



Department for
Infrastructure

An Roinn
Bonneagair

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Practice Guidance Document No.1

GOOD REPUTE AND FITNESS

Commencement	01/10/2019
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PG1 - Version 1.2 Issued:	18/09/2020

GUIDANCE

1. The Department issues the following practice guidance as to the way in which it believes that it should interpret the law in relation to the requirements to be of good repute and / or fitness¹.
2. Where findings from the Upper Tribunal relate to traffic commissioners in GB, those findings and subsequent recommendations will be applied within Northern Ireland by the Head of Transport Regulation Unit (“Head of TRU”) on behalf of the Department for Infrastructure (“the Department”).

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

General provisions

3. Section 7(5) requires an applicant to provide any further information which the Department may reasonably require in relation to the application. This includes, but is not restricted to, particulars of convictions and penalties which have occurred during the preceding five years and activities carried out at any time before the application by the applicant, any company of which the applicant is or has been a director, where the applicant is a company any person who is its director or any other company linked with that director, any member of a partnership, any parent company.
4. Section 8(1) requires an applicant to inform the Department of any prescribed event (any conviction or penalty) incurred by a relevant person, which occurs between the date of making the application and its disposal. This includes the requirement for an applicant for a standard licence to notify the Department of any change in information supplied under Section 7 about the nominated transport manager, which occurs between the date of making the application and its disposal.

Restricted licences

5. Section 12(B) of the Act requires that an applicant for a restricted licence should not be unfit to hold an operator’s licence by reason of (a) any activities or convictions of which particulars may be required to be given under Section 7 or (b) any conviction/penalty required to be notified in accordance with Section 8(1) (see above). An operator’s fitness might be subject to material change. A restricted licence holder must also meet the requirements of sections 12C and, if the Department thinks fit, the requirements of section 12D.

Standard licences

6. Section 12(1) of the Act requires the applicant to satisfy the Department that the requirements of sections 12A and 12C are met. Section 12A(2)(b) contains a requirement that an applicant for a standard licence be of good repute as determined in accordance with regulations and Article 6 of Regulation (EC) 1071/2009 (2009 Regulation). Section 12A(3) requires that a designated

¹ See Practice Guidance and Instructions on the Principles of Decision Making & Concept of Proportionality.

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transport manager must meet the requirements of Article 4 of the 2009 Regulation including;

- to be of good repute as determined in accordance with regulations and Article 6 of the 2009 Regulation
 - in the case of an external transport manager, is not prohibited from acting as a transport manager
7. Action may be taken against a licence under section 23(1)(b) for a failure to meet the requirements of a licence condition. It is a condition for standard licence operators to inform the Department within 28 days of any change to:
- the name and legal form of the undertaking
 - the address of the establishment (standard licence holders)
 - matters affecting good repute
 - matters affecting financial standing
 - matters affecting professional competence
 - the transport manager's good repute and/or professional competence
 - the type of authorisation, number of vehicles etc.
8. Section 12(A)(2)(b) of the 2010 Act states that the Department needs to be satisfied that an applicant for a standard licence is of good repute. Section 24(1) states that the Department shall direct that a standard licence be revoked if it appears to the Department that the licence holder is no longer of good repute.
9. Regulation 5 of the Goods Vehicles (Qualifications of Operators) Regulations (Northern Ireland) 2012 gives the Department discretionary powers to have regard to any matter in determining whether individuals or companies are of good repute either upon application or at any time during the life of the licence, but in particular, must have regard to any convictions and penalties of the individual or company/directors, employees/officers, or agents.
10. Under Regulation 6 of the Goods Vehicles (Qualifications of Operators) Regulations (Northern Ireland) 2012 the Department shall determine that an individual is not of good repute if they have a) been convicted of a serious offence or b) has been convicted of road transport offences². More than one road transport offence is required for a mandatory finding of loss of good repute.
11. A serious offence is defined as any conviction where one of the following punishments has been imposed:
- imprisonment exceeding three months
 - a fine exceeding level 4 on the standard scale³ currently £2,500
 - a community service order (or equivalent) requiring unpaid work for more than 60 hours
 - any punishment outside the UK corresponding to the above
12. A road transport offence is defined as follows:

² These provisions were amended by the Regulations to give effect to Council Directive 98/76/EC, amending Council Directive 96/26/EC. The 1996 Directive, as amended, distinguishes between "serious criminal offences" and "serious offences" relating to aspects of road transport, as specified in the Directive. The respective Regulations implementing the amended Directive impose a mandatory finding that an operator is no longer of good repute if either criterion applies. Now see Regulations (EC) No. 1071/2009

³ <http://sentencingcouncil.judiciary.gov.uk>

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(a) an offence under the law of any part of the United Kingdom relating to road transport including, in particular:

- (i) an offence relating to drivers' hours of work or rest periods, the weights or dimensions of commercial vehicles, road or vehicle safety or the protection of the environment; and
- (ii) any other offence concerning professional liability; or

(b) any corresponding offence under the law of a country or territory outside the United Kingdom.

13. For the purposes of both restricted and standard licences:

a. Relevant activities are defined as any activities in carrying on any trade or business in the course of which vehicles are operated, employment in that type of business or as a director of that type of business.

b. Relevant convictions can be summarised as any of the following offences committed by the applicant, any company of which the applicant is or has been a director, where the applicant is a company any person who is its director or any other company linked with that director, any member of a partnership, any parent company and any employee or agent:

- an offence under Article 69 of the Road Traffic (Northern Ireland) Order 1995 (goods vehicle test certificates)
- an offence in relation to a goods vehicle relating to the maintenance of vehicles in a fit and serviceable condition, or overloading, or the licensing of drivers
- a drivers' hours offence relating to a goods vehicle
- an offence under Article 174 of the Road Traffic (Northern Ireland) Order 1981 (false statements in connection with forgery of, and fraudulent use of documents) in relation to international permit (as was)
- an offence under section 3 of the Control of Pollution Act 1974, or section 2 of the Refuse Disposal (Amenity) Act 1978, or section 1 of the Control of Pollution (Amendment) Act 1989, or section 33 of the Environmental Protection Act 1990
- an offence in relation to a goods vehicle in contravention of a provision prohibiting or restricting waiting vehicles made under the Road Traffic Regulation (Northern Ireland) Order 1997 or a relevant traffic regulation order

and the following offences committed by the applicant, any company of which the applicant is or has been a director, where the applicant is a company any person who is its director or any other company linked with that director, any member of a partnership, any parent company:

- an offence under the Goods Vehicles (Licensing of Operators) Act (Northern Ireland) 2010, the Transport Act (Northern Ireland) 1967, the GB Road Traffic Act 1988 relating to licences or means of identification or the Vehicle Excise and Registration Act 1994
- an offence relating to section 13 of the Hydrocarbon Oil Duties Act 1979 (unlawful use of rebated fuel oil in relation to goods vehicles)

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- an offence under the Road Traffic (Northern Ireland) Order 1981
14. Under regulation 9 of the Goods Vehicles (Qualifications of Operators) Regulations (Northern Ireland) 2012 spent convictions shall be disregarded and the Department has discretion to disregard any other offence as appropriate based on the time which has expired since the conviction subject to the guidance below.

Other Relevant Legislation: Convictions and infringements

The Rehabilitation of Offenders (Northern Ireland) Order 1978

15. Article 3 of the Rehabilitation of Offenders (Northern Ireland) Order 1978 provides that a person is to be treated as a rehabilitated person. A conviction is to be treated as “spent” provided that the following conditions are satisfied in relation to any offence or offences committed before or after commencement of the Order:
- the sentence imposed is not excluded from rehabilitation under the Order
 - since the conviction and during the relevant rehabilitation period, there has not been a subsequent conviction and sentence which is excluded from rehabilitation
16. The convictions of corporate bodies are not subject to the Rehabilitation of Offenders (Northern Ireland) Order 1978.
17. A person can only become a rehabilitated person if the sentence has been served in full or there has been full compliance with the requirements of the sentence. A failure to pay a fine or breach of a community penalty does not exclude a person from subsequently becoming rehabilitated. A sentence of imprisonment is deemed to have been served as at the time that the order requires the offender to be released from prison.
18. Article 5 of the Order sets out the effect that rehabilitation has on an offender. A person who has become a rehabilitated person shall be treated for all purposes in law as a person who has not committed or been charged with or prosecuted for, or convicted of or sentenced for the offences which were the subject of the conviction. The result is specifically limited and refers to convictions rather than the conduct itself:
- no evidence is admissible in any proceedings before a judicial authority exercising its functions in Northern Ireland to prove that the individual has committed or been charged with or prosecuted for or convicted of or sentenced for any offence which is the subject of the spent conviction
 - no question can be put to that individual in any such proceedings, which cannot be answered, without acknowledging or referring to a spent conviction
19. For the purposes of Article 5 of the Order “proceedings before a judicial authority” include, in addition to proceedings before any of the ordinary courts of law, proceedings before any tribunal, body or person having power:
- by virtue of any statutory provision, law, custom or practice
 - under the rules governing any association, institution, profession, occupation or employment

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- under any provision of an agreement providing for arbitration with respect to questions arising thereunder
 - to determine any question affecting the rights, privileges, obligations or liabilities of any person or to receive evidence affecting the determination of any such question
- 20.** Article 7 sets out the rehabilitation periods as summarised in the attached Practice Guidelines and the rehabilitation period applicable where multiple convictions apply:
- where only one sentence covered by this Order is imposed the rehabilitation period is as set out at Article 5
 - where more than one sentence covered by this Order is imposed in respect of a conviction (whether or not in the same proceedings) the applicable rehabilitation period is that for the longer sentence
 - where a person is conditionally discharged or a probation order is made and after the end of the applicable rehabilitation period they are dealt with, in consequence of a breach of the order for the offence for which the order was made then they shall not be treated as having become rehabilitated until the end of the rehabilitation period for the new sentence
 - If during the rehabilitation period the person convicted is convicted of a further offence (other than a summary offence) and no sentence excluded from rehabilitation is imposed, any rehabilitation period which would end the earlier shall be extended so as to end at the same time as the other rehabilitation period
 - the rehabilitation period applicable to another conviction cannot be extended by reference to an order imposing on a person any disqualification, disability, prohibition or other penalty
- 21.** The provisions do not apply to a conviction in another country which would not have constituted an offence if it had taken place in Northern Ireland.
- 22.** Whilst Article 8(3) of the Rehabilitation of Offenders (Northern Ireland) Order 1978 allows a “spent” conviction to be admitted in evidence where the judicial authority, i.e. the Department, is satisfied, in the light of any considerations which appear to it to be relevant (including any evidence which has been or may thereafter be put before it), that justice cannot be done in the case except by admitting or requiring evidence relating to a person’s “spent” convictions, this is subject to the specific provisions relating to spent convictions in the Goods Vehicles legislation, as above. Article 8(3) ensures that “spent” convictions stay “spent” unless it is in a class where it is permissible to do so and the party applying to put the “spent” conviction in (for example the Police or DVA) can satisfy the Department that there is no other way of doing justice.
- 23.** In 2014/008 Duncan McKee & Mary McKee, the Upper Tribunal reminded traffic commissioners that *“this is a civil commercial jurisdiction with a strong emphasis on firm and consistent regulation, public protection and fair competition. One key question that routinely arises in cases such as this is whether or not the TC can trust an operator to be compliant in the future. In our view, especially with a pattern of ongoing and apparently continuous non-compliance in the past, TCs are entitled to go back as far as they need to, in order to properly answer this question (subject to the permitted statutory framework which, of course, does impose time limits in relation to some aspects)”*. The Senior Traffic Commissioner

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in GB has identified some examples of where, the Department agrees, justice might require consideration to admitting evidence of a spent conviction:

- non-disclosure – the Tribunal made clear its view on a failure to notify: “*In considering how to dispose of the appeal we wish to make it clear that we regard the... conviction and the non-disclosure as serious matters*”⁴. The Department might also wish to consider cases where the party would benefit from, for example, repeated adjournments or a failure to report the conviction to the traffic commissioner (which only came to light much later) or failed to be sentenced for the offence(s) for several months due to an outstanding trial of other defendants, and, for example, under section 26(1)(b) for breach of a condition
- rebuttal - to refute a positive assertion. For example, if an operator has made a positive statement about an incident or offence that is not correct, this might require a the Department to revisit an earlier preliminary indication not to seek to admit the relevant spent conviction
- similar fact – i.e. evidence of prior conduct, which demonstrates the same failings or shortcomings in management. In some circumstances, it may not be possible to assess the attitude of an operator when something goes wrong which, as the Upper Tribunal indicates, can be very instructive and to the benefit of a party

Cautions

- 24.** A person who is given a caution which is spent shall be treated for all purposes in law as a person who has not committed, been charged with or prosecuted for, or been given a caution for the offence and no evidence is admissible in any proceedings before a judicial authority to prove that person has committed, been charged with or prosecuted for, or been given a caution for the relevant offence. That person cannot be asked in the course of any proceedings any question which cannot be answered without acknowledging or referring to a spent caution or any ancillary circumstances.

Regulation (EC) 1071/2009

Serious infringements

- 25.** Annex IV of the Regulation (EC) 1071/2009 identifies the most serious infringements that must be considered by the Department for the purposes of Article 6(2)(a) relating to good repute.
- 26.** These are set out in Annex 2 below.
- 27.** Article 16 refers to the establishment of a National Electronic Register, which must contain:
- the name and legal form of the undertaking
 - the address of its establishment
 - the names of the transport managers designated to meet the conditions as to good repute and professional competence

⁴ 2000/055 Michael Leslie Smith t/a Mike Smiths Transport

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- the type of authorisation, the number of vehicles it covers and, where appropriate, the serial number of the Community Licence and of the certified copies
- the number, category and type of serious infringements, as referred to in Article 6(1)(b), which have resulted in a conviction or penalty during the last two years
- the name of any person declared to be unfit to manage the transport activities of an undertaking, as long as the good repute of that person has not been re-established pursuant to Article 6(3), and the rehabilitation measures applicable

Regulation (EU) 2016/403

- 28.** Annex 1 of Regulation (EU) 2016/403 lists the categories, types and degree of seriousness of serious infringements of Community rules which may lead to the loss of good repute. Where repeated infringements are notified to the Department these must be considered in accordance with both 1071/2009 and Regulation (EU) 2016/403 when considering repute and decisions on their impact on repute must be reasoned and proportionate and set out in any deliberations or decisions taken.

Interconnectivity of the National Registers between Member States

- 29.** Regulation (EC) 1213/2010 requires that Member States ensure that there is inter-connectivity between the various National Registers. The Department may therefore be referred to incidents where an operator and/or transport manager has been convicted of a *serious criminal offence* or has incurred a penalty within the European Union for a serious infringement of Community rules relating to:
- the driving time and rest periods of drivers, working time and the installation and use of recording equipment
 - the maximum weights and dimensions of commercial vehicles used in international traffic
 - the initial qualification and continuous training of drivers
 - the roadworthiness of commercial vehicles, including the compulsory technical inspection of motor vehicles
 - access to the market in international road haulage or, as appropriate, access to the market in road passenger transport
 - safety in the carriage of dangerous goods by road
 - the installation and use of speed-limiting devices in certain categories of vehicle
 - driving licences
 - admission to the occupation
 - animal transport

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Case law

- 30.** These guidelines may be subject to decisions of the higher courts and to subsequent legislation. As good repute and fitness are not defined in legislation the Department accepts the following principles and examples from existing case law which apply to both⁵. Where a legal person is subject to an existing disqualification that means they cannot be involved in an application or operation⁶ they will likely need to be considered at public inquiry on any application to re-enter the industry after the expiry of any disqualification. Repute is a mandatory and continuing requirement and although repute must be considered as at the date of any decision that does not mean that the past becomes irrelevant. The Upper Tribunal has said that “*in many cases, the present is simply the culmination of past events*”⁷.
- 31.** Whilst European law leaves the choice of form and methods for the implementation of a Directive or Regulation to the particular Member State, European case law requires, in this instance the interpretation of ‘road transport offences’, to be consistent with the wording and purpose of the Regulation so as to achieve the intended result (as per the third paragraph of Article 249 of the EC Treaty)⁸. This approach is supported by domestic case law⁹. The EC legislation refers to “serious” road transport offences. It follows that the Department is not required to revoke licences for loss of good repute if operators are convicted of a number of minor road transport offences but might still take action in these cases under the existing discretionary powers in the legislation (see Article 6 at Annex 2). In the interests of consistency the Department will generally view as serious those offences which have a significant adverse impact in particular on:
- an operator’s fitness to hold a licence
 - road safety
 - the promotion of fair competition
 - the protection of the environment
- 32.** The Department must now approach the question of good repute by taking into account not only the NI legislative provisions but also Article 6 of Regulation 1071/2009¹⁰. They cannot review the merit of a criminal conviction¹¹ but must consider the relative seriousness.
- 33.** The Upper Tribunal has explored the scope of the requirement to be of Good Repute¹². The provisions refer to an individual or company’s repute¹³ or

⁵ 2013/007 Redsky Wholesalers Ltd

⁶ 2013/040 Southwaterstreet Ltd t/a S W Transport and Thomas McKinney – as a Director, 2014/066 Bridget Burdon & Partners – as a partner

⁷ 2014/059 Randolf Transport Ltd & Catherine Tottenham

⁸ Case C-106/89 Marleasing [1990] ECR I-4135 and Case C-334/92 Wagner Miret [1993] ECR I-6911

⁹ Litster v. Forth Dry Dock and Engineering Company Ltd (1990) I AC 546, and Pickstone v Freemans plc (1989) AC 66 and Clyde v Eagle Star Insurance Co (1988) 4 All ER 417

¹⁰ 2012/034 Martin Joseph Formby t/a G&G Transport

¹¹ Nottingham City Council v Farooq (Mohammed) (1998) The Times, 28th October

¹² NT/2013/082 Arnold Transport & Sons Ltd v DOENI as set out in Regulations 5-9 of the Goods Vehicles (Qualifications of Operators) Regulations (Northern Ireland) 2012. In 2017/042 Mark Lyons the Upper Tribunal confirmed “decisions on the meaning of a section in the 1995 Act or a paragraph in the Regulations, made under that Act, are highly relevant to the interpretation of an identical provision in the Northern Ireland legislation and vice versa.” In relation to Goods Vehicle operator licensing the terms of Regulation 5(1) and 5(2) of the Goods Vehicles (Qualifications of Operators) Regulations (Northern Ireland) 2012, are identical to the terms of paragraph 1 of Schedule 3 of the Goods Vehicle (Licensing of Operators) Act 1995

¹³ Section 12A of the Goods Vehicle (Licensing of Operators) Act (Northern Ireland) 2010

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fitness¹⁴ to hold a licence, as relevant considerations. The Upper Tribunal in their decision: “*underlined the word ‘fitness’ in both these provisions because it is critical to understanding the breadth of the requirement to be of good repute. It means, for example, that an operator who cannot be trusted to comply with the operator’s licensing regime is unlikely to be fit to hold an operator’s licence*”¹⁵.

- 34.** Fitness is an essential element of an operator’s repute and it is more than just convictions, it is the ability to meet the requirements/undertakings on the operator’s licence. The Upper Tribunal reinforced in the appeal of ETS25: “... *it does not matter whether an operator’s licence is held by an owner operator, a partnership or a limited company because in each case the person or persons responsible for managing the business bear the ultimate responsibility for ensuring that the road transport aspect of the business operates in compliance with the regulatory regime. That means that they cannot plead ignorance or put the blame on the transport manager because they are required to have sufficient knowledge of the regulatory regime to ensure compliance in general and the proper performance of the transport manager’s duties in particular*”. The Tribunal has dismissed an appellant’s belief that responsibility for maintenance failings sat with the persons to whom she had handed over responsibility¹⁶. They confirmed that ultimately “*as the proprietor of the business the responsibility for ensuring that properly maintained vehicles were used for the purposes of that business, rested with her.*”
- 35.** The case law indicates the range of knowledge an operator is required to possess in order to ensure satisfactory arrangements¹⁷. In the case of a standard licence holder, the operator has the benefit of a transport manager with a Certificate of Professional Competence. However, the operator retains the responsibility for ensuring the transport manager performs their duties and in particular exercises continuous and effective management. For restricted licence holders the operator arguably has a more difficult task as they are not required to employ a qualified transport manager yet the compliance required is no less. An operator must have satisfactory arrangements and should review the need for further training at regular intervals in light of there being no examination to demonstrate ability to manage an operator’s licence¹⁸.
- 36.** A useful indication of relevant evidence would be attendance on an operator licence awareness training course (OLAT), run by a trade association (e.g. FTA/ RHA/ BAR/ CPT), a professional body (e.g. IoTA/ CILT/ SOE/ IRTE) or an approved examination centre offering the relevant transport manager CPC qualification for the type of licence held. However, the level of training will need to be properly assessed in each case, based on the size and complexity of the transport operations.
- 37.** The provisions regarding road transport offences are entirely separate from the general provisions relating to serious offences. On the previous wording of the legislation the phrase “more than one conviction” did not require proof of different incidents or different days of commission or of hearing in court. On any view a second conviction makes the breach of the law all the more serious, since the

¹⁴ Section 12B of the Goods Vehicle (Licensing of Operators) Act (Northern Ireland) 2010

¹⁵ NT/2013/082 Arnold Transport & Sons Ltd v DOENI

¹⁶ 2016/056 Tracy Noddings t/a Noddies Cars

¹⁷ As determined in accordance with regulations and Article 8 of the 2009 Regulation

¹⁸ See Submissions under the Practice Guidance Docs – Pages 17-19 below

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additional conviction indicates a repetition of wrong-doing which properly affects the issue of general good repute¹⁹. The Department will consider each conviction separately to determine its seriousness, e.g. adherence to the rules relating to drivers' hours are fundamental to road safety²⁰. However, the case law importing a test of seriousness to road transport offences predates both the decisions in *Crompton t/a David Crompton Haulage v Secretary of State for Transport [2003] EWCA Civ 64* and *2002/217 Bryan Haulage Ltd*, which in any event must now be read in the context of the directly applicable provisions of Regulation (EC) 1071/2009.

38. As indicated above the Upper Tribunal expects traffic commissioners, (and therefore the Department) to take account of (EC) Regulation 1071/2009²¹. Article 6.1, subparagraph 3 (a), which refers to serious infringements of national rules, and (b) which refers to a serious criminal offence or a penalty for a serious infringement of Community rules. In relation to (b), serious offences are defined within Regulation 7 of The Goods Vehicles (Qualifications of Operators) Regulations (NI) 2012 and the Department is required to determine whether the loss of good repute would constitute a disproportionate response.
39. The Department should be careful to distinguish between the position of a company and individuals such as directors due to the provisions relating to mandatory loss of repute. Convictions of a company's officers, servants or agents, however, may be relevant. The minimum repute requirement will not be satisfied if relevant individuals have been convicted of serious criminal offences. That minimum requirement of good repute cannot be reduced by reference to "proportionality"²².
40. The Upper Tribunal has highlighted the differences between an application where the Department exercises a 'gatekeeper function' and any subsequent regulatory action taken after a licence has been granted²³. On application the Department will therefore wish to determine who will be responsible for fulfilling the undertakings and conditions and whether they are fit to do so²⁴. Clearly an application form cannot envisage every situation, for instance where serious convictions are not necessarily notifiable²⁵ or where convictions are not specifically referred to. The Department cannot be expected to overlook facts which might be relevant to future compliance²⁶. The undertakings specified on the licence, however, include a commitment to report convictions recorded against the licence holder or employees or agents of the licence holder.
41. An applicant or operator can be taken to be aware of the various guidance documents issued on behalf of the Department²⁷. The legislative provisions gives the Department a wide discretion so that they 'may have regard to any matter' in determining whether an applicant is of good repute and can take into account any

¹⁹ 2000/009 & 2000/010 J C Stephenson & T E Turner (trading as J & T Transport) and Thomas McHugh

²⁰ 2001/074 B E Clark

²¹ 2012/050 Charlie Roberts Ltd t/a MAN Euro applies Stephenson & McHugh but only so far as to define "serious offence" under Schedule paragraph 2(a) and "more than one conviction". In respect of the remainder of this decision the law was more fully considered in 2010/025 Skip It (Kent) Ltd and Others.

²² 2008/580 TS Dhaliwal, See Practice Guidance and Instructions on the Principles of Decision Making

²³ 2013/046 Shearer Transport Ltd & James Shearer

²⁴ 2013/019 Susan Tattersall t/a TMS

²⁵ 2001/044 N Hazel trading as JRS Freight (sentence of 46 months imprisonment for wounding with intent)

²⁶ 2009/528 KHJ Ltd, once trust breaks down it is very difficult to rebuild – Upper Tribunal stay decision in Jarson Ltd t/a Rob Jones Tractor Hire the Upper Tribunal

²⁷ 2012/346 MGM Haulage & Recycling Ltd

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other information which appears to them to relate to the fitness of the individual to hold a licence. The wording of the general conditions on standard licences explicitly imposes a duty to inform the Department of any events affecting good repute including convictions listed in the schedules.

42. The Department is not limited to the circumstances of a particular offence but can and will look at the conduct involved²⁸. It can and will, for instance, consider general conduct where the operator was well aware of the commercial advantages that they were obtaining by reason of operating outside the operator licensing system and was not operating on a level playing field with competitors²⁹ such as fraud and breach of contract³⁰. This might include anti-competitive behaviour, a failure to deliver against registered timetables or the use of fraudulent emissions systems.
43. The Department may examine matters where there is no conviction e.g. relevant charges left on the Crown Court file or a Police report of a relevant offence. The Department is entitled 'to take into account all reports concerning speeding or overloading when considering an operator's fitness to hold a licence'³¹. Other conduct such as a lack of co-operation and/or honesty during the course of the public inquiry will also be relevant. It is incumbent of course on an operator to ensure that prohibitions are cleared before using a relevant vehicle³².
44. 'Fronting', where a person, partnership or company, which does not have an operator's licence, uses the operator's licence held by another entity to conceal the fact that they are behaving in a way which requires them to have an operator's licence of their own, is considered to be serious. Fronting deprives the Department of the opportunity to oversee an 'operator'. 'Fronting' is aggravated and very much more serious where it is apparent that the entity hiding behind the legitimate 'front' would be unlikely to obtain or would be debarred from holding their own operator's licence. The Upper Tribunal has given clear guidance that evidence of fronting can, on its own, provide justification for deciding that the operator being used as a 'front' has lost its good repute³³. When concerns are raised that an applicant could be a 'front', they will need to do more than make bare assertions and rely on their good character to satisfy the Department that there will be "clear blue water" between the applicant and the entity without an operator's licence.³⁴
45. It is clear from the case law that the loan of discs is a serious matter³⁵ as is the use of out of date discs³⁶. It is incumbent on an operator who displays a disc from another operator to provide a paper trail to show that the use is legitimate³⁷ simply

²⁸ 2010/367 Aspey Trucks Ltd considering the circumstances surrounding a conspiracy to supply Class B drugs

²⁹ 2006/73 AG Everett

³⁰ 2010/058 Asif Mohammed Din t/a Ribble Valley Private Hire – unauthorised sub-contracting and use of drivers with no CRB checks for taxi work

³¹ 2001/010 T Smith

³² 2006/487 J & CM Smith

³³ 2011/357 Utopia Traction Ltd, 2012.071 Silvertree Transport Ltd – Gives s further definition: 'fronting' occurs when appearances suggest that a vehicle, (or fleet) is being operated by the holder of an operator's licence when the reality is that it is being operated by an entity, (i.e. an individual, partnership or company), which does not hold an operator's licence and in the manner in which the vehicle is being operated requires, if the operation is to be lawful, that the real operator holds an operator's licence. In which circumstances the Department is entitled to take a serious view of such conduct.

³⁴ 2016/044 Sana Aziz

³⁵ 2000/15 D Murphy, 2010/84 & 86 Coach Express Ltd & Others

³⁶ 2000/027 P Brown trading as Leroy Coaches

³⁷ 2010/084 & 86 Coach Express Ltd & Others

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relying on an assertion is not sufficient³⁸. If an operator is found to have deliberately not paid vehicle excise duty it is open to conclude that there has been tax evasion³⁹, as with the persistent use of untaxed vehicles⁴⁰. The avoidance of fuel excise duty through the unlawful use of untaxed fuel “undermines fair competition and no responsible regulator can tolerate it”⁴¹ (and HMRC may also impose penalties)⁴². In such circumstances the Department will give very serious consideration as to whether operators can continue to satisfy the repute requirement.

- 46.** Adherence to the rules relating to drivers’ hours is fundamental to road safety.⁴³ The responsibility for ascertaining what is required and for complying with those requirements lies with the operator⁴⁴. The Department agrees with the Senior Traffic Commissioner’s description of three simple steps: (1) check compliance with the governing legislation, (2) train drivers regarding that legislation and monitor compliance, (3) retrain and discipline drivers where shortcomings are identified. Whilst the task of ensuring compliance with those requirements can be delegated, for instance to the transport manager, the responsibility cannot⁴⁵. The Department can and will exercise its discretion in individual cases and therefore is entitled to conclude that convictions for this type of breach are serious road transport offences which could then lead to a loss of repute⁴⁶. In cases of persistent breaches of the drivers’ hours rules and tachograph regulations by drivers the Department will scrutinise the operator’s arrangements for ensuring compliance expecting detailed evidence of those arrangements to be provided (rather than mere assertions being made).
- 47.** Where the Department finds that the operator had knowledge of the breaches and failed to take sufficient and adequate action to prevent reoccurrence it will give serious consideration as to whether the operator can continue to satisfy the repute requirement. Similarly where the Department finds that the operator had no knowledge of the breaches it will also give serious consideration as to whether the operator can continue to satisfy the repute requirement as the operator should have been complying with the relevant undertaking. Missing mileage and a failure to retain or keep full records can often result in the remaining records being false as they may not show the true position⁴⁷. In cases of persistent breaches it may be difficult for an operator to contend that they have complied with their undertaking, as it requires a more rigorous regime⁴⁸.
- 48.** A licence is issued to an operator on trust that the operator will comply with the requirements and that the application form has been fully, accurately and

³⁸ 2011/058 Robert David Moore t/a RDM Travel

³⁹ 2000/066 D Eccles

⁴⁰ 2001/007 Alcaline UK (following a withdrawal of funds by an associated company)

⁴¹ NT/2014/019 OC International Ltd v DOENI

⁴² 2002/018 UK Plant & Haulage (Services)

⁴³ From 2 March 2015, EU Regulation 165/2014 replaced EEC 3821/85, concerning the construction, installation, use, testing, and control of tachograph recording equipment. The new regulation increases the journey distance for exemptions from 50km to 100km from the operator’s base for vehicle/trailer combinations with a maximum weight of 7,500kg which are: used to carry materials, equipment or machinery for the driver’s use in the course of their work (when driving is not the driver’s main activity); used to carry goods and are propelled by natural or liquefied gas or electricity; used to carry live animals from farms to local markets or from market to slaughter.

⁴⁴ 2010/063 Cornelius Pryde Hart and Abigail Hart t/a Zulu’s Minibus

⁴⁵ *Harding v VOSA* [2010] ewhc 713 (Admin) establishes that where a driver does not take the required rest period and has not kept a record of their reasons cannot rely on the exemption which allows derogation for safety reasons.

⁴⁶ 2001/074 Brian Edward Clark

⁴⁷ 2011/065 Deep Transport Ltd

⁴⁸ 2001/007 Alcaline UK

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honestly completed⁴⁹. A failure to appoint a replacement transport manager after a period of grace or to communicate with the Department can amount to serious misconduct on the part of the operator⁵⁰. A persistent failure to comply with undertakings, especially following a warning, may provide *compelling* reasons⁵¹ to conclude that there has been a loss of repute/fitness. The Department is entitled to have regard to the annual roadworthiness first time pass rate/failures because they can be a barometer of the way in which vehicles in question are being maintained⁵². Where the Department finds that trust has been abused it may lead to a loss of repute, for example where there has been a failure to notify changes⁵³. The honest and truthful completion of an application for a licence is fundamental to the operator licensing system. The Department is entitled to conclude that an application form should have been checked by the applicant, a company secretary or by the directors/officers of the company⁵⁴ and that the vehicles will be operated by the person who has applied for the licence⁵⁵. Clearly the provision of false bank statements⁵⁶ or the failure to disclose relevant previous conduct such as convictions⁵⁷ or revocations⁵⁸ or insolvency⁵⁹ will entitle the Department to question the operator's repute and is likely to have a serious impact upon that repute.

49. A history of involvement with dissolved companies without any evidence of actual wrongdoing will not of itself amount to a loss of repute⁶⁰. Where an individual has declared a previous bankruptcy but produced a discharge certificate and satisfactory financial evidence, in the absence of any other issue this should not of its own prevent grant. However, the use of "Phoenix" arrangements to avoid previous liabilities may amount to unacceptable business practice⁶¹. A phoenix company is where the assets of one limited company are moved to another legal entity (sometimes referred to as a 'pre-pack') but with no obligation to pay the failed company's debts. The conduct of the company is an important factor when considering repute and any suggestion that a company has, for example, favoured trade creditors over the Crown will prompt questions as to the motive behind such actions⁶². The Department will scrutinise such applications carefully to ensure the promotion of the principle of fair competition.

50. Dishonesty⁶³ and illegal operation are very serious matters. The Department is entitled to conclude that a person does not have the required repute where they have decided to operate without authorisation (either on an interim or full licence) particularly in the face of warnings not to⁶⁴. All operators have a positive duty to co-operate with DVA, DVSA, and the Department. Any attempt to deceive the Department is serious conduct that cannot be condoned particularly where an

⁴⁹ 2016/074 Christchurch Coaches Ltd

⁵⁰ 2012/001 Zeeshan Malik t/a Langston's Group

⁵¹ 2011/036 LWB Ltd

⁵² 2012/023 JA & VC Fryer Farms

⁵³ 2000/36 C Clark, 2008/410 Brian Hill Waste Management (prior to administration)

⁵⁴ 2000/041 Hi-Kube

⁵⁵ 2004/426 EA Scaffolding, 2004/255 M Oliver,

⁵⁶ 2006/313 D Lloyd

⁵⁷ 2000/059 Dolan Tipper Services

⁵⁸ 2004/367 N & S Gillman

⁵⁹ 2007/212 Huxley Travel

⁶⁰ 2010/067 Pemberton Transport Ltd

⁶¹ 2010/083 Paul Frederick Boomer t/a Carousel and see Guidance and Instructions on Legal Entities

⁶² 2014/064 Alan Michael Knight – the amount owed to the Crown creditors was close to 90%

⁶³ The Supreme Court formulated a new test for criminal dishonesty in *Ivey v Genting Casinos (UK) Ltd* [2017] UKSC 67 effectively removing the second (subjective) limb of the test established in *R V Ghosh* [1982] EWCA Crim 2 but also emphasises a subjective aspect to the circumstances that fall to be considered

⁶⁴ 2005/537 West Mix, 2002/027 D Broadie

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operator and/or applicant relies on a document that has been altered so that it might mislead the Department⁶⁵. Similarly operators who deliberately deceive and present false evidence to the Department either in correspondence or at public inquiry are also liable to prosecution through the criminal courts and are likely in serious cases to receive a custodial sentence. It follows that, where an operator is later found to have misled the Upper Tribunal or other tribunal of law, they place at risk their ability to hold an operator licence.

51. Other conduct such as a failure to heed instructions⁶⁶ from enforcement agencies⁶⁷ or police officers⁶⁸, attempts to circumvent the licensing system⁶⁹, recurring civil penalties, and breaches of other enforcement regimes such as the Home Office code of practice on preventing clandestine entrants⁷⁰, findings by the Competition Appeal Tribunal, or action taken by The Pensions Regulator, will also have a serious impact on repute⁷¹. In such circumstances, the Department might be prompted to attach further conditions at grant or to seek undertakings to ensure compliance with these codes⁷².
52. Subject to the restrictions in the Goods Vehicles legislation referred to above any reference to “a conviction” is not the same as a court hearing resulting in a finding of guilt, for instance a conditional discharge is not strictly a conviction⁷³. The same will apply to other alternative court disposals including an absolute discharge. A discharge from a court will NOT be a disposal that renders a licence liable to automatic revocation but authorities are entitled to ask questions. The application of the Rehabilitation of Offenders (Northern Ireland) Order 1978 can prove difficult when the Department is considering multiple offences and it is important to differentiate between summary only offences and offences which can or must be dealt with by the higher courts⁷⁴.
53. Useful parallels can be drawn from other licensing regimes⁷⁵ when determining the relevance of previous convictions to proceedings before the Department and the principles set out below are useful when deciding whether or not to consider spent convictions:
 - where a judicial authority is considering whether justice cannot be done in a particular case except by admitting evidence of spent convictions, it would be contrary to the purpose of the legislation to receive all spent convictions and then decide which ones to take into account
 - when asked to provide information an enforcing authority should identify the issue to which the spent convictions would relate if they were admitted and

⁶⁵ 2002/009 Gollop, 2005/087 P Duckmanton (maintenance records), 2002/075 Hazco Environmental Services (Drivers' hours)

⁶⁶ Any failure to follow lawful instructions, obstruct/intimidation of public officials such as DVA examiners, or operation outside of any international agreements

⁶⁷ e.g. Health and Safety Executive who can refer workplace transport incidents such as load security

⁶⁸ 2005/050 Rush Travel

⁶⁹ 2006/056 Paul Oven Transport, AG Everett (as above),

⁷⁰ Issued pursuant to the Immigration and Asylum Act 1999.

⁷¹ 2011/065 Deep Transport Ltd

⁷² For instance failures to comply with EU Regulation 181/2011 on bus and coach passenger rights (via bus Users UK & Travelwatch) breach of voluntary guidelines on the carriage of passengers to designated sporting events in England and Wales (See Annex 3), the above Home Office Code of practice pursuant to the Immigration and Asylum Act 1999.

⁷³ R v Rupal Patel No 2006/4890/B5

⁷⁴ 2009/530 Boomerang Travel Ltd

⁷⁵ Adamson v Waveney District Council [1997] 2 All ER 898, where the court was concerned with the grant of hackney carriage licence to 'a fit and proper person'.

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then should not only limit disclosure to those convictions which are relevant but should also provide a covering note indicating in general terms the class, age and seriousness of each of those offences in order to help the licensing authority to decide whether, once it has heard the applicant on the matter, it wishes to be informed of the details of the spent convictions so that it may treat them as material convictions

- any advocate should indicate in general terms the class, age and seriousness of the offences in order to help a tribunal decide whether, once it has heard the applicant on the matter, it wishes to admit evidence of the convictions it may be that only some of the spent convictions should be received and the applicant should be given an opportunity to persuade the tribunal that any spent convictions which have been disclosed are either irrelevant or should not prejudice the application because of their age, circumstances or lack of seriousness
- the tribunal should come to its own dispassionate conclusion having regard to the interests of both the applicant and the public in whose interests the exceptional power to have regard to spent convictions is being exercised

54. The Upper Tribunal has previously indicated that, in light of the statutory restrictions referred to above, it would be slow to accept that there are any circumstances in which the Department may refer to spent convictions when considering loss of repute⁷⁶. In *2012/034 Martin Joseph Formby t/a G & G Transport* indicated that, in applying paragraphs 1 - 5 of Schedule 3 to the 1995 Act, traffic commissioners must also now consider Article 6 of EU Regulation 1071/2009, which establishes *common rules concerning the conditions to be complied with to pursue the occupation of road transport operator* is met. Article 6 requires a Member State to implement a procedure for consideration of the repute of an operator or transport manager where convicted of a serious criminal offence or has incurred a penalty for one of the most serious infringements. Article 6(3) allows a margin of appreciation whereby Member States may provide for rehabilitation; this is achieved through the Rehabilitation of Offenders (Northern Ireland) Order 1978.

55. Where the rehabilitation of Offenders (Northern Ireland) Order 1978 does not apply, for instance, because of the length of sentence imposed, it is for the Department to determine as a question of fact, depending on the circumstances of each individual case, whether or not the commission of a particular offence remains a bar to the grant of an operator's licence⁷⁷.

⁷⁶ 2000/055 Michael Leslie Smith t/a Mike Smith Transport

⁷⁷ Martin Joseph Formby t/a G & G Transport.

INSTRUCTIONS

56. The Department issues the following instructions for use by staff and other interested individuals. They should not be construed as legal guidance or interpretations of the law as this rests with the Courts. These instructions are issued in respect of the approach to be taken by staff acting on behalf of the Department for Infrastructure and dictate the operation of delegated functions.

Basis of Instructions

57. These instructions are issued to provide practical advice on the administrative arrangements to those who support the Department in fulfilling its statutory functions.
58. The difficulty in providing directions stems from the absence of a definition for 'good repute' or 'fitness' within the legislation. The Guidance above cannot provide a definitive list of all conduct which might impact on repute or fitness. The Department must also decide when to exercise its discretion. The purpose of these instructions is to provide as much clarification as is possible and they should be read in conjunction with the attached Guidance which offers useful examples by way of illustration. The attached Annex 1 summarises those examples. It sets out the starting point for submissions but the Department officials making decisions can and might call for more information.

Submissions

59. When processing an application, if staff members find some adverse history, they will need to gather all the relevant facts surrounding the case and present it to the Head of TRU so that they can decide on the appropriate action. When compiling a submission members of staff should:
- gather ALL relevant information
 - complete the template, provide facts, distinguishing information from evidence, and quote dates and licence number(s) if applicable, be precise and to the point
 - provide a recommendation which is fully supported by the relevant legislation
60. The Department has identified the following instances where an operator/applicant should expect to provide evidence of their ability to manage an operator's licence:
- on initial application
 - on renewal (continuation) of an operator's licence
 - at public inquiry
61. Members of staff should refer to the Guidance for examples of conduct that might impact on an operator/applicant's repute. In general the Department will be assisted by any information relating to the following conduct:
- convictions taking account of the different application to individuals and whether it is a most serious infringement, serious offence and/or a road transport offence

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- previous orders for revocation, curtailment, or suspension of previous linked licences
- previous adverse history on the current licence to include warnings and any public inquiry history
- prohibitions
- fixed penalty notices
- bankruptcy, sequestration, administration or liquidation cases
- avoidance of debts (“phoenix” or “front” applications)
- late payments and non-payment of court orders, fines and/or fixed penalty notices
- DVA, DVSA, or Department’s inability to contact operator
- abusive behaviour or non-cooperation towards enforcement officers and/or members of Departmental staff
- failure to notify material and relevant changes
- failure by a transport manager(s) to exercise continuous and effective responsibility
- unauthorised use of a place as an operating centre
- failure to fulfil a licence undertaking
- the operator is no longer professionally competent or able to show the availability of sufficient finance

62. There are some operators who are subject to other regulatory regimes where strict liability (“no fault”) offences or other enforcement action might result. The numbers of incidents involved may be significant. To ensure a consistent approach the Department has identified the types of offence which should be notified:

- any transport related (e.g. Construction and Use, overloading, drivers’ hours etc.) convictions for any director, transport manager or driver
- any convictions under, for instance traffic legislation, the Health and Safety at Work Act 1974 resulting from an incident at a work site etc.
- any convictions for environmental offences, for instance pollution, Environmental Protection Act including licensing, dumping, control, storage etc.
- any other “no fault” offences (e.g. where a water company has taken control of unknown and unidentifiable sections of sewers and an environmental offence becomes apparent)
- in addition, any offences by employees who hold vocational licences such as offences for drink/drug driving, dangerous driving, death by dangerous driving, and mobile phone abuse must be notified to the Department if the driver holds a vocational licence and resides in NI

The Department has indicated that, where there is intervention by the Health and Safety Executive, it only needs to be notified of formal enforcement rather than a Fee for Intervention (FFI).

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General changes which must be notified:

Conviction of operator	within 28 days
Conviction of employee	within 28 days
Bankruptcy of operator/partner/Director	within 28 days
Liquidation/administration/receivership/company voluntary agreement (CVA)	before order/appointment is made
Change in name or legal form of undertaking	within 28 days
Death of operator/partner	as soon as possible
Change of licence type	Application required as no authority until grant
Change in operating centre	Application required as no authority until grant
Change in address of establishment	within 28 days
Change of director	as soon as possible
Change of partner	as soon as possible
Change in transport manager	within 28 days
Change in maintenance contractor/arrangements	as soon as possible
Removal of vehicle/trailer	within 28 days
Addition of vehicle/trailer	within 28 days if within the margin otherwise application required as no authority until grant

Where there is no specific timetable, the Department considers that it would be reasonable to expect such changes to be notified within 28 days.

Rehabilitation

- 63.** Staff are specifically referred to the Guidance above which sets out the provisions of the Rehabilitation of Offenders (Northern Ireland) Order 1978 as they apply to proceedings before the Department and the principles which can be drawn from the available case law. Spent convictions should not generally be referred to or taken into account in respect of an operator appearing before a public inquiry but the conduct itself might be relevant (see below). Care must be taken when recording and retaining the details of the spent convictions to ensure that when staff become aware that they are in possession of information about spent convictions that only senior members of the Department have access to those spent convictions.

Rehabilitation periods (subject to reduction by half for persons under 18).

Sentence	Rehabilitation period
A sentence of imprisonment or corrective training for a term exceeding six months but not exceeding thirty months.	Ten years
A sentence of cashiering, discharge with ignominy or dismissal with disgrace from Her Majesty's service.	Ten years
A sentence of imprisonment for a term not exceeding six months.	Seven years
A sentence of dismissal from Her Majesty's service.	Seven years

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Any sentence of detention in respect of a conviction in service disciplinary proceedings. Five years

A fine or any other sentence subject to rehabilitation under this Order, not being a sentence to which Table B or any of paragraphs (3) to (8) applies. Five years

Rehabilitation periods for certain sentences confined to young offenders.

Sentence	Rehabilitation period
A sentence of Borstal training.	Seven years
A custodial order under Schedule 5A to the Army Act 1955 or the Air Force Act 1955 or under Schedule 4A to the Naval Discipline Act 1957 where the maximum period of detention specified in the order is more than six months.	Seven years
A custodial order under section 71AA of the Army Act 1955 or the Air Force Act 1955, or under section 43AA of the Naval Discipline Act 1957, where the maximum period of detention specified in the order is more than six months.	Seven years
A sentence of detention for a term exceeding six months but not exceeding thirty months passed under Article 45 of the Criminal Justice (Children) (Northern Ireland) Order 1998.	Five years
A sentence of detention for a term not exceeding six months passed under that Article 45.	Three years
A custodial order under any of the Schedules to the said Acts of 1955 and 1957, where the maximum period of detention specified in the order is six months or less.	Three years
A custodial order under section 71AA of the said Acts of 1955, or section 43AA of the said Act of 1957, where the maximum period of detention specified in the order is six months or less.	Three years

A later conviction may affect the rehabilitation period for an earlier conviction if it happens before the first period has run out.

64. The convictions of corporate bodies are not subject to the Rehabilitation of Offenders (Northern Ireland) Order 1978. Since Article 5 of the Rehabilitation of Offenders (Northern Ireland) Order 1978 states that a person who has become a rehabilitated person shall be treated for all purposes in law as though there has been no conviction against that person, no evidence is admissible in any proceedings to prove that conviction where it is “spent” and an individual cannot be questioned in any proceedings if the questions cannot be answered without referring to a “spent” conviction. This provision relates to proceedings before any judicial authority including a Tribunal, and as a result, includes proceedings before the Department. The Department should therefore satisfy itself as to whether:

- the sentence imposed is/is not excluded from rehabilitation under the Order

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- since the conviction and during the relevant rehabilitation period, there has not been a subsequent conviction and sentence which is excluded from rehabilitation
- the sentence served in full. (A sentence of imprisonment is deemed to have been served as at the time that the Order requires the offender to be released from prison.)

Any decision on whether a spent conviction is to be considered in assessing repute or fitness must be referred to the Head of the TRU.

Ultimately the Department retains a discretion to allow convictions and/or conduct to be considered, but must take into account the evidence and circumstances of the case, balancing that conduct against other relevant material such as the operator's record. The Department also has discretion to disregard other convictions, which are not spent, applying the principle of proportionality.

- 65.** In relation to repute, whilst a "spent" conviction shall be disregarded in so far as the actual recorded conviction is concerned, the Department can have regard to any other information which appears to relate to the individual's fitness to hold a licence (for example, a course of conduct which may be revealed by convictions for similar offences over a period of time, which demonstrates propensity). The final decision as to whether it may be relevant to the proceedings before the Department and should, therefore be admitted notwithstanding that it is "spent", is a matter for the Head of TRU alone. The Department will need to be satisfied that there is no other way of doing justice in the case other than taking account of the spent conviction. Each case will be considered on its own individual merits. The Department has therefore directed that the following procedure be adopted:
- a) when notification of a conviction is received the caseworker must consider each conviction separately and determine as against the Practice Guidance Documents whether that conviction appears to be spent
 - b) the caseworker should try to identify why the conviction was not notified previously. They must identify if the conviction(s) relates to any other relevant conduct such as compliance with undertakings, whether it is similar to previous shortcomings and whether it is a most serious infringement. The caseworker must ask themselves if the spent conviction is capable of relating to an issue on which the Head of TRU may have to decide
 - c) if the spent conviction is capable of being relevant then reference to it must be included in a submission to the Head of TRU identifying where possible the date of conviction, penalty and type of offence. The Head of TRU should be asked to give a preliminary indication of whether the spent conviction might be admitted and whether to make a request for explanation or to identify the conviction in the call-up letter and invite representations in writing and/or at the hearing
 - d) the Head of TRU will then decide whether to seek further details and admit any of the spent convictions in light of representations from the operator or transport manager, having in mind not only the interests of the individual who has spent convictions but also the public in whose interests the exceptional powers are being exercised

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Most Serious Infringements

66. As stated above Regulation 33, (EC) 1213/2010 requires that Member States ensure that there is inter-connectivity between the various National Registers. The Department may be referred to incidents where an operator and /or transport manager has been convicted of a serious criminal offence or has incurred a penalty within the European Union for a serious infringement of Community Rules. Where there has been one or more most serious infringements, that must be considered by the Department for the purposes of Article 6(2)(a) relating to good repute; and where the Department determines that it is not proportionate to call to a public inquiry then the reasons must be fully recorded by the Department.

Endorsements

67. Where an endorsable offence has been committed, call up letters and correspondence should refer to endorsements rather than convictions. Details of some driving offences may remain on a driving licence for longer than the four years which staff members normally deal with, for instance an endorsement for a drink or drugs related road traffic offence remains on a driving licence for 11 years. Another example might be where a court imposes a fine for travelling at excessive speed and endorses a licence. If it was committed, say eight years ago, it would be more than five years old and the driver would be treated as rehabilitated. If, however, there was another similar offence four years earlier, both offences would strictly be disclosable under the provisions of the Rehabilitation of Offenders (Northern Ireland) Order 1978.
68. Current DVA/DVLA practice is to hold endorsements for between four or 11 years depending on the offence, in line with Article 50 of the Road Traffic Offenders (Northern Ireland) Order 1978. It follows that information about disclosable endorsements which might be put before the criminal courts for the purposes of sentencing following similar offences may not be brought to the attention of the relevant decision maker.

Driver Certificate of Professional Competence (CPC)

69. Vocational HGV drivers have been required to hold a Drivers Certificate of Professional Competence since 10 September 2009. Those who already held a licence at those dates were exempt until 10 September 2014. The Vehicle Drivers (Certificates of Professional Competence) Regulations 2007 allow some specific exemptions but they only apply in particular circumstances. Regulation 3(g) replicates a tools of the trade exemption in other legislation so that drivers of vehicles which are carrying equipment or material that will be used by that driver at the destination are not required to hold a Driver CPC provided that driving the vehicle is not the driver's main occupation. Where a driver is found to be driving and does not comply with the regulations then the Department will require an explanation from the operator as well as the driver and, as appropriate, the transport manager about the steps taken to ensure that drivers of authorised vehicles have the necessary qualification. Failure by the operator to take the appropriate steps can result in regulatory action being taken against the operator.

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Previous decisions

- 70.** Care needs to be taken before any weight is attached to a matter that may be regarded as stale where there is an inherent objective to achieve fairness. Sometimes the letter of the Act allows consideration of a conviction, but the spirit of the legislation suggests otherwise. As a general guideline, where the operator has appeared before the Department⁷⁸ at a previous hearing or hearings, it is both fair and proper that previous decisions from earlier hearings are made available provided of course that the principles of the legislation are adhered to.

Attempts to Avoid Liabilities

- 71.** Not all legitimate businesses succeed at the first attempt. Companies can fail for any number of reasons and there are times when directors find their company can no longer trade. There is no legal prohibition to forming a new company from the remnants of a failed business. A phoenix company is where the assets of one limited company are moved to another legal entity (sometimes referred to as a 'pre-pack'⁷⁹) but with no obligation to pay the failed company's debts⁸⁰. Often some or all of the directors remain the same. A director of a failed company can become a director of a new company unless they:

- is subject to a disqualification order or undertaking, or
- is personally adjudged bankrupt, or
- is subject to a bankruptcy restrictions order or undertaking

- 72.** These arrangements can allow a business to start again with the profitable elements of the failed business and are likely to seek to operate in the same sphere as its predecessor. In some cases, the new company has the same or a similar name to the failed business.

- 73.** Some unscrupulous individuals seek to avoid responsibility for their liabilities by putting their companies into insolvency or use a Company Voluntary Arrangement (CVA) or Individual Voluntary Arrangement (IVA) to continue to trade whilst insolvent. Once a company enters insolvency or liquidation proceedings, the creditors will only be paid in order of priority from whatever remaining company funds are still available. (Trade creditors often receive only a portion of the money owed, which can impact on their ability to trade, and they may feel pressured to agree to a voluntary arrangement.) The directors may therefore seek to transfer the assets of a failing company for below their market value before insolvency and reduce the funds available to creditors when the original company is declared insolvent. These tactics may result in an unfair competitive advantage over other operators.

- 74.** Whilst the Insolvency Act 1986 has made it more difficult for directors to do this by introducing stricter rules over the insolvency process and requiring liquidators to obtain the best price for a business and its assets there are still a number of unscrupulous individuals who still seek to avoid their legal responsibilities. Staff are reminded that it is an offence for a director of a company, which has gone into insolvent liquidation, to be a director of a company with the same or a similar

⁷⁸ See Practice Guidance on Delegations for the impact and limitations of delegated powers

⁷⁹ See Practice Guidance and Instructions on Legal Entities

⁸⁰ See separate guidance on legal entities

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name, or concerned in its management, without the leave of a court etc. The liquidator can also take action to recover funds where the failed company has entered into a sale at a lower than market value at a time when the company was unable to pay its debts.

75. A phoenix company may be a legitimate business but the Department will wish to satisfy itself as to any application which has the characteristics of a phoenix application. Save in exceptional circumstances, the directors of a company that goes into administration will have been aware that it was in financial difficulty for a sufficient period of time to enable them to inform the Department of the material change in the company's financial position prior to administration⁸¹. A failure to inform the Department of a material change including, for instance a CVA, may lead to adverse conclusions being drawn against the fitness of those directors. Once an Administrator is appointed they must decide whether or not to carry on the road haulage business of the company. If they decides not to do so they should take immediate steps to surrender the licence and to return the discs for the authorised vehicles. Operators who fail to surrender a licence when they cease to operate will raise questions as to their fitness to hold a licence on any future application.
76. Departmental staff should scrutinise any application carefully to find out why the previous company failed and to ensure that directors are not serial abusers of the phoenix company arrangements. They might for instance search the information available from Companies House and/or seek to obtain a status report from a credit ratings agency. The official receiver or insolvency practitioner has a duty to investigate the affairs of companies in compulsory liquidation and to report evidence of criminal offences to a prosecuting agency. Staff should attempt to obtain a copy of the relevant report and must refer it to the decision maker where they have concerns about the application. Financial standing refers to the levels required for an established business. Restricted Goods Licences are required to have a sum available in order to support maintenance. Where an applicant or existing operator can only demonstrate the minimum sum this might prompt further questions about the fitness of that applicant or operator to meet the other licence requirements and the basic expenses involved in running a business.

Transport Manager Declarations

77. In October 2011 transport managers were requested to complete and return a questionnaire in order to populate the national register. Some operators used this opportunity to change the transport manager details without making an application as they were required to do. The questionnaire specifically required the individual transport manager to only list those licences for which they had been *authorised*. Staff should be alive to this risk when making checks against the records. If there has been a false declaration this will need to be referred to the Department to consider whether or not to take regulatory action in respect of the named CPC holder and/or the operator. A similar approach should be taken where the self-service facility has been used and there is no subsequent application lodged.

Transport Regulation Unit

01 May 2020

⁸¹ See Guidance and Instructions on Legal Entities

ANNEX 1: STARTING POINT FOR SUBMISSIONS

Examples of conduct which might be relevant (not an exhaustive list)	
<ul style="list-style-type: none"> Abusive behaviour, dishonesty or lack of co-operation towards DVA/DVSA and/or other enforcement officers and/or the Department or its staff 	
<ul style="list-style-type: none"> Deliberate attempts to circumvent the operator licensing system 	
<ul style="list-style-type: none"> Inability of DVA/DVSA and/or other enforcement officers or the Department to contact operator 	
<ul style="list-style-type: none"> Production of false documents to DVA or any other any enforcement agency or the Department or their staff 	
<ul style="list-style-type: none"> Loan of operator licence and/ or licence discs 	
<ul style="list-style-type: none"> Use of out of date or forged operator licence and/or discs 	
<ul style="list-style-type: none"> Previous or current unauthorised operation or operation in excess of current authority 	
<ul style="list-style-type: none"> Previous revocation, suspension or curtailment of licence within the last 5 years 	
<ul style="list-style-type: none"> Previous warnings by the Department or traffic commissioner within the last 5 years 	
<ul style="list-style-type: none"> Failure to comply with a statutory or other recognised Code of Practice within the last 5 years 	
<ul style="list-style-type: none"> Failure to comply with a civil penalty within the last 5 years 	
<ul style="list-style-type: none"> Tax evasion of any kind including non-payment of or avoidance of VED, fuel tax and HMRC payments re employee tax and NI contributions within the last 5 years 	
<ul style="list-style-type: none"> Bankruptcy, sequestration, administration or liquidation cases within the previous 3 years 	
<ul style="list-style-type: none"> Unfair commercial advantage 	
<ul style="list-style-type: none"> Failure to declare relevant previous conduct 	
<ul style="list-style-type: none"> Failure by Transport Manager to exercise continuous and effective responsibility 	
<ul style="list-style-type: none"> Changes, failure to notify of: 	Conviction of operator
	Conviction of employee (see paragraph 13)
	Bankruptcy of operator/partner/director within previous 3 years
	Liquidation/administration/receivership within previous 3 years
	Death of operator/partner
	Change in legal entity
	Change in operation requiring change of licence type
	Change in operating Centre
	Change of director
	Change of partner
	Change in transport manager
Change in maintenance contractor/arrangements	
<ul style="list-style-type: none"> Charges left on file 	
<ul style="list-style-type: none"> Commercial advantage; the operator was aware that they were not operating on a level playing field with their competitors 	

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<ul style="list-style-type: none"> • Convictions (Notifiable) 	Article 69 of the Road Traffic (Northern Ireland) Order 1995 (plating certificates and goods vehicle test certificates)
	An offence in relation to a goods vehicle relating to the maintenance of vehicles in a fit and serviceable condition, or overloading, or the licensing of drivers
	A drivers' hours offence
	Article 174 of the Road Traffic (Northern Ireland) Order 1981 (false statements in connection with the forgery of, and fraudulent use of documents in relation to international permit
	Section 3 of the Control of Pollution Act 1974
	Section 2 of the Refuse Disposal (Amenity) Act 1978
	Section 1 of the Control of Pollution (Amendment) Act 1989
	Section 33 of the Environmental Protection Act 1990; contrary to a provision prohibiting or restricting waiting vehicles under the Road Traffic Regulation 1984 or a relevant traffic regulation order
	An offence under the Goods Vehicles (Licensing of Operators) Act (Northern Ireland) 2010
	An offence relating to section 13 of the Hydrocarbon Oil Duties Act 1979 (unlawful use of rebated fuel oil in relation to goods vehicles)
	An offence under Article 82 of the Road Traffic (Northern Ireland) Order 1995 (duty to keep inspection records in relation to goods vehicles)
	<ul style="list-style-type: none"> • Individual:
	road transport offence in UK or corresponding offence outside the UK
	serious offence – where one of the following punishments has been imposed: <ul style="list-style-type: none"> - Imprisonment exceeding three months - A fine exceeding level 4 on the standard scale - A community service order (or equivalent) requiring unpaid work for more than 60 hours - Any punishment outside the UK corresponding to the above
<ul style="list-style-type: none"> • Drivers' hours and tachograph offences, convictions or fixed penalty notices within the last 5 years 	
<ul style="list-style-type: none"> • Prohibitions and/or use of vehicles whilst still under prohibition within the last 5 years 	
<ul style="list-style-type: none"> • Overloading offences or prohibitions within the last 5 years 	
<ul style="list-style-type: none"> • Use of vehicle(s) whilst uninsured or without MOT (i.e. an MSI) within the last 5 years 	

ANNEX 2: EU LEGISLATION

Regulation 3 of the Goods Vehicles (Qualifications of Operators) Regulations (Northern Ireland) 2012 states that a standard licence constitutes an authorisation to pursue 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:

(b) be of good repute;

(d) have the requisite professional competence; 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 6 - Conditions relating to the requirement of good repute

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

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

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

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

(i) commercial law;

(ii) insolvency law;

(iii) pay and employment conditions in the profession;

(iv) road traffic;

(v) professional liability;

(vi) trafficking in human beings or drugs; and

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

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

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

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

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

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

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

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

To comply with this provision the Commission has made the following Regulation:

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Regulation (EU) 2016/403

Article 6 (2)(b) of Regulation (EC) 1072/2009 requires the Commission to draw up a list of categories, types and degrees of seriousness of serious infringements of Community rules which, in addition to those set out in Annex IV above may lead to the loss of good repute. Where repeated infringements are notified to the Department these must be considered in accordance with both 1071/2009 and Regulation (EU) 2016/403 when considering repute and decisions on their impact on repute must be reasoned and proportionate and set out in any deliberations or decisions taken.

EU ANNEX IV

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

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

(b) Exceeding, during a daily working period, the maximum daily driving time limit by a margin of 50% or more without taking a break or without an uninterrupted rest period of at least 4.5 hours.
2. Not having a tachograph and/or speed limiter, or using a fraudulent device able to modify the records of the recording equipment and/or the speed limiter or falsifying record sheets or data downloaded from the tachograph and/or the driver card.
3. Driving without a valid roadworthiness certificate if such a document is required under Community law and/or driving with a very serious deficiency of, inter alia, the braking system, the steering linkages, the wheels/tyres, the suspension or chassis that would create such an immediate risk to road safety that it leads to a decision to immobilise the vehicle.
4. Transporting dangerous goods that are prohibited for transport or transporting such goods in a prohibited or non-approved means of containment or without identifying them on the vehicle as dangerous goods, thus endangering lives or the environment to such extent that it leads to a decision to immobilise the vehicle.
5. Carrying passengers or goods without holding a valid driving licence or carrying by an undertaking not holding a valid Community licence.
6. Driving with a driver card that has been falsified, or with a card of which the driver is not the holder, or which has been obtained on the basis of false declarations and/or forged documents.
7. Carrying goods exceeding the maximum permissible laden mass by 20% or more for vehicles the permissible laden weight of which exceeds 12 tonnes, and by 25% or more for vehicles the permissible laden weight of which does not exceed 12 tonnes.

COMMISSION REGULATION (EU) 2016/403 Annex III

DOCUMENT CONTROL HISTORY

Version 1.0 (published 01/10/2019)	Version 1.1 (published 01/05/2020)
Adjustments limited to correction of typographical errors.	
Version 1.0 (published 01/10/2020)	Version 1.2 (published 18/09/2020)
Paragraph 3	Updated to clarify that the application of Section 7(5) of the 2010 Act refers to any information that the Department requests to ensure that the requirements to allow the grant of a licence can be met on an ongoing and continuous basis.