



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

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) and by reference to section 1(2) of the Goods Vehicles (Licensing of Operators) Act 1995 as to the way in which the Senior Traffic Commissioner believes that traffic commissioners should interpret the law in relation to different legal entities.

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.

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.*¹ A company or other corporate body has a distinct legal personality from its members (shareholders), officers or directors. It may be necessary to determine which individual(s) is responsible for the undertaking, for example the partners in a partnership, where restrictions might apply² or the relationship with another corporate body.³ 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 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.⁴

¹ [2012/008 Brian Richards trading as B Richards](#)

² 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. Regulation 6 of the Goods Vehicles (Licensing of Operators) (Amendment) Regulations 2017 modifies Regulation 29 of the 1995 Regulations to take account of the provisions of Regulation 1071/2009

³ Regulation 30 of The Goods Vehicle (Licensing of Operators) Regulations 1995 as amended by Regulation 7 of the Goods Vehicles (Licensing of Operators) (Amendment) Regulations 2017 to reflect the requirement of Regulation 1071 for undertakings to have an effective and stable establishment in a member state

⁴ See sections 104 and 103 of the Companies Act 2006, for instance a body incorporated or registered under a general Act of Parliament. Part 34 of the Companies Act, together with the Overseas Companies Regulations 2009 and Overseas Companies (Execution of Documents and Registration of Charges)(Amendment) Regulations 2011, allows an overseas company carrying on business in the UK and with a physical presence here to register

6. The name of a private limited company must end with the word "limited" or the abbreviation "ltd" or the Welsh equivalent, "cyfyngedig" or "cyf", 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" or the Welsh equivalent, "cwmni cyfyngedig cyhoeddus" or the abbreviation "ccc".⁵ 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. It is the company that is operating the vehicles that should hold the operator's licence.⁶ However, a limited company may own subsidiaries that are private limited companies. In limited circumstances a traffic commissioner might allow authority for those subsidiaries to operate.
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 Office of the Traffic Commissioner (OTC), 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 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.*⁷
11. As the Tribunal indicated in [2003/350 Al Madina Transport Ltd](#):

"Directors have collective responsibility for the company that they manage. It is their responsibility to set the standards that employees are expected to meet; it is their responsibility to ensure that those standards are actually met, and that undertakings and promises made in their name are complied with".

a UK establishment. The overseas company can be registered using its corporate name or the name under which it proposes to carry on business in the UK. Further guidance is available via Companies House.

⁵ Companies Act 1985 ss.25 & 27A

⁶ Regulation 30 as above, allows for a parent company to hold a Good Licence under which the subsidiary is deemed to be the user

⁷ HL Bolton (Engineering) Co. Ltd v TJ Graham & 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 \[1971\] UKHL 1](#) 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 \[2012\] EWHC 2930 Admin](#). See the approach in [2013/057 T Henderson Transport Ltd](#). The principle might be extended to the act of applying for a licence.

12. A company is required to have at least one director and where no director can be identified on the Companies House register or contacted a traffic commissioner can proceed to revoke a licence. 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.

13. Directors have collective responsibility for the company which they manage and it is therefore their responsibility to set the standards which employees are expected to meet and to ensure that those standards are met.⁸ Persons who control an entity which operates heavy goods or public service vehicles must have sufficient knowledge to exercise proper oversight.⁹ 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.¹⁰ 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.

14. 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. Section 250 of the 2006 Act does not provide an exhaustive definition of 'director'. The case law¹¹ indicates that there are three ways in which a person can be held to be a director of a limited company:

- (i) directors in law (de jure), who have been lawfully appointed as directors of the company in question and whose names appear as directors of that company on the register at Companies House;
- (ii) shadow directors as defined by section 251 of the 2006 Act, which provides that it means: "*a person in accordance with whose directions or instructions the directors of the company are accustomed to act*" but excludes a person giving professional advice to the directors. A shadow director must be

⁸ See Statutory Guidance and Statutory Directions on Good Repute and Fitness

⁹ [2012/025 First Class Freight Ltd](#)

¹⁰ [2010/071 Eurofast \(Europe\) Ltd and Others](#)

¹¹ [2014/011&12 David Keith and Julie Bradley](#) by reference to [Secretary of State for Trade and Industry v Dennis George Hollier & Others \[2006\] EWHC 1804 \(Ch\)](#) and [Holland v Commissioners for HMRC & another \[2010\] UKSC 51](#)

shown to play a part in the corporate governance of the company in question by telling the de jure director or directors what to do.¹² It is not necessary to show that a shadow director gave all the directions or instructions necessary for the company to function;

- (iii) directors in fact, (de facto); as above, the decision will turn on the findings of fact made in the case. There is no single test to determine who is a de facto director but what is required is an assessment of all the evidence relevant to the part that the person concerned has played. It is not necessary for the person concerned to have participated in decision making over the whole field of the company's activities but a person can only be held to be a de facto director if they participate or have the right to participate in collective decision making on corporate policy and strategy and its implementation. In any assessment there is a need to distinguish between, on the one hand, those who decide the policy which a company is to follow and/or those who decide how to implement that policy and/or those who originate the orders which are given to subordinates and, on the other, those who are instructed to implement policy decisions or to carry out orders passed down from above.

15. The Upper Tribunal¹³ has set out the steps to be taken if there is evidence to suggest that someone has acted as a de facto director:

- (i) the allegation must be included in the call up letter addressed to the directors with reasons for making the allegation and alerting the concerned party to the possibility that they may be found to be a de facto director with a consequential risk of disqualification;
- (ii) the party for whom the allegation is made against should be sent a separate call up letter in the above terms;
- (iii) if the issue arises during the course of a hearing, the traffic commissioner should put the party on notice of their concerns about their role within the company and thereby give them an opportunity to deal with the concerns. If the party does not accept that they were a de factor director then the matter should be adjourned and a separate call up letter sent out so that they can deal with the issues in a separate hearing;
- (iv) if the concerns only begin to formulate when the traffic commissioner is writing their decision then again the party should be put on notice so that they can deal with the concerns prior to the traffic commissioner coming to their decision. If necessary, a further hearing should be offered with a full call up letter being issued.

16. From 6 April 2016 Companies and LLPs have been required to keep a register of individuals/entities that have control over them. From 30 June 2016 they have been required to supply this as part of the confirmation statement (previously referred to as an annual return) and those seeking to incorporate must also send

¹² [VOSA v FM Conway Ltd \[2012\] EWHC 2930 Admin](#) - 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

¹³ [2016/050 Lorraine Baldwin, Andrew Skelton and Wayne Baldwin](#)

a statement of initial significant control. The provisions apply to UK incorporated companies limited by shares, guarantee, unlimited companies and Societates Europaeae, even if dormant. They do not apply to limited partnerships or Charitable Incorporated Organisations, or companies subject to Chapter 5 of the Financial Conduct Authority's Disclosure and Transparency Rules and companies with voting shares admitted to trading on a regulated market in the UK or EEA or on specified Swiss markets, USA, Japan and Israel. Overseas companies will be subject to the requirements in their home Member State but might still be required to disclose their ownership or control of companies registered here¹⁴.

17. A person of significant control is defined as someone who:

- in/directly holding 25% of the shares;
- in/directly holding 25% voting rights;
- in/directly holds the right to appoint/remove majority of Directors;
- has the right to/does exercise significant influence or control;
- has the right to/does exercise significant influence or control over the activities of trust/firm which would itself satisfy any of the above conditions.

The provisions impose a duty on the entity to take reasonable steps to identify people who have significant control; and those people are obliged to respond to requests for information. The entity must ensure that the information is kept up to date.

18. The Upper Tribunal has suggested the following questions, but it may not be necessary to ask every question in every case:

- Did the person concerned participate in directing the affairs of the company?
- Did the person concerned operate at the same level as the properly appointed directors as opposed to being subordinate to them at all times?
- Did the person concerned describe himself as a director or was he held out by anyone in authority to be a director of the company?
- Did the person concerned simply give advice to the directors and then withdraw or did he remain and join with other directors, whether de jure or de facto and participate in decisions affecting the future of the company?
- Does the evidence show that the person concerned did in fact participate in decision making about strategic or policy issues, including their implementation, not merely as an agent or employee or adviser, but as part of the corporate governing structure of the company?

19. A traffic commissioner can therefore infer that a person is exercising authority as if they were a director and may proceed to make further findings on that basis.¹⁵ The Upper Tribunal has indicated that traffic commissioners are at liberty to consider who the controlling mind of a company really is, and to look behind the facade of an incorporation to find out who is really responsible if wrongdoing by a company is found.¹⁶ It is possible for a new company to be a front for a company

¹⁴ Part 21A Companies Act 2006; Register of People with Significant Control Regulations 2016; European Public Limited-Liability Company (Register of People with Significant Control) Regulations 2016; Limited Liability Partnerships (Register of People with Significant Control) Regulations 2016

¹⁵ [2011/037 Springwood Trading Ltd](#), [2006/056 Paul Oven Transport Services Ltd](#)

¹⁶ [NT/2014/019 OC International Transport Ltd v DOENI](#), see also [2014/046 Marshland Logistics Ltd & John McGuinness](#) in line with the Supreme Court in [Prest v Petrodel Resources Ltd & Others \[2013\] UKSC 34](#)

in liquidation where the new company is a front for the controlling mind of the company in liquidation.

20. It is for the traffic commissioner to assess the culpability of directors on the basis of the evidence in each case. The jurisdiction of traffic commissioners is not limited to the directors, current at the date of the determination, and a traffic commissioner may take action against a director who was in post at the time of any relevant conduct. 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.
21. The Upper Tribunal has indicated that where the corporate entity is, in effect, an extension of an individual including director(s), the 'corporate veil' can be lifted so that the individual cannot hide behind limited liability status to reveal the reality of the structure and operation of the transport undertaking.¹⁷
22. 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 Branch¹⁸ 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

23. 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.¹⁹ Partnerships must not be confused with a newer type of body known as a limited liability partnership (LLP).
24. Any two or more individuals can be partners. In England and Wales, when 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) or the business continues without change including any financial settlement.²⁰ Similarly, when one or more partners leave a partnership this may mean that there has been a change in entity and the Office of the Traffic Commissioner must be notified. Where a partner dies²¹ there are

¹⁷ [2013/008 Vision Travel Ltd](#)

¹⁸ now known as the Insolvency Service

¹⁹ [2014/066 Bridget Burden & Partners](#)

²⁰ Section 27(2) of the Partnership Act 1890

²¹ [2015/074 Ian Phillips trading as T & R Phillips Haulage](#)

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. The Office of the Traffic Commissioner 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.

- 25.** 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 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.²²
- 26.** 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).²³ 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.²⁴ 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.²⁵ 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

- 27.** Limited Liability Partnerships²⁶ are known as "LLPs" and are a relatively new form of business entity.

²² 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.

²³ Section 4(2) of the Partnership Act 1890 provides that, in Scotland, a firm is a legal person distinct from the partners of whom it is composed

²⁴ [2013/006 & 011 Munro's Of Jedburgh Ltd, Michael Jenkins, and Shelagh Jenkinsv](#)

²⁵ [2016/065 & 066 Carrie McKendry & Douglas McKendry](#)

²⁶ Limited Liability Partnerships Act 2000

28. 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 “partneriaeth atebolrwydd cyfyngedig”, or the abbreviation “pac”. It must state its name on all its correspondence and documents.
29. 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.²⁷ 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.

Business Names

30. 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.
31. 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

32. 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.²⁸ It may therefore apply for an operator’s licence²⁹ or a permit issued pursuant to section 19 or section 22 of the Transport Act 1985. If there is any doubt as to who will be responsible for ensuring compliance, then the application should be referred to the traffic commissioner.

Trusts

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

²⁷ Limited Liability Partnerships Act 2000 ss.2(2) & 8

²⁸ 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".

²⁹ Regulation 4 of the Operation of Public Service Vehicles (Partnership) Regulations 1986 (as amended)

Charities

- 34.** A charity can be established in a number of forms, such as a charter body; a company; a trust; or by Act of Parliament.³⁰ A charity can also be incorporated³¹, including charitable incorporated organisations. The majority of charities must be registered with the Charity Commission. 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 £5,000³²;
 - exempt charities, (a category including numerous major educational and academic institutions, the Church Commissioners, registered places of worship, and friendly and provident societies³³).
- 35.** The register will include copies of the trusts along with such other information as the Charity Commission think fit. The register is available for public inspection and the supply of copies and can be accessed via the website³⁴. Charities with an annual gross income above a specified amount are required to show registration on all financial documents.

Schools

- 36.** The classification of schools and the status of Local Education can be confusing.³⁵ 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.

Employees

- 37.** The First-Tier Tribunal (Tax) has considered the employment status of drivers.³⁶ Her Majesty's Revenue & Customs ('HMRC') is concerned that haulage operators are wrongly treating workers as self-employed or are hiring workers through their own companies in ways that are not compliant with tax laws and

³⁰ The Public Bodies Act 2011 allows relevant Ministers to make an Order transferring property between various public bodies including certain charitable organisations. In terms of an operator's licence any transfer must be explicit – see [2008/410 Brian Hill Waste Management Ltd](#) on the primacy of operator licensing legislation.

³¹ 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.

³² £100,000 or less for charities in one of the following groups: churches and chapels belonging to certain Christian denominations; charities that provide premises for some types of schools; Scout and Guide groups; and charitable service funds of the armed forces

³³ Schedule 3 of the Charities Act 2011

³⁴ www.gov.uk/find-charity-information

³⁵ In England: School Standards and Framework Act 1998

³⁶ [TC/2015/03681 RS Dhillon and GP Dhillon Partnership v The Commissioners for her Majesty's Revenue & Customs](#)

therefore, fair competition amongst other operators. Their position is that in road haulage it is rare for someone to be genuinely self-employed unless they are an owner-driver. HMRC has issued detailed guidance on employment status³⁷ and has published a tool to help determine a worker's employment status for tax purposes.³⁸ HMRC is aware that some companies wrongly believe that anti-avoidance legislation does not apply and that HMRC cannot pursue workers, agents³⁹ and their companies.⁴⁰ From 6 April 2021 many more workers will fall within the scope of off-payroll working rules⁴¹ (IR35) and those self-employed who work for a company as if they were an employee, may have to pay the same level of tax that permanent members of staff pay. The responsibility for working out if IR35 provisions apply will move to the organisation contracting for that individual's services.⁴²

- 38.** The tax position is comparable to that of drivers working for taxi companies who have been found to be workers and not self-employed⁴³ for the purposes of the Employment Rights Act 1996⁴⁴ and within the meaning of the Working Time Regulations 1998.⁴⁵ In finding that a courier making deliveries via the business's mobile app, has worker status under the Employment Rights Act 1996, the Employment Appeal Tribunal flagged the need to consider whether the individual is under an obligation to perform the services personally or whether they have an unfettered right of substitution, which has an effect on the obligation of personal performance.⁴⁶ The applicable principles of personal performance were summarised into five categories by Sir Terrance Etherton MR in the Court of Appeal decision of *Pimlico Plumbers*⁴⁷:
- i. an unfettered right to substitute another person to do the work or perform the services is inconsistent with an undertaking to do so personally;
 - ii. a conditional right to substitute another person may or may not be inconsistent with personal performance depending upon the conditionality. It will depend on the precise contractual arrangements and, in particular, the nature and degree of any fetter on a right of substitution or, using different

³⁷ Which applies to all drivers of commercial vehicles that carry goods, passengers or livestock:

<https://www.gov.uk/hmrc-internal-manuals/employment-status-manual/esm4210>

<https://www.gov.uk/hmrc-internal-manuals/employment-status-manual/esm4211>

<https://www.gov.uk/hmrc-internal-manuals/employment-status-manual/esm4212>

³⁸ <https://www.gov.uk/guidance/check-employment-status-for-tax>

³⁹ Regulation 13A of the Conduct of Employment Agencies and Employment Businesses Regulations 2003 requires all agency workers, who sign up to an employment business after 6 April 2020, to be given a 'Key Information Document' which details, amongst other things, the name of the employment business. Agency workers are now also entitled to equal pay once they have satisfied the 12-week qualifying period.

⁴⁰ <https://www.gov.uk/hmrc-internal-manuals/employment-status-manual/esm3505>

<https://www.gov.uk/guidance/ir35-find-out-if-it-applies>

⁴¹ The off-payroll working rules have been in place since 2000. They are designed to make sure that an individual who works like an employee, but through their own limited company (usually a personal service company) or other intermediary, pays broadly the same Income Tax and National Insurance contributions as other employees

⁴² <https://www.gov.uk/guidance/prepare-for-changes-to-the-off-payroll-working-rules-ir35>

<https://www.gov.uk/government/publications/hmrc-issue-briefing-supporting-organisations-to-comply-with-changes-to-the-off-payroll-working-rules-ir35>

⁴³ *Uber BV and Others v Aslam and Others* [2021] UKSC 5, *Autoclenz Ltd v Belcher* [2011] UKSC 41 – “the true agreement will often have to be gleaned from all the circumstances of the case, of which the written agreement is only a part”

⁴⁴ s.230(3) sets out the two limbs where an individual is considered a 'worker' for the purposes of the Employment Rights Act 1996

⁴⁵ [UKEAT/0037/18/BA Addison Lee Ltd v Mr M Lange and Others](#)

⁴⁶ [UKEAT/0219/18/BA Stuart Delivery Ltd v Mr Warren Augustine](#)

⁴⁷ *Pimlico Plumbers v Smith* CA [2017] EWCA Civ 51 – upheld on appeal to the Supreme Court [2018] UKSC 29

language, the extent to which the right of substitution is limited or occasional;

- iii. a right of substitution only when the contractor is unable to carry out the work will, subject to any exceptional facts, be consistent with personal performance;
- iv. a right of substitution limited only by the need to show that the substitute is as qualified as the contractor to do the work, whether or not that entails a particular procedure, will, subject to any exceptional facts, be inconsistent with personal performance;
- v. a right to substitute only with the consent of another person who has an absolute and unqualified discretion to withhold consent will be consistent with personal performance.

39. The Upper Tribunal has held that the legitimacy of a driver's employment status may be fact specific.⁴⁸ The Upper Tribunal has also reviewed the tax and employment position of goods drivers.⁴⁹ In that case the employment clauses suggesting that the drivers had a degree of control were undermined by the reality and as described in the Driver Handbook. The Upper Tribunal raised concern that the arrangement was highly questionable, if not a sham, as the company and transport manager had abdicated their responsibilities for ensuring that the transport operation was compliant and safe, in order to save money.

40. The long-established test for self-employment was set out in the case of Ready Mix Concrete⁵⁰ and involves three key hurdles:

- i. is the worker subject to a right of control? If there is no right of control of any kind, then you will not have a contract of service. However, it was also made clear in the judgment that, although a right of control is an important factor in determining employment status, it is not necessarily a determining factor;
- ii. does the service have to be provided by that individual?. However, the court did indicate a limited right of delegation may not be inconsistent with a contract of service;
- iii. are the other factors present are consistent with a contract of service? Factors such as ownership of significant assets, financial risk and the opportunity to profit are not consistent with a contract of service.

In general, someone is self-employed if they are in business on their own account and bear the responsibility for the success or failure of that business. Conversely, they will be employed if they personally work under the control of their engager and do not run the risks of having a business themselves.⁵¹

⁴⁸ [2018/066 Abus Ltd](#) – the Upper Tribunal clarified that the focus of section 81(1)(b)(ii) in the 1981 Act is not on control but on the identity of the person for whom the driver works

⁴⁹ [2019/054 Bridgestep Ltd and Tom Bridge](#), confirmed in 2019/069 GS Couriers (Nottingham) Ltd and Others

⁵⁰ [Ready Mix Concrete \(South East\) Ltd v Minister of Pensions and National Insurance \[1968\] 2 QB 497](#)

⁵¹ See Statutory Guidance and Statutory Directions on Impounding

Bankruptcy⁵², Sequestration, Insolvency and Voluntary Arrangements

Individuals – Sole Traders

41. 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.⁵³
42. Bankruptcy is only applicable to individuals and not to companies. Once a bankruptcy order has been discharged the individual can apply for a discharge certificate to prove the bankruptcy and any restrictions have ended. The court retains discretionary power⁵⁴ to annul a bankruptcy, following confirmation by way of a report from either the Official Receiver or the Trustee in Bankruptcy that all debts have been paid. Annulment returns the bankrupt to their original position as if the bankruptcy did not happen.
43. A debtor may enter into a "voluntary arrangement" with creditors regarding payment of his/her debts.⁵⁵ Such an arrangement ceases in the event that a debtor is made bankrupt.
44. 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.⁵⁶ As an individual s/he may not meet the requirements in operator licensing terms.⁵⁷
45. Section 26(1)(g) of the Goods Vehicles (Licensing of Operators) Act 1995 was amended to include Debt Relief Orders (DRO). An order will last 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 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.
46. 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

⁵² <https://www.gov.uk/bankruptcy>

⁵³ Sections 252-256 Insolvency Act 1986

⁵⁴ Section 282 of the Insolvency Act 1986

⁵⁵ Sections 264-371 Insolvency Act 1986. IVAs are not available in Scotland but a protected trust deed offers similar solutions albeit with different benefits, risks and fees

⁵⁶ Company Directors Disqualification Act 1986

⁵⁷ Section 26(1)(h) Goods Vehicles (Licensing of Operators) Act 1985

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.

Partnerships

47. The Insolvent Partnerships (Amendment) Order 2005 and the Limited Liability Partnerships (Amendment) Regulations 2005 have a combined effect by which the administration of partnerships and LLPs follow the procedure contained in Schedule B1 of the Insolvency Act 1986.

Insolvent Companies

48. 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 with approval of more than 50% of the company's shareholders. If 75% (by debt value) of creditors agree, then all the creditors will be bound by 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.
49. 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.
50. 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.
51. 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.
52. Directors will have had advance notice of the financial difficulties and those directors should therefore have notified the traffic commissioner, via the Office of the Traffic Commissioner, before the procedures are underway.⁵⁸
53. Companies which find themselves in difficulties can seek to avoid formal insolvency by entering into a CVA with creditors. The legal agreement prevents

⁵⁸ [2008/410 Brian Hill Waste Management Ltd](#)

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

- 54.** 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).⁵⁹
- 55.** 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*.⁶⁰ The administration order represents a material change in the circumstances required in order to enjoy an operator's licence.
- 56.** Regulation 31 of the 1995 Regulations may be invoked but must be supported by the administrators.⁶¹ The same process is not available to administrators under section 57 of the Public Passenger Vehicles Act 1981. Directors should notify the Office of the Traffic Commissioner as soon as administration becomes a distinct possibility. The Office of the Traffic Commissioner 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. Regulation 8 of the Goods Vehicles (Licensing of Operators) (Amendment) Regulations 2017 makes clear that the powers to issue directions under Regulation 31(4) are subordinate to the time limits specified in article 13.1 of Regulation 1071/2009 for rectifying non-compliance with article 3 of the same Regulation.

⁵⁹ Insolvency Act 1986

⁶⁰ [2010/029 David Finch trading as David Finch Haulage](#)

⁶¹ [2008/410 Brian Hill Waste Management Ltd](#)

Winding-Up / Liquidation

- 57.** 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.
- 58.** 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.
- 59.** A compulsory winding up must also be notified to the Registrar and directors should notify the traffic commissioner via the Office of the Traffic Commissioner where such a situation is pending or likely to arise.⁶²
- 60.** Regulation 23 of the Public Service Vehicles (Operators' Licences) Regulations 1995 and section 57 above allows a traffic commissioner to defer termination of an operator's licence where the relevant company has been made the subject of a winding up order or a resolution has been passed for a voluntary winding up order.

Receivership

- 61.** 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.
- 62.** 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.
- 63.** An official receiver⁶³ 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.⁶⁴
- 64.** 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

⁶² [2008/410 Brian Hill Waste Management Ltd](#) and section 57 of the Public Passenger Vehicles Act 1981 and regulation 23 of the Public Passenger Vehicles (Operator Licensing) Regulations 1995

⁶³ Insolvency Act 1986

⁶⁴ Insolvency Rules, The Insolvency (England and Wales) Rules 2016 come into force on 6 April 2017

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; continued operation may result in an unfair advantage over other operators.

65. 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.
66. 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 the administrative receiver will be vacated if the company is made subject of an administration order.

Dissolved Companies

67. Once a company is dissolved it ceases to exist and, unless it is restored, it cannot assert any of its previous rights. For example, the Upper Tribunal considered the right of former shareholders to assert privilege over a company's documents after it had been dissolved.⁶⁵ It concluded that the privilege belonged to the company and following dissolution any rights were vested in the Crown under bona vacantia.
68. 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.
69. 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.
70. 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.

⁶⁵ [FS/2010/0010 & 0011 Denis Desmond and others v The Pensions Regulator and Garvin Trustees](#)

Restoration to the Companies House register

71. A court has the power under section 1032 of the Companies Act 2006 to issue an order which will have the general effect of restoring that company to the register and the company will be deemed to have continued in existence as if it had not been dissolved or struck off the register.
72. The Upper Tribunal has considered the decision of a traffic commissioner to revoke a dissolved company's licence because there was no longer an entity that could hold it. The company was subsequently restored to the relevant register after the traffic commissioner's decision. The Upper Tribunal issued case management directions to the effect that they did not have jurisdiction to consider the appeal in respect of actions taken by Companies House.⁶⁶ Para 17(3) of Schedule 4 to the Transport Act 1985 provides that the Upper Tribunal may not take into consideration any circumstances which did not exist at the time of the determination which is the subject of appeal.⁶⁷

Director Disqualification

73. Under the Company Directors Disqualification Act 1986, undischarged bankrupts 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.⁶⁸ The Companies House website or enquiries of the Insolvency Service should confirm whether there has been a disqualification.

Employees

74. 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.⁶⁹ 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.⁷⁰

Partnerships

75. 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.
76. In the event of the insolvency of a limited liability partnership, the laws applicable to companies under the Companies Act 2006 and the Insolvency Act 1986 will apply.

⁶⁶ Case Management Directions in 2018/060 1 Scaffolding Ltd

⁶⁷ See Statutory Guidance and Statutory Directions on Appeals

⁶⁸ [The Official Receiver v Atkinson & Ors \[2021\] EWHC 175 \(Ch\)](#) provides guidance as to the circumstances in which a person can be considered to be acting as a shadow or de facto director for the purposes of the 1986 Act

⁶⁹ Regulation 8 Transfer of Undertakings (Protection of Employment) Regulations 2006

⁷⁰ Paragraph 99 of Schedule B1 of the Insolvency Act 1986 and *Re Paramount Airways Ltd (No. 3)* [1995] 2 AC 394

Death, Bankruptcy (Sequestration), Liquidation / Administration / Receivership

Goods Licences

- 77.** An operator's licence cannot be transferred between legal entities.⁷¹ 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).
- 78.** 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.⁷²
- 79.** A traffic commissioner is not obliged to make an order under the above provisions without an application.
- 80.** 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.
- 81.** 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 to adverse conclusions being drawn against those directors.⁷³ The case law provides the following guidance on this type of application:⁷⁴
- once an administrator is appointed, he must decide whether 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

⁷¹ s.48(1) of the Goods Vehicles (Licensing of Operators) Act 1995 and [2015/009 Richard & Sylvia Jones trading as Acorn Skips](#)

⁷² [2011/044 P Plant Ltd & PGC Skip Hire Ltd](#)

⁷³ See Statutory Guidance and Statutory Directions on Good Repute and Fitness

⁷⁴ [2008/410 Brian Hill Waste Management Ltd](#)

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 reputation 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 reputation 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*⁷⁵

- 82.** 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 affect 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.⁷⁶ Insolvency practice indicates that creditors should be provided with a detailed 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.⁷⁷ 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, 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 reputation.⁷⁸

PSV Licences

- 83.** An operator's licence cannot be transferred between legal entities.⁷⁹ 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.
- 84.** 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

⁷⁵ See Phoenix Applications in Statutory Guidance and Statutory Directions on Good Reputation and Fitness

⁷⁶ Rule 4.228 Insolvency Rules. The Insolvency (England and Wales) Rules come into force on 6 April 2017.

⁷⁷ Statement of Insolvency Practice (SIP) 16

⁷⁸ See Statutory Guidance and Statutory Directions on Good Reputation and Fitness

⁷⁹ s.57(1) of the Public Passenger Vehicles Act 1981 and [2015/009 Richard & Sylvia Jones trading as Acorn Skips](#)

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>

85. 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.

86. 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 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.

87. 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).

88. A traffic commissioner is not obliged to make an order under the above provisions without an application.⁸⁰

89. 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.

⁸⁰ [2010/087 PIT 101 Ltd \(formerly Ethos Recycling Ltd\)](#)

Changes in Entity

90. 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.⁸¹ 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”.

⁸¹ R v Secretary of State for Social Services ex parte Chapman and Taylor [1996] 1 WLUK 432, [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

91. The Senior Traffic Commissioner for Great Britain issues the following Directions to traffic commissioners under section 4C(1) of the Public Passenger Vehicles Act 1981 (as amended) and by reference to section 1(2) of the Goods Vehicles (Licensing of Operators) Act 1995. 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 different legal entities.

Basis of Directions

92. 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

93. 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

94. 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.
95. 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 directors⁸² and the Upper Tribunal has indicated that directors should check the contents of an application form to ensure that it is accurate⁸³ and that the company is prepared to be bound by the requirements, it is not disproportionate to require that an application form is signed by a director. Traffic commissioners are entitled to infer that the individual director signing is authorised to bind the company.

⁸² [2011/037 Springwood Trading Ltd](#)

⁸³ [2000/041 Hi-Kube](#)

- 96.** The Companies Register⁸⁴ 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.
- 97.** The Companies Register can also be used to ascertain the details of persons with significant control (PSC) over entities such as companies and LLPs. Those details can include:
- Names
 - Dates of birth
 - Nationality
 - Country where PSC usually lives
 - Service address
 - Usual residential address
 - Date became PSC
- 98.** 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

- 99.** 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.
- 100.** When a change of name is notified or there is a suspicion of a phoenix application⁸⁵ it is essential that the company number is checked.⁸⁶
- 101.** 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.
- 102.** Changes of directors must be notified to the traffic commissioner and thereafter the DVSA National Intelligence Unit may 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.

⁸⁴ <https://find-and-update.company-information.service.gov.uk>

⁸⁵ See Statutory Guidance and Statutory Directions on Repute

⁸⁶ See attached Annex Re: Company Names

- 103.** 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 provides written confirmation on the LLP's headed paper of the authority of that person to represent the partnership's guiding mind.

Subsidiaries

- 104.** 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

- 105.** All partners should be named on licence documentation and all correspondence. For the reasons given above staff might complete a search for each partner. 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.
- 106.** If an individual partner becomes bankrupt, proof of finance should be requested and questions raised with the partners as to the position of the partnership.
- 107.** In the past a custom may have arisen which has allowed partners to change by simply notifying the traffic commissioner through the Office of the Traffic Commissioner, (a process which might then lead to a check of the financial standing of the remaining partners). However, whilst the legislation allows this approach in Scotland, it 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, however, 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, 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

- 108.** Any queries regarding an unincorporated body should be referred to the traffic commissioner. As per the Statutory 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

109. 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.

110. 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).

111. 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 administrators⁸⁷ and that administrators of companies holding PSV licences cannot apply under the similar provision in section 57 of the Public Passenger Vehicles Act 1981⁸⁸ as this applies to individuals only. Directors should have notified the traffic commissioner through the Office of the Traffic Commissioner 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.

112. 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. As with an application under Regulation 31 it is important to ensure that the person making the application has the authority to do so. 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.

⁸⁷ [2012/008 Brian Richards trading as B Richards](#)

⁸⁸ Regulation 23 Public Service Vehicles (Operators' Licences) Regulations 1995 – only available for winding up order or resolution.

- 113.** 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. The application form must be signed and completed by the liquidator, administrator or receiver. A former director does not have authority to make this application and therefore all correspondence should be addressed to the liquidator, administrator or receiver following their appointment. Arguments that some other party can pursue this type of application are misconceived, as the Upper Tribunal case law summarised above suggests. It is a long established principle that grant of an operator's licence confers property rights on the lawful holder. Provisions such as those contained within the Insolvency Act 1986 indicate that it is the administrator who is the authorised agent and requires the administrator to take possession of assets, which will include the operator's licence, and it is on that basis that the administrator is permitted to pursue this application. A traffic commissioner may only interfere with the rights of that holder with lawful justification such as the change in financial status. It is therefore only the administrator who has locus (i.e. the right) to pursue the application. If the administrator etc. does not make an application then the licence should be subject to surrender or revocation depending on the circumstances of the case. In the case of a 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 below).
- 114.** 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)⁸⁹, 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.
- 115.** 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.
- 116.** 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.

⁸⁹ Goods Vehicles (Licensing of Operators) Regulations 1995

Dissolved Companies

- 117.** 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

The Company, Limited Liability Partnership and Business (Names and Trading Disclosures) Regulations 2015 set out requirements and limitations as to the use of business names and the details which must be displayed on company documentation. 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: <https://www.gov.uk/government/publications/re-use-of-company-names/re-use-of-company-names>

An example of the limitations is that 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. Furthermore, 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 acquire 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 4th December 2011

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

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

(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.