

10 November 2017

Dear Stakeholder

**Consultation on draft guidance for The Railways Infrastructure (Access, Management and Licensing of Railway Undertakings) Regulations (Northern Ireland) 2016 and amendments to our Economic Enforcement Policy and Penalties Statement**

Thank you for your responses to our consultation on draft guidance and proposed changes to our existing economic enforcement policy and penalties statement (enforcement policy).

New guidance and changes to our enforcement policy are required to reflect The Railways Infrastructure (Access, Management and Licensing of Railway Undertakings) Regulations (Northern Ireland) 2016 (the NI Regulations). The NI Regulations implement EU Directive 2012/34/EU - the recast of the First Railway Package. The Recast Directive repeals and consolidates previous EU legislation and makes some substantive changes to the law.

The consultation began on 21 August 2017 and closed on 29 September 2017. This letter sets out our conclusions.

**Responses to our consultation**

We received responses from<sup>1</sup>:

- Translink;
- The Consumer Council in Northern Ireland; and
- Network Rail.

**The guidance**

The purpose of ORR's guidance is to help the reader understand:

- The meaning and implications of the provisions of the NI Regulations;
- The obligations of infrastructure managers and service providers;
- ORR's role as an appeal body and power to make directions; and
- Where to find further guidance on specific issues.

We discuss our conclusions on the main issues on the draft guidance below.

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<sup>1</sup> <http://orr.gov.uk/rail/consultations/closed-consultations/policy-consultations/consultation-on-orrs-economic-enforcement-policy-to-reflect-northern-ireland-regulations>

### Did the guidance help consultees understand the impact of the NI Regulations?

Respondents welcomed the guidance and supported the objectives and proposed content. Translink noted in particular that it thought the guidance was well structured and helped it understand the impact of the NI Regulations.

### Areas for improvement

Translink asked for further clarity on the wording in paragraphs 1.30 and 1.31 of the draft guidance, which it thought appeared contradictory.

Both paragraphs aim to explain the scope of the NI Regulations (as set out in Regulation 3).

Paragraph 1.30 deals with the scope of the Regulations in respect of railway undertakings. It explains that the NI Regulations do not apply to a railway undertaking whose activity is limited to the provision of solely urban, suburban or regional services on local and regional stand-alone networks for transport services on railway infrastructure, or on networks intended only for the operation of urban or suburban rail services.

It aims to clarify, however, that while the NI Regulations do not generally apply to the railway undertakings described above; there are certain circumstances when certain regulations will apply. Those circumstances are when the railway undertaking is under the direct or indirect control of an undertaking or other entity performing or integrating rail transport services other than urban, suburban or regional services. In such circumstances, a railway undertaking is expected to comply with the requirements relating to management independence, separation of accounts and business plans.

Paragraph 1.31 explains the scope of the regulations as they apply to networks. It clarifies that certain requirements do not apply to those networks set out in regulation 3(7) of the NI Regulations.

To address the concerns raised we have amended the text in the guidance (now numbered paragraphs 1.30 – 1.32). We have engaged with Translink on our proposed amendments who has confirmed it is content with the revised text.

### **The enforcement policy**

The NI Regulations give ORR a new power to impose a penalty where a party has failed to comply with a decision, direction or notice issued under the NI Regulations. The NI Regulations require ORR to publish a statement of policy with respect to the imposition of penalties and the determination of their amount. We consulted on revisions to our existing current enforcement policy to reflect these new powers.

We invited views on our revised enforcement policy. Conclusions on the main issues are set out below.

### Did consultees support the general revisions proposed to the enforcement policy?

While Network Rail supported the proposed changes, it highlighted the need for future changes to ensure the enforcement policy remains fit for purpose for the next price control, Control Period 6 (CP6). In our consultation on the Overall Framework for regulating Network Rail in CP6<sup>2</sup> we advised that we will be undertaking a review of our economic enforcement policy and penalties statement to ensure it is fit for purpose for the next control period as part of our PR18 programme. This review will include engagement and consultation with all relevant stakeholders, including Network Rail.

Translink initially supported revisions to the enforcement policy to ensure that all relevant operators are captured in one policy. However, Translink found that incorporating the NI Regulations into the existing enforcement policy had inadvertently created some confusion.

### Areas for improvement

Translink found certain areas of the policy difficult to understand; in particular, it had difficulty in easily identifying which areas applied to relevant operators in Northern Ireland. To address this, Translink suggested either adding an annex to the existing enforcement policy detailing application of the NI Regulations. Alternatively, Translink suggested producing a completely separate enforcement policy for Northern Ireland might be more appropriate.

Translink also asked that we revisit the definitions for the Northern Irish corporate entities used as examples of relevant operators, as these were incorrect.

Our approach to enforcement must be clear to stakeholders, particularly Translink. We have carefully considered feedback and decided to produce a standalone enforcement policy for the NI Regulations.

We will engage with Translink in developing this separate enforcement policy and expect this to be published on our website by the end of 2017.

### **General comments**

The Consumer Council sought confirmation that the Recast Directive would not impact on rail passengers in Northern Ireland.

The Recast Directive was implemented in Northern Ireland through the NI Regulations, which give ORR a number of regulatory functions in Northern Ireland in respect of rail.

ORR can confirm that the functions it has been given in Northern Ireland do not directly impact on rail passengers. That said, ORR must consult, at least every two years, representatives of users to take into account their views on the rail market. We intend to

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<sup>2</sup> Overall Framework consultation July 2017: [http://orr.gov.uk/\\_data/assets/pdf\\_file/0007/25279/overall-framework-for-regulating-network-rail.pdf](http://orr.gov.uk/_data/assets/pdf_file/0007/25279/overall-framework-for-regulating-network-rail.pdf)

discharge this function through engagement with the Consumer Council in Northern Ireland.

The Consumer Council also sought clarification on the term 'Economic Regulation', which we use in our consultation documents. In particular, we were asked to confirm that the level of rail service provision, the level of public service obligation subsidy for rail and the level of passenger fares would remain the remit of the Department for Infrastructure in Northern Ireland. We confirm that this is the case.

The functions we have been given in Northern Ireland focus on economic regulation. We have no role in respect of safety or licensing in Northern Ireland. Nor do we set access charges, hold periodic reviews of access charges, set outputs in respect of funding levels, monitor the delivery of outputs or hold to account. While we acknowledge that we do not carry out a full economic regulatory role in Northern Ireland, we used the term 'Economic Regulation' in our consultation documents to make it clear that this is the focus of our regulatory remit and that we have no role with regards to safety regulation in Northern Ireland.

To help provide further clarity to all stakeholders, we have updated our website with additional information to help fully explain our regulatory role in Northern Ireland.

## **Conclusion**

Once again, I would like to thank stakeholders for their responses. The guidance has now been finalised and is available on our website<sup>3</sup>. We will separately publish in due course an enforcement policy for the NI Regulations once we are satisfied that it meets stakeholders needs.

Yours faithfully

**Graham Richards**

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<sup>3</sup> [http://www.orr.gov.uk/\\_data/assets/pdf\\_file/0004/25933/northern-ireland-access-and-management-2016-regulations-guidance.pdf](http://www.orr.gov.uk/_data/assets/pdf_file/0004/25933/northern-ireland-access-and-management-2016-regulations-guidance.pdf)