies House or Registrar in Scotland, and its name must end with the words 'limited liability partnership', or 'LLP', or the Welsh equivalent- 'partneriath atebolrwydd cyfngedig'. It must state its name on all its correspondence and documents.
23. As with a company, the LLP's registered office will be recorded at Companies House. As with partnerships the members can be individual persons and/or corporate entities. The LLP belongs to its 'members' or 'designated members' and all existing or designated members of an LLP must be recorded with Companies House<sup>19</sup>. Individual designated members of the LLP may have additional functions within the partnership associated with its running, e.g. the signing of the accounts; when acting in these roles the designated members will be acting on behalf of all participants in the LLP. If the number of designated members falls to one then there is a period of grace of 6 months before the LLP status and protections are lost.

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<sup>16</sup> Section 1 of the 1890 Partnership Act defines Partnership as "the relationship which subsists between persons carrying on a business in common with a view to profit". The 1890 Act codified the common law in Scotland and in England. The 1978 Interpretation Act adopted the 1889 definition that "person" includes a body of persons corporate or unincorporate. Partnership is a creature of contract. The contract can be written, can be unwritten or partly one and partly the other.

<sup>17</sup> 2013/006 & 011 Munro's Of Jedburgh Ltd, Michael Jenkins, and Shelagh Jenkins

<sup>18</sup> Limited Liability Partnerships Act 2000

<sup>19</sup> Limited Liability Partnerships Act 2000 ss.2(2) & 8

## *Business Names*

- 24.** Many individuals and many companies use trading names, these have no legal status and so the 'real' legal name must be used for the operator's licence. A person carrying on a business in a name other than his/her own must include his/her true name in business correspondence and documents, and also specify an address where documents can be served. There is also a requirement to display this information in a prominent position at every place of business.
- 25.** Similar provisions apply:
- to partnerships where the name of each partner must be stated if the name of the partnership does not consist of the surnames of the partners; and
  - to registered companies which operate under a name other than the full corporate name of the company.

## *Unincorporated bodies*

- 26.** An unincorporated body is an association or a body of persons that is not incorporated e.g. a sports or social club where the members contribute funds to pay for running costs. An unincorporated body has no distinct legal personality although it does meet the legal definition of a person<sup>20</sup>. It may therefore apply for an operator's licence or a permit issued pursuant to section 19 or section 22 of the Transport Act 1985.

## *Trusts*

- 27.** Trusts should hold licences in the names of the trustees, specifying that they are trustees of particular property (as if a trading name).

## *Charities*

- 28.** A charity can be established in a number of forms, such as a charter body; a company; a trust; or by Act of Parliament. A charity can also be incorporated<sup>21</sup>, including charitable incorporated organisations. The majority of charities must be registered with the Charity Commissioners. In Scotland the Office of the Scottish Charity Regulator maintains a public index of those bodies which are recognised as charitable. The principal exceptions in England and Wales are:
- certain charities without permanent endowment or property;
  - charities with an income less than £1,000;
  - exempt charities, (a category including numerous major educational and academic institutions, the Church Commissioners, registered places of worship, and friendly and provident societies).

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<sup>20</sup> The Interpretation Act 1978, sections 5 and 11 and schedule 1, defines the word "person" in any Act or subordinate legislation since 1889, unless a contrary intention appears, as "a body of persons corporate or incorporate".

<sup>21</sup> The Charities Act 1993. Following the introduction of the Charities and Trustee Investment (Scotland) Act 2005 charities in Scotland are now regulated by the Office of the Scottish Charity Regulator. Following the introduction of the Charitable Incorporated Organisations (General) Regulations 2012 charities have been able to register as a Charitable Incorporated Organisation (CIO) in England and Wales, in Scotland the equivalent is a Scottish Charitable Incorporated Organisation.

29. The register will include copies of the trusts along with such other information as the Charity Commissioners think fit. The register is available for public inspection and the supply of copies and can be accessed via the website. Charities with an annual gross income above a specified amount are required to show registration on all financial documents.

### *Schools*

30. The classification of schools and the status of Local Education can be confusing<sup>22</sup>. In state schools the Local Authority has been the employer. In foundation and voluntary aided schools the governing body is the employer, except in instances where the Local Authority employs particular members of staff directly. In independent schools, which now include city technology colleges, city colleges for the technology of the arts, and city academies, the employer of the drivers may be a trust, the governors or governing body, or a private proprietor. The situation for independent schools will vary. Any case must be considered in relation to its own particular circumstances, in order to determine who the appropriate operator is.

## **Bankruptcy, Sequestration, Insolvency and voluntary arrangements**

### *Individuals – Sole Traders*

31. Bankruptcy proceedings under the jurisdiction of a bankruptcy court (sequestration in Scotland) allow the property of a debtor to be seized. That property may then be realised and, subject to certain priorities, distributed amongst the people to whom the debtor owes money<sup>23</sup>.
32. Bankruptcy is only applicable to individuals and not to companies.
33. A debtor may enter into a "voluntary arrangement" with creditors regarding payment of his/her debts<sup>24</sup>. Such an arrangement ceases in the event that a debtor is made bankrupt.
34. An undischarged bankrupt is prohibited from acting as a director or taking part or being concerned directly or indirectly in the promotion, formation or management of a company; except with the permission of the court by which he was adjudged bankrupt during the currency of his bankruptcy<sup>25</sup>. As an individual s/he may not meet the requirements in operator licensing terms<sup>26</sup>.
35. Section 26(1)(g) of the Goods Vehicles (Licensing of Operators) Act 1995 was amended to include Debt Relief Orders. An order lasts for 12 months. In that time creditors named on the order cannot take any action to recover their money without permission from the court. At the end of the period, if the person's circumstances have not changed they will be freed from the debts that were included in the order. DROs do not involve the courts. They are run by the Insolvency Service in partnership with debt advisers, called approved intermediaries. To apply the person must be unable to pay their debts, owe less

<sup>22</sup> In England: School Standards and Framework Act 1998

<sup>23</sup> Sections 252-256 Insolvency Act 1986

<sup>24</sup> Sections 264-371 Insolvency Act 1986

<sup>25</sup> Company Directors Disqualification Act 1986

<sup>26</sup> Section 26(1)(h) Goods Vehicles (Licensing of Operators) Act 1985



than £15,000, have very limited total assets, with no more than £50 disposable income a month, be domiciled in England or Wales at some time in the last 3 years and not have been subject to another DRO within the last 6 years or subject to another form of insolvency procedure.

- 36.** Bankruptcy will usually dissolve a partnership and prevent a debtor from acting as a director of a company. A self-employed trader will have to disclose the fact that he or she is bankrupt when obtaining credit. Individuals wishing to avoid bankruptcy can seek an individual voluntary arrangement (IVA) under Part VIII of the Insolvency Act 1986. The IVA consists of a contractual arrangement with creditors. It usually only covers the claims of unsecured creditors and allows an individual to agree a payment plan for repayment of some or all of the debts. The individual will have to pay fees to an insolvency practitioner but may allow the individual to write off debt and/or to avoid bankruptcy. It may therefore allow a commercial advantage over competitors trading in the same environment.

### *Insolvent Companies*

- 37.** Trading whilst insolvent is unlawful and may result in the directors becoming personally liable for a company's assets. An insolvent company can enter into a company voluntary arrangement (CVA), which allows a company with debts or that is insolvent to reach an agreement with its creditors for the repayment of some or all of its corporate debts over an agreed period of time. A company voluntary arrangement can only be implemented by an insolvency practitioner. If 75% (by debt value) of creditors agree, then all the creditors are then bound to the terms of the proposal. Creditors are then unable to take further legal actions whilst the CVA is in place. The CVA may allow the company to write off debt and/or to avoid insolvency.
- 38.** The Companies House register will reveal whether a company is the subject of one of the several procedures connected with company insolvency. The most important procedures are:
- administration;
  - voluntary winding up;
  - compulsory winding up.
- 39.** A company in the course of either form of winding up is said to be "in liquidation". For goods operators Regulation 31 of the Goods Vehicle (Licensing of Operators) Regulations 1995 may be invoked if supported by the Liquidator. Section 57 of Public Passenger Vehicles Act 1981 applies in the case of death, bankruptcy etc. of a licence holder and by inference the events relevant to individuals apply also to corporate bodies, see below.
- 40.** At the completion of the winding up process, the company is dissolved. Administration may be succeeded by winding up, but a company that is in liquidation may not be placed under administration. These procedures can be initiated by the company or by its creditors.

41. Directors will have had advance notice of the financial difficulties and those directors should therefore have notified the traffic commissioner via CLO before the procedures are underway<sup>27</sup>.
42. Companies which find themselves in difficulties can seek to avoid formal insolvency by entering into a company voluntary arrangement (CVA) with creditors. The legal agreement prevents those creditors from seeking to have the company liquidated and allows that company to continue trading even through insolvency. The Directors will stay in control of the company and may allow them the opportunity to sell the business or to seek refinancing. However, whilst a CVA avoids a formal finding of insolvency it does amount to a material change, which should be notified to a traffic commissioner and will prompt further enquiries.

### *Administration*

43. A company goes into administration when an administrator is appointed to manage the company's affairs, business and property. A person may be appointed as administrator of a company in one of three ways: by an order of the court; as the holder of a floating charge, or by the company (or its directors)<sup>28</sup>.
44. The administrator must perform their function with the objective of (a) rescuing the company as a going concern; or (b) achieving a better result for the company's creditors than would be likely if the company was wound up; or (c) realising property in order to make a distribution to one or more secured/preferential creditors. The administrator must perform their functions with the objective of rescuing the company as a going concern unless they think that it is not reasonably practicable to do so, or objective (b) would achieve a better result for the company's creditors as a whole. Paragraph 69 of Schedule B1 of the Insolvency Act 1986 describes that Administrator as acting as the agent of the company in administration. However this must be read in the context of paragraph 67 which indicates that *the administrator shall on his appointment take custody or control of all the property to which he thinks the company is entitled*. Whilst the company remains as the operator the Administrator has responsibility for the property rights in the operator's licence. The Upper Tribunal has made clear that responsibility for compliance extends not only to directors but to those who exercise a *controlling interest*<sup>29</sup>. The administration order represents a material change in the circumstances required in order to enjoy an operator's licence.
45. Regulation 31 of the 1995 Regulations may be invoked but must be supported by the Administrators<sup>30</sup>. The same process is not available to Administrators under section 57 of the Public Passenger Vehicles Act 1981. Directors should notify CLO as soon as administration becomes a distinct possibility. The Central Licensing Office will then be alive to the possibility of an application. However Regulation 31(4) of the 1995 regulations is clear that any application can only be made *after* the company enters liquidation or administration.

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<sup>27</sup> 2008/410 Brian Hill Waste Management Limited paragraph 16

<sup>28</sup> Insolvency Act 1986

<sup>29</sup> 2010/029 David Finch

<sup>30</sup> 2008/ 410 Brian Hill Waste Management Ltd

## *Winding-Up/Liquidation*

- 46.** A company may be wound up in one of two ways:
- voluntary winding-up by resolution of the company or its creditors;
  - compulsory winding-up most commonly on the application of a creditor to the court.
- 47.** In a voluntary winding up the Registrar of Companies must be notified by the liquidator as soon as s/he forms the opinion that the company will be unable to pay its debts. In a Creditors' Voluntary Liquidation (CVL) the creditors must ratify the appointment of the liquidator who is appointed to realise the assets so that the creditors can be paid. The liquidation is in effect under the control of the creditors but the liquidator must act impartially and in good faith.
- 48.** A compulsory winding up must also be notified to the Registrar and directors should notify the traffic commissioner via CLO where such a situation is pending or likely to arise<sup>31</sup>.

## *Receivership*

- 49.** A company's creditors who have advanced money to it in the past are likely to hold "debentures", that is a document acknowledging the debt, which usually provides for a charge on the company's assets. This charge will be called a 'fixed charge' where it is secured on particular property, or a 'floating charge' where it is secured on the assets generally.
- 50.** Remedies are available to debenture holders who are concerned about the recovery of their debt. A holder of a debenture secured by a fixed charge may appoint a receiver to deal with the disposal of the charged property only. A debenture holder who is secured by a floating charge may appoint an administrative receiver who will be responsible for the administration of the company.
- 51.** An official receiver<sup>32</sup> may be appointed on an application to the court by debenture holders where a compulsory winding-up is in progress. An administrative receiver is appointed to control the financial dealings of the directors, and to ensure that the debenture holder's interest is not prejudiced by the way the company is run. An administrative receiver must advertise his appointment in the London Gazette<sup>33</sup>.
- 52.** A company in receivership is not necessarily in liquidation, and the appointment of a receiver or an administrative receiver does not necessitate of itself the company's winding up, (although the winding up of the company may well follow). Therefore if the company is simply in receivership it may still meet the financial standing criteria but it is a notifiable event and finance should be requested.

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<sup>31</sup> Brian Hill Waste Management Limited (as above) paragraph 16 and section 57 of the Public Passenger Vehicles Act 1981 and regulation 23 of the Public Passenger Vehicles (Operator Licensing) Regulations 1995

<sup>32</sup> Insolvency Act 1986

<sup>33</sup> Insolvency Rules

53. As it is possible that the company is both in liquidation (being wound up) as well as in administrative (or other) receivership, it is essential that you have clear information as to the true position. It may be brought to your attention by a court notice that a company is in receivership. If so you should, therefore, check whether they are also in liquidation.
54. Winding up in the interest of the creditors may proceed notwithstanding the appointment of a receiver on behalf of a debenture holder(s). The role of administrative receiver will be vacated if the company is made subject of an administration order.

#### *Dissolved Companies*

55. Once a company is dissolved it ceases to exist.
56. Where there is a voluntary winding-up, a liquidator is appointed to distribute the assets of the company to creditors and then to distribute any surplus to those entitled to it. As soon as the company's affairs are fully wound up, the liquidator must make an account of what they have done and call a general meeting of the company.
57. After this general meeting, the liquidator sends the account and confirmation of the meeting to the registrar of companies, who registers this on the company register. The company is then deemed to be dissolved on the expiry of 3 months from the date of the registration. Any interested person may apply to the court for an order deferring the date at which the company is dissolved.
58. Where there is a winding up by the court, the company will be dissolved at the expiry of 3 months following the registrar registering:
  - an application by the Official Receiver (where the Official Receiver is the liquidator) for an early dissolution of the company on the ground that the Official Receiver believes that the company's realisable assets are insufficient to meet the expenses of the winding up and that no further investigation is required; or
  - a liquidator's notice that the final meeting of creditors has taken place and that the liquidator is vacating the office of liquidator; or
  - a notice from the Official Receiver that the winding up of the company by the court is complete.

#### *Director Disqualification*

59. Disqualified persons must not, without the leave of the court, be a director, liquidator or administrator of a company, or manager of company property, or in any way, directly or indirectly, be concerned or take part in the promotion, formation or management of a company for a specified period. The Companies House website or enquiries of the Companies Investigation Branch should confirm whether there has been a disqualification.

## *Employees*

- 60.** The Transfer of Undertakings (Protection of Employment) Regulations 2006 implements protections for employees where the ownership of a business is transferred. This can apply when an insolvency practitioner takes over the running of a business<sup>34</sup>. There is a 14 day restriction after which the insolvency practitioner is obliged to adopt the contracts of employment for existing employees at that time<sup>35</sup>.

## *Partnerships*

- 61.** A partnership is an agreement between individuals. A bankruptcy order might be made against individual partners. This may call into question the legal and financial viability of the partnership as a whole; as might the kind of “voluntary arrangement” referred to above.
- 62.** In the event of the insolvency of a limited liability partnership, the laws applicable to companies under the Companies Acts 1985 and 2006 (which will replace the 1985 Act and will be largely in force by October 2009) and the Insolvency Act 1986 will apply.

## *Death, bankruptcy (sequestration), liquidation/administration/receivership*

### *Goods licences*

- 63.** An operator’s licence cannot be transferred between legal entities. Regulation 31 of the Goods Vehicles (Licensing of Operators) Regulations 1995 applies where an individual or “actual holder” (including a partner but not a member of an LLP) dies; becomes a patient under Part VII of the Mental Health Act 1983, or in Scotland a curator bonis is appointed because he or she is incapable by reason of mental disorder; or becomes bankrupt (sequestered).
- 64.** These provisions also apply to a company and LLP going into liquidation or an administration order being made in relation to that company; or the appointment of a receiver or manager of the trade or business of the actual holder of a licence. An administrator etc cannot operate without that authority<sup>36</sup>.
- 65.** A traffic commissioner is not obliged to make an order under the above provisions without an application.
- 66.** Regulation 31(4) states that the other person should be carrying on the business of the actual holder of the licence, as opposed to a separate business.
- 67.** In this situation the traffic commissioner would expect the directors of a company to have notified him or her prior to any administration, as failure to inform the traffic commissioner of a material change in circumstances may lead

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<sup>34</sup> Regulation 8 Transfer of Undertakings (Protection of Employment) Regulations 2006

<sup>35</sup> Paragraph 99 of Schedule B1 of the Insolvency Act 1986 and *Re Paramount Airways Ltd* (No. 3) [1995] 2 AC 394

<sup>36</sup> *P Plant Ltd & PGC Skip Hire Ltd* (As above)

to adverse conclusions being drawn against those directors<sup>37</sup>. The case law provides the following guidance on this type of application<sup>38</sup>:

- Once an Administrator is appointed he must decide whether or not to carry on the transport business of the company. If he decides not to do so he should take immediate steps to surrender the licence and to return the discs for the authorised vehicles.
- If the Administrator decides to carry on the transport business of the company, either personally or by appointing managers, he must make an application.
- Where the Administrator decides to appoint someone else the terms of the agreement will need to be considered with care. The agreement must provide for the management of the business of the company in administration not, for example, to use the vehicles covered by the operator's licence of the company in administration for the purposes of some other business. An Administrator who makes an application should provide the traffic commissioner with a copy of the agreement with the application or as soon afterwards as possible.
- If the Administrator does nothing he should not be surprised if the company is called to a Public Inquiry on the grounds of loss of good repute, loss of financial standing and, possibly, unlawful operation.
- If the company was called to a Public Inquiry before being put into administration there is no reason why that Public Inquiry should not continue. If the Administrator decided to continue the transport business, by making an application, the convenient course is likely to be to consider both matters in the course of the same Public Inquiry.
- If the company is in administration at the time of the Public Inquiry the primary issues are likely to be the good repute and financial standing of the Administrator and/or any manager appointed by the Administrator. If the previous directors of the business, (or any of them), have been appointed to manage it then their good repute will also be in issue and any past conduct, especially in relation to the company before it went into administration, is likely to be relevant
- Where the person appointed to manage the company on behalf of the Administrator already holds an operator's licence the convenient course is likely to involve the transfer of vehicles to that licence, with, if necessary, an application for a variation to increase the number of vehicles authorised, together with the revocation or surrender of the original licence.

### *Pre-packaged Sales*<sup>39</sup>

- 68.** An arrangement for the sale of all or part of a company's business or assets can be negotiated with a purchaser prior to the appointment of an administrator. The administrator can then effect the sale immediately upon appointment or shortly afterwards, without the prior approval of the creditors or the permission of the court. The administrator, however, must act in the interests of the purposes of the administration and notify creditors within 28 days of sale<sup>40</sup>. Insolvency practice indicates that creditors should be provided with a detailed

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<sup>37</sup> See Statutory Guidance and Statutory Directions on Good Repute and Fitness

<sup>38</sup> Brian Hill Waste Management Ltd (as above)

<sup>39</sup> See Phoenix Applications in Statutory Guidance and Statutory Directions on Good Repute and Fitness

<sup>40</sup> Rule 4.228 Insolvency Rules

explanation and justification of why a pre-packaged sale was undertaken, so that they can be satisfied that the Administrator has acted with regard for their interests<sup>41</sup>. It is important to remember that the Administrator is concerned with ensuring that the largest amount of money is available with which to pay back creditors. The Administrator will probably seek to avoid reducing that amount by ensuring that employment obligations are transferred elsewhere quickly and pre-packaged sales often allow for this. Whilst there may be advantages to the creditors, pre-packaged purchases by former Directors may be relevant to the consideration of their fitness or repute<sup>42</sup>.

### PSV licences

- 69.** An operator's licence cannot be transferred between legal entities. Section 57(2) of the Public Passenger Vehicles Act 1981 provides that a PSV operator's licence held by an individual (including a partner) terminates if he dies, or is adjudged bankrupt or, in Scotland, has his estate sequestrated or becomes a patient within the meaning of part VIII of the Mental Health Act 1959, or in Scotland, becomes incapable of managing his own affairs.
- 70.** For standard licences Regulation (EC) 1071/2009 allows but does not require the traffic commissioner to provide a period of time to rectify the situation. The operator may be given a limited time to make written representations before the traffic commissioner decides whether to allow time for rectification and for what period by way of a notice served under section 17(1A) of the Public Passenger Vehicles Act 1981. The maximum periods allowed under the legislation are as follows:

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

- 71.** Section 57(3) provides that in relation to a PSV licence held by an individual (including a partner) or by a company, regulations may specify other events relating to the licence holder on the occurrence of which the licence is to terminate.
- 72.** Section 57(4) provides that the traffic commissioner by whom the licence was granted may (a) direct that the termination of the licence by subsection (2) above, or under subsection (3) above, be deferred for a period not exceeding 12 months or, if it appears to the commissioner that there are special circumstances, 18 months, and (b) authorise the business of the licence holder

<sup>41</sup> Statement of Insolvency Practice (SIP) 16

<sup>42</sup> See Statutory Guidance and Statutory Directions on Good Repute and Fitness

to be carried on under the licence by some other person during the period of deferment, subject to such conditions as the commissioner may impose.

73. Regulation 23 of the Public Service Vehicles (Operators' Licences) Regulations 1995 states that in a case where a licence is held by a company the events relating to the holder on the occurrence of which the licence is to terminate are as follows – (a) the making of a winding up order and (b) the passing of a resolution for voluntary winding up. It therefore follows that an application cannot be made by a company under section 57 in those circumstances (in contrast to an individual who can).
74. A traffic commissioner is not obliged to make an order under the above provisions without an application<sup>43</sup>.
75. Section 57(4) states that the other person should be carrying on the business of the actual holder of the licence, as opposed to a separate business.

### **Changes in Entity**

76. Where there has been a change in entity the new entity will need to make an application for a new licence in its own right. The traffic commissioner will then consider action against the original licence<sup>44</sup>. In many cases the commissioner will be able to accept surrender of the original licence and consequently grant of a licence to the new entity will require the old entity to surrender the licence. This might apply, for example, where a partnership ceases and a limited company is formed. In other cases revocation of the licence held by the old entity may be required but this revocation will not necessarily prevent grant of a new licence to the new entity provided that there are no serious compliance issues and provided that there are no undue concerns regarding “phoenix” entities or “fronting”.

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<sup>43</sup> 2010/087 PIT 101 Ltd (formerly Ethos Recycling Ltd)

<sup>44</sup> R-v-Secretary of State for Social Services ex parte Chapman and Taylor, The Times February 5<sup>th</sup> 1996, 2008/410 Brian Hill Waste Management Ltd. Regulation 31 was amended to be consistent with the Enterprise Act (Insolvency) Order 2003 and Schedule B1 to the Insolvency Act 1986 as amended.



## DIRECTIONS

77. The Senior Traffic Commissioner for Great Britain issues the following Directions to traffic commissioners under section 4C(1) of the Public Passenger Vehicles Act 1981. The aforementioned Guidance relates to matters which may affect the holding of an operator's licence. These Directions are addressed to the traffic commissioners in respect of the approach to be taken by staff acting on behalf of individual traffic commissioners and dictate the operation of delegated functions.

### Basis of Directions

78. These directions are issued under section 4C(1)(b) of the 1981 Act to provide practical advice on the administrative arrangements to those who support the traffic commissioners in fulfilling their statutory functions. In the interests of adopting a consistent approach to decision making the following checks have been identified to assist support staff, who must decide whether to refer a case to the traffic commissioner for consideration and the circumstances in which a traffic commissioner may wish to consider an application or existing licence at a public hearing .

#### *Individuals - Sole Traders*

79. The trading name should always be checked as this may hint to what may actually be a partnership e.g. ANP Skip trading as ANP & DJ Skip. However an assumption should not be made that just because the trading name refers to two names or initials that it is necessarily a partnership. Commissioners and their staff should check the name(s) on the financial evidence served in support. There may be occasions where it will be appropriate to complete an officer search at Companies House to ascertain if the individual is also a director of one or more companies. This may be relevant for a number of reasons such as whether licences are held by those other companies or to ascertain if the individual will have sufficient time to attend to compliance if a licence is granted.

#### *Companies and LLPs*

80. A company and LLP must be correctly described in any formal documentation. Companies and LLPs are obliged to state their full names, registration numbers, and registered addresses on all of its business letters and other forms. Its name should appear outside every place where its business is carried on and on all its other correspondence and trading documents.
81. The Senior Traffic Commissioner has determined that, since any new application must leave the traffic commissioner in no doubt as to the identity of the company director or directors<sup>45</sup> and that the Upper Tribunal has indicated that directors should check the contents of an application form to ensure that it is accurate<sup>46</sup> and that the company is prepared to be bound by the requirements, it is not disproportionate to require that an application form is

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<sup>45</sup> 2011/037 Springwood Trading Ltd

<sup>46</sup> 2000/041 Hi-Kube

signed by a director. Traffic commissioners are entitled to infer that the individual director signing is authorised to bind the company.

**82.** The Companies Register can be used to confirm:

- the company's correct name;
- its company number;
- the address of its registered office;
- its directors (past and present)
- whether the company is in the process of being wound up.

**83.** The general enquiry line of the Insolvency Service should also be able to confirm whether a compulsory winding-up order has been made, by quoting the company number.

*Company or LLP: change of name or structure*

**84.** Where a company or LLP has changed its name, this does not affect any legal proceedings. The company number will remain the same and correspondence can refer to the new name and, if the operator has failed to notify the traffic commissioner of the change might also refer to previously “known as....”. This will also apply when a company registered as limited is re-registered as unlimited, and when a company registered as unlimited is re-registered as limited. The company's former names will be listed on its record at Companies House.

**85.** When a change of name is notified or there is a suspicion of a phoenix application<sup>47</sup> it is essential that the company number is checked<sup>48</sup>.

**86.** Where correspondence is received from someone other than a director, a letter signed by a current director on headed paper or a Board Meeting minute confirming the authority of the person to bind the company, is required.

**87.** Changes of directors must be notified to the traffic commissioner and thereafter the VOSA National Intelligence Unit should be asked to conduct a check of any new directors. Staff members may also make enquiries to determine whether evidence of finance should be requested if the departing director was also a shareholder.

**88.** If staff acting on behalf of the traffic commissioner speak to a person representing an LLP about a matter that will have a material effect upon the licence (such as potential revocation or surrender) it is best practice to require that a designated member (see paragraph 20 above) provides written confirmation on the LLP's headed paper of the authority of that person to represent the partnership's guiding mind.

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<sup>47</sup> See Statutory Guidance and Statutory Directions on Repute

<sup>48</sup> See attached Annex Re: Company Names

### *Subsidiaries*

- 89.** A company is a 'subsidiary' of another company (its parent or holding company), if that other company:
- Holds a majority of the voting rights; or
  - has the right to appoint or remove a majority of the board of directors; or
  - controls alone, under agreement with other members, a majority of voting rights; or
  - it is a subsidiary of a company that is a subsidiary of the parent.

### *Partnerships*

- 90.** All partners should be named on licence documentation and all correspondence. As with the above staff might complete a search for each partner, for the reasons given above. Where an application or existing licence are the subject of a hearing all the partners should be asked to attend, unless there are good reasons for excluding some, particularly if the division of responsibilities is unknown. Discretion may be exercised based on factors such as the nature of the alleged breaches and the division of responsibilities within the partnership but the decision should be referred to the traffic commissioner.
- 91.** If an individual partner becomes bankrupt proof of finance should be requested and questions raised with the partners as to the exact position.
- 92.** In the past a custom may have arisen which has allowed partners to change by simply notifying the traffic commissioner through the Central Licensing Office, which might then lead to a check of the financial standing of the remaining partners. The legislation allows this approach in Scotland but does not accord with the law in England and Wales. When a partner leaves for whatever reason that particular partnership terminates unless the partnership deed (written agreement) specifically states otherwise. The remaining partners may decide to continue to work together as a different partnership but in England and Wales this equates to a change in the legal entity. In the interests of consistency this must be treated in the same way as any other similar change. If the numbers fall to one at anytime then the partnership is at an end. The remaining 'partner' must therefore apply for a sole trader licence if the business is to continue. If an application is made to surrender by one of the partners it will be necessary to check that the individual has the authority of the other partners.

### *Unincorporated and other bodies*

- 93.** Any queries regarding an unincorporated body should be referred to the traffic commissioner. As per the Guidance it may be necessary to address Trusts via individual trustees. This will be different if it is a charitable trust where the trustees are incorporated. In respect of charities members of staff should find out what sort of charity is involved before referring to the traffic commissioner. This may be apparent from the register of charities and/or from the charity itself or the Charity Commission/Office of the Scottish Charity Regulator. If the charity is a company, it will be registered at Companies House. If trustees have not been incorporated, then documents should refer to them in their own names as trustees.

*Death, bankruptcy (sequestration), liquidation/administration/receivership*

- 94.** Where the licence holder, including one of the partners, is deceased or has been deemed mentally incapacitated in law, traffic commissioners are likely to deal with an application under regulation 31 or section 57:
- sympathetically (if notified within a reasonable time);
  - on the papers alone.
- 95.** Save in unusual circumstances traffic commissioners are likely to grant an application allowing a sufficient period to permit the applicant the opportunity to surrender the licence and/or make a new application. Any new application will be dealt with on its merits depending on the circumstances at the date of the application. Section 57(5) refers to the time limits for rectification allowed under Regulation (EC) 1071/2009 (see Article 13).
- 96.** A company in the course of either form of winding up is said to be "in liquidation". Commissioners and their staff are reminded that for goods licence holders Regulation 31 of the Goods Vehicle (Licensing of Operators) Regulations 1995 may be used but only with the support of the Administrators<sup>49</sup> and that Administrators of companies holding PSV licences cannot apply under the similar provision in section 57 of the Public Passenger Vehicles Act 1981<sup>50</sup> as this applies to individuals only. Directors should therefore notify the traffic commissioner through the Central Licensing Office as soon as administration becomes a possibility so that either the Regulation 31 procedure can be used in goods cases or advice can be given in PSV cases of the effect of the administration.
- 97.** Section 57(4) allows termination of a PSV licence under section 57(3) to be deferred. Regulation 23 of the Public Passenger Vehicles (Operator Licensing) Regulations 1995 provides that, in a case where the licence is held by a company and the events relating to the holder on the occurrence of which the licence is to terminate and there has been a winding up order made or the passing of a resolution for a voluntary winding up order an application can be made to the traffic commissioner for permission to continue to operate. Where there is a winding up by the court, the company will usually be dissolved at the expiry of 3 months, following notification by the registrar.
- 98.** In the case of a Regulation 31 application the form must either be completed and signed by the liquidator, administrator or receiver, or be accompanied by written authority for some-one else to correspond. In the absence of authority a former director is not able to make an application on behalf of the company and so correspondence should be addressed to the liquidator, administrator or receiver following their appointment. If the administrator etc. does not make an application then the licence will be subject to surrender or revocation subject to the circumstances of the case. In the case of section 57 application this can be made by a person who was listed as a Director by Companies House at the time of the winding up order or resolution but see paragraph 102 below.

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<sup>49</sup> 2008/ 410 Brian Hill Waste Management Ltd

<sup>50</sup> Regulation 23 Public Service Vehicles (Operators' Licences) Regulations 1995 – only available for winding up order or resolution.

- 99.** Insolvency practitioners are often not aware of these provisions or the available case law referred to in the attached Statutory Guidance. Administrators usually have a 21 day window from the Notice of Intention to try and secure the employment for the employees of the business. Regulation 31(4) [goods vehicles], makes it clear that the applicant must actually be carrying on the trade or business which indicates that the Administrator cannot make an application until the Notice of Appointment. The Administrator will be under pressure to progress the application as quickly as possible. Commissioners and their staff are expected to assist as much as possible and, where they have notice of a potential application, they should notify the relevant traffic commissioner so they can allow time to consider the application.
- 100.** An application must be determined by a traffic commissioner at an oral hearing with all parties and witnesses given the opportunity to attend. The hearing will often be at short notice subject to the public inquiry schedule, due to the urgent nature of such applications.
- 101.** If the traffic commissioner considers it desirable to hear evidence of a likely application by a new entity at the hearing of the regulation 31 or section 57 application, the traffic commissioner will do so and may then give an indication on the prospects of success of grant and how many vehicles and trailers the traffic commissioner deems it appropriate to authorise in the circumstances. If, having heard all oral and written evidence the traffic commissioner determines that it is appropriate to allow the regulation 31 or section 57 application the traffic commissioner must indicate the duration of any order.

#### *Dissolved companies*

- 102.** Where a company or LLP has been wound up or dissolved it no longer exists in law. There is therefore no legal entity to write to in respect of an operator's licence. That being the case where there is an existing licence there is no need to go through the formal process of sending a proposal to revoke as there is no entity which can respond and/or request a hearing. In those circumstances the matter can be referred straight to the traffic commissioner to make the order for revocation.

## ANNEX 1 - COMPANY NAMES

It is not possible to have two companies registered with the same name at the same time. Once the company goes into either a voluntary or, compulsory liquidation section 216 of the Insolvency Act 1986 would apply.

Detail can be found at [www.insolvency.gov.uk](http://www.insolvency.gov.uk) under the heading 'Publications/Information about insolvency procedures'.

Under section 216 of the Insolvency Act 1986, a director/shadow director (either at the date of liquidation or in the previous 12 months) of a company which has entered into insolvent liquidation is prohibited from using a name if:

- it is a name by which the liquidating company was known at any time in that period of 12 months; or
- it is a name, which is so similar to a name as above as to suggest an association with that company.

The ban lasts for 5 years. Therefore, a director/shadow director cannot use the name or trading style or a similar name of a liquidated company in a successor company, sole proprietorship, or partnership business for a period of 5 years. There are certain exceptions as follows:

- If the director obtains leave of the court; or
- Where a company or business buys the whole, or substantially the whole, of the business of the company in liquidation from the liquidator. If this happens or is intended to happen under arrangements made by an administrator, administrative receiver or supervisor of a voluntary arrangement of the insolvent company, the director must use a prescribed form to publish a notice in the London Gazette and also send it to all creditors known to the director or whose names and addresses could be obtained by making reasonable enquiries. The notice may be published and given before the completion of the sale arrangements but must be published and given no later than 28 days after completion; or
- For an interim period where an application has been made to the court within 7 days of the liquidation, continued use of the name is permitted for 6 weeks from the date of liquidation, or until the court reaches its decision, whichever is earlier; or
- Where another company has been known by that name for more than 12 continuous months prior to the liquidation and has been actively trading during that period.

If a person wishes to complain about a breach of these provisions, they should address their complaint to the liquidator/official receiver. It is a criminal offence (punishable by imprisonment or a fine or both) for anyone to contravene the restrictions. Further, any person who contravenes them, or acts or is willing to act on instructions given by another whom he knows to be in contravention of the restrictions, may also be held personally liable for all the 'relevant debts', defined as the debts incurred by the company whilst the breach is happening (section 217 of the Insolvency Act 1986).

Where the directors/a company under the control of the directors acquires the whole, or substantially the whole of the business, the liquidator must give notice to the creditors. Sanction of the creditors'/members' committee is not required for a connected party transaction, but the liquidator has a statutory obligation to give notice to the committees where he disposes of any property of the company to a person who is connected with the company.

## **ANNEX 2: 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:

(c) have appropriate financial standing; and

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

**Article 13 - Procedure for the suspension and withdrawal of authorisations\*If a standard licence operator no longer meets the financial standing criteria S27 (1) applies for goods operators and s17 for PSV which (after serving a notice) requires revocation of the licence if the operator has not rectified the failing?**

1. Where a competent authority establishes that an undertaking runs the risk of no longer fulfilling the requirements laid down in Article 3, it shall notify the undertaking thereof. Where a competent authority establishes that one or more of those requirements is no longer satisfied, it may set one of the following time limits for the undertaking to rectify the situation:

(c) a time limit not exceeding 6 months where the requirement of financial standing is not satisfied, in order to demonstrate that that requirement will again be satisfied on a permanent basis.

3. If the competent authority establishes that the undertaking no longer satisfies one or more of the requirements laid down in Article 3, it shall suspend or withdraw the authorisation to engage in the occupation of road transport operator within the time limits referred to in paragraph 1 of this Article.