



OFFICE OF RAIL REGULATION



**Office of Rail Regulation Economic  
Enforcement Policy and Penalties  
Statement Review**

**Consultation on options for  
improvement**

**8 December 2014**



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# Executive Summary

The Office of Rail Regulation (ORR) is the combined economic and health and safety regulator for Great Britain's rail network.

One of our core statutory functions is to grant licences for railway businesses. A licence (or in some instances a licence exemption) is required to operate a train, station, network or light maintenance depot. To provide clarity to licence holders, and others, we have in place an economic enforcement policy which provides an overview on how we will monitor and investigate possible breaches, as well as the options available to the regulator when taking enforcement action. We regulate railway operators because operating railway assets and providing passengers and freight services are activities of national importance and must be safeguarded in the public interest. Regulating monopoly infrastructure managers, like Network Rail, means we can hold them to account for delivering what has been promised.

Our economic enforcement policy and penalties statement was last updated in 2012. Consistent with regulatory best practice, we now need to review this policy to ensure that it provides effective guidance and clarity to all licence holders to reflect the current circumstances. We need to ensure that our policy effectively captures new licence responsibilities which set out passenger train operator obligations on complaints handling and to provide protections for disabled travellers. In addition, Network Rail's borrowing arrangements changed in September 2014 such that the company now borrows from Government instead of from the markets.

As part of this review, we have considered our enforcement activities over the past 6 years and have also undertaken a review of the powers, principles and enforcement processes used by regulatory peers and our own other enforcement functions.

We generally hold the same enforcement principles for all our range of enforcement functions and the same as other sector regulators. Our research has led us to conclude that our economic enforcement policy principles remain sound and are consistent with the wider regulatory environment.

We therefore do not seek any further harmonisation of enforcement of our economic, safety and competition functions at this time.

However, we do think there are opportunities for sharing best practice and learning from ORR's other enforcement functions and other regulators in their approaches to streamlining internal processes for investigation and regulatory case management systems. We may also want to consider, in the future, whether it would be helpful for transparency to produce an overarching statement setting out our all enforcement powers and principles. This may also include an overview of prioritisation principles.

Whilst we consider our principles and overall licence enforcement objectives remain appropriate, our research has helped us identify areas which could bring improvements and greater flexibility to our current policy. These areas are the focus of this consultation document and the questions to which we are asking Consultees to respond to:

- **Economic enforcement policy for all** - We considered the issue of publically funded licence holders (including reclassification) and assert that one policy for all licence holders is still the most appropriate approach. We do however propose to ensure the policy document is drafted to better reflect the range of licence holders covered by our economic enforcement functions. *[chapter 3];*
- **Early Intervention and engagement** - We see real value in regulatory intervention at early stages of an issue to bring parties together and resolve issues. This can mean formal enforcement may not be not required. We monitor licence compliance and use a range of information, data and regulatory influence to hold licence holders to account. We think there are better ways in bringing transparency in our approach to early intervention and industry engagement. We also consider how we
- can apply reputational levers more effectively as well as bringing greater clarity and efficiency to our internal processes for intervention and enforcement; *[chapter 4]*
- **Financial penalties** are an important part of a regulator's enforcement toolkit – although in many cases a penalty will likely be ORR's last resort for enforcement. We see benefit in exploring the use of other tools, such as more effective use of reparations and enforcement orders to create a package of effective measures.

However, we also recognise that the seriousness of a breach, or the particular circumstances of a case, might require a financial penalty as the most suitable sanction (rather than offers of reparations or a mix of both).

We raise questions about how best to use financial penalties and at what levels to act as an incentive for future compliance of financial penalties. We set out how we think we could improve our current **penalties statement** to ensure it reflects more effectively the implications of financial penalties on all licence [*chapter 5*];

- **Practical application of reparations** – We have found that our current policy does not provide the flexibility in considering reparation offers which other regulators have and have used effectively. We propose to incentivise early admission and offers of redress by establishing in our policy that the absence of such offers will be a factor in our consideration of the appropriateness and size of any financial penalty. We think there is scope to improve our reparations process and add a stage into the current process which would enable consideration of reparations after a breach has been identified (either by ORR or by way of early admission by the licensee) but before we decide that a penalty is appropriate. We think that our three component parts of reparations – genuinely additional, appropriately targeted and proportionate to the harm done and deliverable – remain appropriate and we do not intend to make major changes to these. However, we think that ‘appropriately targeted and proportionate to the harm done’ is a desirable element of any offer of reparations, but should be flexibly applied. [*chapter 6*];
- **Enforcement orders** - We would like to use enforcement orders more innovatively to get licence holders to remedy issues as quickly as possible – utilising a range of activities which engage the industry, where appropriate; these could include taskforces, recovery boards, joint recovery plans. We consider that provisional orders offer a real opportunity to take targeted and swift actions in circumstances where it is clear that the required process for making a final order will impact on the loss and damage suffered by any person as a result of the licence breach. [*chapter 7*];
- **General updates** – we propose to make general updates where necessary and improve the format of the document. This includes ensuring the policy reflects any

changes in response to our competition primacy duty and our approach to determining when to take action under the Railways Act 1993 or Competition Act 1998. *[chapter 8]*

A full list of all questions posed in this consultation document are included in annex A. This consultation on ORR's economic enforcement policy will close on 6 February 2015. We are interested to hear stakeholder views on what more we should be doing or what we should be doing differently to improve the effectiveness of our economic enforcement policy.

We would also like to hear any evidence you have which support your suggestions. There is a stakeholder workshop planned for 12 January 2015 to enable a conversation about the key issues raised in this review.

Taking into account the views raised through this consultation, we aim to reach our final conclusions and publish our final policy in March 2015.

# Glossary

ATOC = Association of Train Operating Companies

CA98 = Competition Act 1998

CHP = Complaints Handling Procedure

CP4 = Control period 4 (2009 - 2014)

CP5 = Control Period 5 (2014 to 2019)

CMA = Competition and Markets Authority

DfT = Department of Transport

DPPP= Disabled People's Protection Policy

NR = Network Rail

ORR = Office of Rail Regulation

PF = Passenger Focus

PIDD = Passenger Information During Disruption

PPM = Public Performance measure

PR13 = Periodic Review 2013

RA 1993 = Railways Act 1993

RU = Railway Undertaking

SI = Statutory Instrument

SNRP = Statement of National Regulatory Provisions

TOC = Train Operating Company

A full online glossary is available at: <http://orr.gov.uk/glossary>

# 1. Introduction

## Summary

This chapter explains the purpose and rationale for this policy review and how to respond to this consultation.

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### 1.1 Aims of this consultation

- 1 We have powers to enforce licence conditions for infrastructure, operators, network and stations as set out in the Railway Act 1993 (RA 1993). The same powers apply to the enforcement of Statement of National Regulatory Provisions (SNRP) (covering matters like passenger information, complaints handling and disability protection). We must carry out our functions in a manner calculated to meet various wide-ranging duties set out in section 4 of the RA 1993. When an issue is identified, we must use the best regulatory tools we have available to address it.
- 2 Our duties include protecting the interests of users, the promotion of competition for the benefit of users, efficiency and economy in the provision of services and enabling operators to plan their businesses with a reasonable degree of assurance.
- 3 We are undertaking this review in the context of our strategic objectives to support a better service for customers, promote an increasingly dynamic and commercially sustainable rail sector and be a high performing regulator.
- 4 The purpose of this consultation is to seek stakeholders' views, supported by evidence where appropriate, on the proposals for further improving the effectiveness of our economic enforcement policy.
- 5 We expect this consultation to be of particular interest to licence holders, passenger groups and consumer representatives.
- 6 As part of the research phase of this policy review, we have looked back at the enforcement action we have taken since 2006 to consider the forms of enforcement



we have used and the impact these have had on future compliance, as well as the types of informal interventions we have made. We have also carried out research and engagement with a range of regulatory bodies to compare enforcement policies and processes and engaged with our consumer expert panel. This work has informed our thinking on the potential areas for improvement in the current policy.

## 1.2 Why ORR is reviewing its economic enforcement policy regulations now

- 7 ORR's last full review of the economic enforcement policy was four years ago and the policy was updated in 2012 to refer specifically to offers of reparations as a mitigating factor.
- 8 In this first year of the new five year control period (CP5) it is appropriate to review ORR's current economic enforcement policy and penalties statement to ensure that they are consistent with our strategic objectives and are still fit for purpose.
- 9 The policy needs to be relevant and appropriate for all licence holders, particularly in light of ORR's recent assumption of responsibility for enforcing licence conditions such as Disabled People's Protection Policy and complaints handling.
- 10 There have also been a number of other developments we need to consider, including the:
  - implications from the reclassification<sup>1</sup> of NR's debt;
  - variable impact of enforcement decisions taken against NR in CP4;
  - recent performance enforcement decision; and
  - lack of flexibility in the practical application of reparations under the current policy.

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<sup>1</sup> Network Rail was reclassified by the Office for National Statistics (ONS) as a public sector body in the national accounts on 1 September 2014 following a change to the European System of Accounts. DfT has confirmed that ORR will remain the economic and safety regulator for the railway and the ONS' decision will have no effect on rail fares, performance, punctuality, timetables, or safety. Further information about the ONS decision is available at [http://www.ons.gov.uk/ons/dcp171766\\_345415.pdf](http://www.ons.gov.uk/ons/dcp171766_345415.pdf)

### 1.3 Timescales for review

- 11 This review commenced in August 2014 and we aim to consult and conclude on any proposed changes by March 2015 to ensure we can complete any revisions to the policy documents by the end of the first year of Control Period 5 (CP5).

### 1.4 How to respond to the consultation

- 12 The consultation period began on **Monday 8 December 2014** and will run until **Friday 6 February 2015**. Please ensure that your response reaches us before the closing date. If you would like further copies of this consultation document, it can be found at <http://orr.gov.uk/consultations/policy-consultations/open-consultations/economic-enforcement-policy-consultation> or you can contact us on the details below if you need alternative formats (Braille, audio CD, etc.).

- 13 Please send your consultation responses to:

Samantha McClelland Hodgson or Gary Taylor  
**Economic enforcement policy review project**  
**Operations and Network Regulation, Railway Planning and Performance**  
**Office of Rail Regulation, 3rd Floor, One Kemble Street, London W2B 4AN**

Email: [ORReconomicenforcementreview@orr.gsi.gov.uk](mailto:ORReconomicenforcementreview@orr.gsi.gov.uk)

Telephone: 020 7282 3871

- 14 When responding, please state whether you are responding as an individual or representing the views of an organisation. If responding on behalf of a larger organisation, please make it clear who the organisation represents and, where applicable, how the views of members were assembled.
- 15 A list of those consulted is attached at Annex B. If you have any suggestions of others who may wish to be involved in this process please contact us.

## **Freedom of Information**

- 16 Information provided in response to this consultation, may be subject to publication or disclosure in accordance with the Freedom of Information Act 2000 (FOIA) or the Environmental Information Regulations 2004.
  
- 17 ORR will process your personal data in accordance with the Data Protection Act (DPA) and in the majority of circumstances this will mean that your personal data will not be disclosed to third parties.

## 2. ORR's legal framework and principles for licence enforcement

### Summary

This chapter explains our legal framework and current principles of enforcement, and how our research into other regulators' enforcement powers and processes and our other functions has informed the scope of this review.

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### 2.1 legal framework

#### The economic enforcement policy and penalties statement

- 18 As economic regulator for the mainline railway in Great Britain, one of our key functions is enforcement. The purpose of enforcement is to ensure delivery and secure compliance with public interest obligations.
- 19 Our current economic enforcement policy and penalties statement (*see link in Annex B*) sets out our enforcement policy and contains the penalties statement required by section 57B of the Railways Act 1993 (RA 1993) (as amended) (the Act). It explains our policy for enforcing all licence and Statement of National Regulatory Provisions SNRP obligations, and sets out in detail what powers we have to enforce compliance and our policies on when (and why) ORR would do so. It also sets out the remedies available to us if licence holders are not compliant and how we will decide whether and when to use them.
- 20 Approval of this economic enforcement policy and penalties statement is a reserved matter for approval by ORR's Board.

### 2.2 Our licence enforcement policy, powers and duties

#### Enforcement orders

- 21 Under section 55 of the Act, where we are satisfied that a licence holder is contravening, or is likely to contravene, a condition, we **must** take enforcement action by making a final order, unless:

- *We consider it requisite that we should make a provisional order<sup>2</sup> (see over); or*
- *One of the relevant statutory exceptions applies, namely:*
  - *Ours section 4 duties preclude us from making the order<sup>3</sup>;*
  - *we are is satisfied that the most appropriate way of proceeding is under the Competition Act 1998<sup>4</sup>; or*
- *The section 55 (5B) exceptions applies. This applies if we are satisfied that:*
  - *the licence holder has agreed to take, and is taking, all such steps as it appears to ORR for the time being appropriate to take for the purpose of securing or facilitating compliance with a condition; or*
  - *the contravention or apprehended contravention will not adversely affect the interests of users of railway services or lead to any increase in public expenditure,*
  - *in which case, we will only make the final order if we consider it appropriate to do so.<sup>5</sup>*

## Final orders

- 22 There is an obligation on ORR to make an enforcement order if we are “satisfied” that a condition is being contravened or is likely to be contravened, unless one of the statutory exceptions applies. Whenever the statutory exceptions (except section 55(5B)) apply, we are precluded from making a final order. Under section 55(5B), we may still impose a final order even where the substantive elements of the exception are satisfied, “if [ORR] considers it appropriate to do so”.
- 23 If we decide not to make a final order, or not to make or confirm a provisional order in respect of a licence breach, because we consider that one of the statutory exceptions applies, we must, under section 55(6) of the Act, serve notice of that fact on the licence holder and publish the notice. Although the Act does not specifically require us to set out in the notice our reasons for making such a decision, we would, as a matter of policy, expect to do so.

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2 Section 55(2).

3 Section 55(5)(a).

4 Section 55(5A).

5 Section 55(5B).

## Provisional orders

- 24 A provisional order is, in effect, an interim measure and may last for no more than three months unless it is confirmed. We must make a provisional order, without going through the procedural steps required for a final order, where it appears to us that it is requisite that a provisional order be made. In considering what is requisite, we must have regard, in particular, to the extent to which any person is likely to sustain loss or damage from the breach before a final order may be made.
- 25 The requirements for confirming a provisional order are substantially the same as for making a final order (see above).<sup>6</sup>

## Content of enforcement orders

- 26 Final or provisional orders must contain requirements for the licence holder to whom it relates (according to the circumstances of the case) to do or not to do, such things as are specified in the order. They will take effect at such time, being the earliest practicable time, as determined by or under the order and they can be revoked at any time.
- 27 The order may include provisions such as:
- production and implementation of a plan to address any weaknesses identified during an investigation;
  - establishment of a recovery board comprising relevant industry representation to agree the steps to take to remedy the breach, within a specified timescale; or,
  - payment of a reasonable sum in the event of a specified contravention of the order, such amount not to exceed 10% of the licence holder's turnover (*section 55(7B) RA 1993*)

## Timing and notice for orders

- 28 Once ORR's Board has decided to make a final order or confirm a provisional order, we must give notice stating that we propose to make or confirm such an order and setting out details of the licence breach. The notice must set out the period for representations to be made, which cannot be less than 21 days.

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6 Section 55(4).

## Penalties

- 29 Under the RA 1993, if we are satisfied that a licence holder is, or has, breached a licence condition, SNRP or an enforcement order, we have legal powers to impose a penalty. This means that we can impose a penalty for a past or current breach, irrespective of whether or not we have made an enforcement order. The maximum penalty ORR may impose is 10% of the licensee's turnover.
- 30 Section 57B of the RA 1993 requires us to "prepare and publish a statement of policy with respect to the imposition of penalties and the determination of their amount". We are also obliged to undertake appropriate consultation in preparing the statement. We include the penalties statement in our published economic enforcement policy document.
- 31 In deciding whether a penalty is appropriate, we take full account of the particular facts and circumstances of the contravention, including any representations and objections made to us, and act in a manner best calculated to fulfil the duties placed upon us by section 4 of the Act. We take account of the six penalty principles set out in the Macrory report 'Regulatory Justice: Making Sanctions Effective' and the related five principles of good regulation: proportionality, targeting, consistency, transparency, and accountability.
- 32 Our primary objective in setting a penalty is to change the future behaviour of an offender so as to deter non-compliance with its obligations (both specifically and in general). We also aim to incentivise others subject to similar obligations to comply with them.
- 33 When assessing the amount of a penalty we are likely to consider a number of factors falling into three categories:
- proportionality;
  - adjustments for mitigating and aggravating factors; and
  - financing duty.
- 34 In setting a penalty, our starting point will normally be the seriousness of the offence. In considering seriousness, we will look at:

- the actual and potential harm caused to third parties including passengers and other railway users, and to the public interest purpose of the obligation (including to the effectiveness of the regulatory regime); and
- the culpability of the offender, including whether the licence holder has acted negligently, recklessly, knowingly or intentionally.

35 We distinguish five levels of seriousness of breaches of licence. These are: technical or de minimis, less serious, moderately serious, serious and very serious.

### Other enforcement powers

36 We also have powers to amend licence conditions with the consent of the licence holder or can make a reference to the Competition and Markets Authority (CMA), requesting a modification in the public interest.

### When can we apply our enforcement powers?

37 The following table sets out the types of licence breaches and the instances we can impose an enforcement measure for non-compliance:

**Table 1: Summary of available enforcement measures**

Type of Licence Breach	Enforcement Order (provisional & final)	Financial Penalty
Past		X
Current	X	X
Future	X	

### Early Intervention

38 We also have a range of regulatory tools to hold licence holders to account as part of our monitoring and escalation process. We can apply our influence, intervening to highlight and address issues before formal action is necessary – this includes informal and formal review meetings, letters, public statements, data analysis, industry and government engagement. (See chapter 4)



## 2.3 Enforcement principles

39 Our enforcement approach is informed by best regulatory practice and the following principles<sup>7</sup>:

- proportionality in applying the law and securing compliance; targeting of enforcement action;
- consistency of approach;
- transparency about how we operate and what the industry may expect; and
- accountability for our actions in line with best practice in regulation.

40 These principles apply both to enforcement in particular cases and to management of monitoring and enforcement activities as a whole.

41 Our enforcement objectives are to:

- ensure that the right incentives are in place for the industry to meet public interest objectives;
- facilitate and encourage the industry to deliver safe and efficient services which meet the reasonable requirements of passengers, freight customers and funders; but
- use our enforcement powers, where appropriate, to ensure that the industry works in the public interest.

42 In summary, our enforcement approach will:

- generally focus our resources and priorities on systemic issues and those aspects of compliance which are most important to passengers, freight customers, funders and where non-compliance would cause most harm;
- fulfil our duty under section 68 of the RA 1993 to investigate any complaint about an alleged or apprehended contravention of a licence condition, unless it is frivolous or vexatious;

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<sup>7</sup> These are the principles of the Better Regulation Task Force, and reflect those used by the Health and Safety Commission (HSC) in respect of safety enforcement policy.

- adopt a staged approach of review, investigation and escalation, within reasonable timescales according to the urgency of the case, leading ultimately to consideration of enforcement action; and
- consider the range of regulatory tools we have available.

## 2.4 Regulatory Peer Research

43 As part of the research phase of the project, we reviewed powers, processes and general approach to economic enforcement of a range of other sector regulators. This included;

- The Office of Gas and Electricity Markets (Ofgem);
- Water Services Regulation Authority (Ofwat);
- Communications Regulator and Authority (Ofcom)
- Civil Aviation Authority (CAA);
- Monitor (economic regulator for the health sector); and
- Financial Conduct Authority (FCA)

44 Our research and discussions with our regulatory peers have helped us develop the scope of this review and our proposals for improving our enforcement policy.

45 Our research has highlighted that:

- each regulator's regime and principles of enforcement are broadly similar, but the industries regulated are very different: our principles of enforcement, are however current and consistent with other regulators;
- our overall approach to undertaking investigation and enforcement action is similar to that adopted by all the other regulators - with a staged approach to intervention and investigations into breaches of licence;
- there appears to be no one regulatory tool which is more effective than another – it is important to have a detailed understanding of the industry and what works best within the relevant legal framework;

- all regulators use a range of tools including influencing and formal powers to incentivise licence compliance: it is important to have flexibility in applying options for formal enforcement action and being able to make timely decisions;
- in recent years there has been a move towards a greater consumer focus and options for reparation and redress within enforcement policies;
- many regulators have an over-arching enforcement statement setting out the principles for the range of powers the regulator has (i.e. licence, competition, consumer, safety); and
- many have practical approaches to incentivise licence holders to offer reparations during the enforcement process and provide redress to customers who have been harmed by a licence holder's non-compliance. Our current policy allows for offers of reparation to be made, but only as a mitigating factor in considering a financial penalty.

## 2.5 ORR functions and enforcement powers: a comparison

46 We have also looked across our organisation and reviewed the powers, policies and processes of our other regulatory regimes; Health and Safety regulation and the Competition Act 1998 powers to inform our consideration of our principles and policy.

### Health and safety enforcement

47 We have a separate enforcement process and enforcement policy for health and safety issues and this is therefore separate to this review of the economic enforcement policy consultation.

48 As the health and safety regulator of the railway industry, our principal function is to secure the safe operation of the railway system, and to protect both those working on the network and members of the public from health and safety risks arising from the railways.

49 Reputational risk and risk of prosecution is a strong incentive to comply with health and safety legislation, despite levels of court fines being smaller to date than we have imposed under economic enforcement. There is also an important individual

culpability element as directors can also be prosecuted where an offence by the company has been committed with their consent or connivance.

- 50 Power to issue improvement and prohibition notices “on-the-spot” is an effective incentive for compliance and can be done by an individual inspector. Furthermore, breach of a notice is a criminal offence.
- 51 There are therefore some significant differences between the legal framework for health and safety enforcement and economic enforcement. Whilst this document explores in chapter 7 the possibility of using provisional orders more frequently, a provisional order cannot be likened to an improvement or prohibition order. Likewise, we do not have the power to fine individuals. There may however be lessons to learn from health and safety enforcement in terms of the power of reputational risk.

### **Competition and licence enforcement**

- 52 The Competition Act 1998 (CA98) is enforced by the Competition Markets Authority (CMA) and the concurrent regulators<sup>8</sup> including ORR (in respect of services relating to railways). The focus of this review is on ORR’s policy for enforcement of licence conditions although it is also important to outline the role competition law plays in this.
- 53 Where conduct could be considered as either a breach of competition law or licence, we are required, to consider whether it would be more appropriate to proceed under the CA98 before taking any licence enforcement action. Where we consider that it would be more appropriate to proceed under the CA98, we must do so, rather than proceeding with licence enforcement under sector-specific regulation.
- 54 The main distinction between competition law enforcement and the use of regulatory tools is that the former is designed to protect the process of competition primarily through deterrence. Effective competition enforcement sends out a message that illegal anti-competitive behaviour will risk exposure to serious sanctions.
- 55 There are links between licence and competition enforcement which we have to consider when applying our functions. Our current economic enforcement policy sets out the principles and approach we adopt when considering whether to take

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<sup>8</sup> Concurrent regulators include; ORR, CAA, Ofcom, Ofgem, Ofwat.

enforcement action under the licence or use our competition powers. We consider that this section of the current policy needs to be reviewed to ensure it is still fit for purpose in the light of our new concurrency duties.

## Roads and licence enforcement

56 We expect to be provided with new powers to carry out monitoring and enforcement of the Strategic Highways Company (SHC) and its management of the Strategic Road Network in England, as set out in Part 1 of the Infrastructure Act 2015. This new function and its associated enforcement policy will be the subject of a separate policy consultation process next year.

## 2.6 Conclusions

### Enforcement principles

57 There are many similarities between the enforcement principles of ORR's licences, competition and health and safety enforcement functions, and other sector regulators.

58 We are satisfied from carrying out this review exercise that our **economic enforcement policy principles remain sound** and are **consistent** with the wider regulatory environment and our other enforcement functions.

59 The exercise has helped us conclude that:

- there are also many differences within the legal frameworks of our other functions and taking account of the range of approaches applied by other regulators, we are not seeking any further harmonisation of enforcement of our economic, safety and competition functions at this point;
- we may want to consider, in the future, whether it would be helpful to produce an overarching statement setting out our all enforcement powers and principles. This may also include an overview of prioritisation principles. Prioritisation principles could help ORR keep a balanced and diversified portfolio of strategic enforcement case work. Resources are very limited and we need to ensure that our actions are targeted and focused in areas where we can achieve greatest impact; and,

- there are opportunities for sharing best practice and learning from our other functions and other regulators in their approaches to streamlining internal processes for investigation and regulatory case management systems.

### Scope of review - specific areas for improvement

60 Whilst we have concluded that the principles of our enforcement policy are still fit for purpose, the review findings have highlighted the importance of having a practical and flexible regulatory toolkit. We need to ensure we have a practical policy which promotes accountability, incentivises compliance and brings positive outcomes for those affected by non-compliance through the use of a range of enforcement options within the legal framework.

61 Our work has helped us identify the following specific areas in the current policy, which could benefit from updating:

- the policy document could be redrafted to better reflect the range of licence holders covered by our economic enforcement functions as we consider **one policy for all licence holders** is still the most appropriate approach [*chapter 3*];
- although not specific to the enforcement policy document, we also look to explore further options for greater transparency in our approach to **early intervention** and industry engagement, the application of reputational levers and clarity in our processes; [*chapter 4*]
- improvements to ORR's current **penalties statement** to ensure it reflects more effectively the implications of financial penalties on all licence holders (it is currently very NR- focused) and provides the necessary financial levels to act as an incentive for future compliance [*chapter 5*];
- Process improvements to incentivise licence holders to offer **reparations** throughout the enforcement process and provide redress to customers who have been harmed by a licence holder's non-compliance. Our current policy allows for offers of reparation to be made, but only as a mitigating factor in the consideration of a penalty. Our research has highlighted ways in which this tool could be better applied [*chapter 6*];

- greater innovation in devising and applying **enforcement orders** [*Chapter 7*]; and,
- make general updates where necessary and improve the format of the document. This includes ensuring the policy reflects any changes in response to our competition primacy duty and our approach to determining when to take action under the RA 1993 or CA98.

62 These areas are discussed further in this document and form the basis of our consultation questions.

# 3. An enforcement policy for all licence holders

## Summary

This chapter sets out the implications for publicly funded licence holders; including the reclassification of Network Rail's (NR's) debt and ORR's proposal to continue to have one economic enforcement policy for all licence holders.

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### 3.1 Introduction

63 We have identified areas of the policy and the penalties statement which could be improved to inform and relate better to all licence holders. This is further discussed in this document. However, it is important as part of this review to consider if there are external factors which could change the way ORR approaches enforcement.

### 3.2 Implications of publicly funded licence holders

64 NR is the monopoly owner and operator of the railway network, including track, signaling, bridges, tunnels and stations. We regulate NR's stewardship of the rail network for investors, funders, train companies and their passengers, freight customers and the taxpayers for the long term. Regulating monopoly infrastructure managers, like Network Rail, means we can hold them to account for delivering what has been promised.

65 NR's borrowing arrangements changed in September 2014, and the company now borrows direct from Government instead of the markets.

66 Following the signing of a framework agreement between DfT and NR in September 2014, DfT has governance powers<sup>9</sup> in relation to the company, which includes power to appoint (and dismiss) the Chair of Network Rail Limited and Network Rail Infrastructure Limited; the right to approve the Board's suggested candidate for Chief

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<sup>9</sup> Further details of the framework agreement between NR and DfT is set out in the following document:  
[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/349439/framework-agreement.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/349439/framework-agreement.pdf)



Executive of Network Rail Limited and NRIL; and the right to approve annual business plans. However, its CP5 funding settlement<sup>10</sup> and its network licence remain unchanged and the company must still deliver the obligations under this licence and the periodic review final determination.<sup>11</sup>

### **Other publicly funded licence holders**

67 Our enforcement policy should apply to all licence holders, not just NR and we are mindful of the fact that there have been publicly funded train operating companies (TOCs)<sup>12</sup> and may be such licence holders in the future.

### **Should we have separate enforcement policies?**

68 We have considered whether the changes in NR's borrowing arrangements are a reason to develop separate enforcement policies, because the monopoly company is subject to different financial arrangements to the other privately-funded companies we regulate. There is a potential risk of an unhelpful disparity in the way these different types of companies can be influenced and incentivised through regulatory action.

69 The section 4 duties have always underpinned ORR's decision-making in the context of enforcement. One of those duties is to have regard to the funds available to the Secretary of State. However, we are required to balance all relevant section 4 duties as part of our enforcement decision-making, and the weight we place on each will depend on the facts of the individual case.

70 Our research shows that there are some similarities with the approach of Monitor, the regulator for the health sector, which also regulates both private health providers and publicly funded NHS trusts. It, like ORR, has a single enforcement policy setting out its range of regulatory powers and enforcement action for all its regulated companies.

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<sup>10</sup> Network Rail's funding requirement has not changed as a result of the change to its borrowing arrangement because Network Rail's borrowing from DfT is at a commercial rate of interest.

<sup>11</sup> The requirements of the network Licence and the CP5 Final determinations are available on ORR's website: <http://orr.gov.uk/what-and-how-we-regulate/regulation-of-network-rail>

<sup>12</sup> For example, East Coast Main Line Limited, which is owned by Directly Operated Railways (DOR), a company set up by the DfT in 2009.

### 3.3 Conclusion

- 71 We do not consider that the reclassification of NR's debt means separate policies are needed to enforce licence obligations for NR, or publicly funded and other private licence holders. This would be consistent with the approach of other regulatory bodies, such as Monitor.
- 72 We consider that the key to a successful and effective economic enforcement policy is to make it fair, flexible and fit for purpose for all licence holders. ORR's economic enforcement policy needs to be sustainable and having one effective policy would also be sustainable should there be a greater mix of publicly and privately funded rail operators in the future.

### 3.4 Question

#### Question 1

**Do you agree with our view that we should continue to have one economic licence enforcement policy and penalties statement which covers all licence holders?**

# 4. Intervention and industry engagement

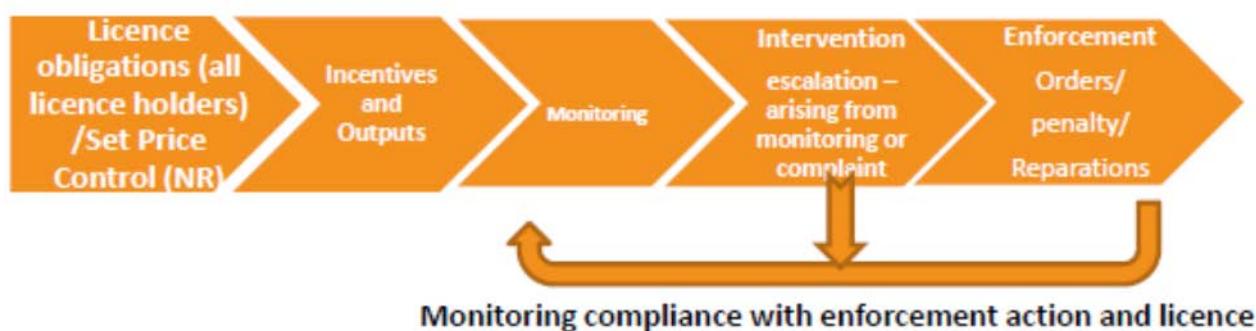
## Summary

This chapter describes the options we have in using our monitoring and holding to account processes to raise issues with licence holders as well as proposals to use these pre-formal enforcement processes more transparently.

### 4.1 Introduction

73 Regulatory intervention at early stages of an issue can be very effective in resolving concerns so that formal action is not required. We monitor licence compliance and use a range of information, data and regulatory influence to hold licence holders to account and bring parties together to find appropriate remedies to issues.

74 The interface between early intervention and enforcement under the economic enforcement policy takes a staged approach but they are both key levers and processes in ORR’s regulatory toolkit: effective and timely intervention could avoid the need for formal enforcement.



### 4.2 Monitoring, intervention and the tools ORR uses

75 Our monitoring takes a forward looking, risk-based, proportionate and targeted approach. It anticipates and highlights issues as early as possible, in order to ensure licence holders manage risks effectively before they become problems that could adversely affect passengers and freight users. ORR also has a duty to investigate any

complaint about an alleged or apprehended contravention of a licence condition, unless it is frivolous or vexatious. As part of our monitoring approach, we use an escalation process – this includes a range of activities; including stakeholder meetings, correspondence and our publications to hold licence holders to account. This process includes discussing escalated issues as part of business meetings with NR and with other operators' management to identify and implement remedies to the issues raised and, where necessary, escalate to investigation and formal enforcement action.

76 Issues which require early intervention may arise from regular monitoring, routine engagement or intelligence gathering and we consider them in relation to:

- whether an issue is a matter for ORR or some other body;
- which levers are available and which are most appropriate (for example, exerting influence, greater transparency, strengthened incentives or the use of more formal licensing and contractual powers);
- whether to raise the issue with a train operator and if so, to identify the best way to do this (for example, how formally, at what level, whether bilaterally or through a wider forum such as Rail Delivery Group or National Task Force (NTF));
- whether an investigation should be initiated and if so what type, how and by whom; and,
- whether and how an issue should be escalated with the licence holder or within other functions of ORR.

77 Our escalation approach has been an essential tool for engaging and addressing issues with licence holders during CP4. For example, concerns raised with TOC licence holders as part of our early intervention process on potential licence issues has enabled the identification of solutions without the need for formal enforcement. No formal licence enforcement has been necessary against a TOC licence holder to date.

78 Our research has also shown other regulators see value in early and informal intervention approaches to resolve issues and can lead to positive outcomes for

customers. We intend to continue to use our escalation approach as an effective method in supporting our regulatory functions.

### **4.3 Holding to account and transparency**

79 ORR values engagement with the industry and licence holders to resolve problems before it becomes a serious or systemic issue which will affect passengers or customers.

80 ORR produces a range of publications which include information, data and analysis, these also serve as a regulatory tool to shine a light on and hold the industry to account for delivery of its licence obligations. The main vehicle is ORR's regular 'Monitor' publications which provides summaries of issues raised under these monitoring and escalation processes.

81 We are also working with TOCs to develop a core data set which will show how well they are performing against their obligations to disabled passengers, provision of accurate passenger information and how well they handle complaints

82 Publishing issues and areas of concern can provide added reputational incentive on the licence holder to address these issues in a timely way. This can also provide greater transparency of the issues affecting the rail industry. Rather than relying on one such key periodic monitor document, there could be further regulatory impact through publishing more of ORR's correspondence with its licensees at intervention stages or associated papers than we currently do.

### **4.4 Reputational levers**

83 We consider there are many ways to use reputational levers more effectively to holding to account a company and its management team.

84 As the independent regulator, we also need to consider how we use our reporting, analysis and assessment of NR to inform DfT's role in applying its governance powers relating to NR management.

85 We consider there are existing levers we can use more effectively to influence behaviours and hold licence holders to account such as:

- A more effective use of our language and behaviours through correspondence and messaging for reputational impact on the licensed company;
- Greater use of transparency and data to highlight regulatory issues;
- Publication of comparative NR and operator route performance to generate reputational incentives; and
- Publication of letters sent to licence holders at the “informal” stage of an investigation.

## 4.5 Timeliness of the staged intervention and formal enforcement process

- 86 We need to progress informal processes efficiently so that, if necessary it can commence formal processes in a timely way. We need to make formal processes as timely and efficient as possible within its current staged approach to investigation and enforcement.
- 87 ORR’s current formal enforcement processes can be lengthy and resource intensive, with many internal stages involved before reaching final decisions at Board level.
- 88 We have also identified some improvements to internal case management which could help with timeliness of investigation processes.

## 4.6 Conclusions

- 89 We will explore further how we can use our existing levers more effectively (as set out above) and we aim to improve efficiency in our internal processes to enable clearer steps between its monitoring, intervention and formal investigation and enforcement.

## 4.7 Questions

### Question 2

**Do you agree ORR should be more transparent in highlighting issues and its activities in taking early intervention; for example publishing more of our intervention correspondence and associated documents? Including more information on which we make our judgement?**

### **Question 3**

**What kinds of activities, such as those discussed in this chapter, would better incentivise the industry and licence holder to raise issues and resolve these before formal enforcement was needed?**

# 5. Penalties Statement

## Summary

This chapter explains our current penalties statement, the issues relating to enforcement penalties and options to improve the statement to reflect its relevance to all licence holders.

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### 5.1 Introduction

90 Our penalties statement, as well as the RA 1993 Act, provides the policy and process we will follow in determining if a penalty is appropriate. It explains how we determine and what the penalty amount should be after considering the seriousness of a (past or current) breach and any mitigating and aggravating factors.

### 5.2 Formal action taken by ORR resulting in penalty action

91 In considering the effectiveness of the current penalties statement we have reviewed our enforcement action to date.

92 Since 2006 all our formal enforcement action has been taken as a result of non-compliance by one licence holder – NR. ORR has imposed five financial penalties (including a reasonable sum as part of an enforcement order), these have been varied in seriousness as set out in the penalties statement, including one determined to be very serious<sup>13</sup> – the penalties statement’s highest breach seriousness category. All of these penalties have been less than 1% of the company’s annual turnover for the relevant year.

93 There have been no penalties or formal licence enforcement action taken against any other licence holder during this time.

94 **The following table summarises the types of breaches for which penalties have been imposed:**

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<sup>13</sup> Penalties statement which includes the breach seriousness table is provided in Annex B



**Table 2: ORR Enforcement action 2006-14: Penalties**

Date	Issue	Action taken	Outcome
07/07/ 2014	NR failed to deliver performance targets for the long distance sector (LD) in 2013-14 (Condition 1)	NR was required to pay a reasonable sum if the 2013-14 LD public performance measure (PPM) target was not achieved. Taking account of issues beyond NR's control in 2013-14, the company was fined £53.1m for failure to deliver its agreed obligations in 2013-14.	DfT and HM Treasury agreed the final £53.1m penalty be re-invested in Wi-Fi for rail users – resulting in future benefit for passengers and customers.
07/07/ 2014	NR failed to deliver performance targets for the London and South East (LSE) sector in 2013-14 (Condition 1)	We decided a penalty was not considered appropriate in light of public acknowledgment by NR of responsibility for its part in the performance failures and the company's commitment to extra funds to improve the resilience of the rail network in LSE.	Plans expected to include range of projects costing at least £25m must be in place by December 2014 and regulated thereafter through the delivery plan. NR's fund will be used for improvements in weather resilience which in turn will improve reliability of passenger services.
22/11/ 2010	Breach of NR's network licence in relation to the introduction of the Integrated Train Planning System. (Conditions 1 and 2)	Penalty of £3m on NR issued under section 57C of the Railways Act 1993.	NR made improvements to its risk assessment and programme planning systems as a result of this breach.
13/05/ 2008	Continuing breach of NR's network licence in relation to the planning and execution of engineering work requiring possessions. (Condition 7)	Penalty of £14m on NR issued under section 57C of the Railways Act 1993.	NR made improvements in its planning and management of engineering programmes during the rest of the control period.
06/09/	Weaknesses in NR's planning of the Portsmouth	Penalty of £2.4m issued under section 57C of the Railways Act	First penalty in excess of £1m imposed by ORR. Demonstrated licence holders would be held to account and penalised for causing

2007	resignalling scheme. (Condition 7)	1993.	prolonged passenger disruption.  <i>(Note: our review identified that this could have been a good case for reparations if ORR had had this option in place at the time as customers affected and harm could be clearly defined.</i>
12/04/ 2006	NR's failure to publish accurate information about the capability of the network. (Condition 7)	Penalty of £250k for NR issued under section 57C of the Railways Act 1993.	An output in the CP4 determination was included as a result of this issue.

## Effectiveness of penalties

- 95 We have used penalties flexibility, both as a single action or in combination with other actions such as enforcement orders, requiring delivery of improvement plans, and as previously mentioned as an incentivising 'reasonable sum' within an order.
- 96 On balance, we believe the most successful use of penalties has been when combined with other regulatory activities. These have been effective in remedying both the causes of the breach as well as building in activities to ensure similar issues can be prevented in the future.
- 97 For example, in response to the West Coast Mainline route modernisation and possession overruns in 2008, we used a range of enforcement orders. These required the licence holder to address the current issues at the time, as well as the longer term systemic issues and root causes identified.
- 98 As a proactive regulator we expect lessons to be learnt, and see benefits in a 'predict and prevent' approach for the industry and its users, as well as the need for ex poste action where necessary.
- 99 However, it is important to emphasise that the principle for imposing a penalty is to incentivise a licence holder back into compliance and deter it and others from future non-compliance. A penalty can have a reputational and incentivising impact on the licence holder. This is particularly important where enforcement action can be taken against a range of licence holders who may be driven by different incentives.

100 Our research of other regulators highlighted that the reputational impact of a financial penalty can have an incentivising impact on licence holders; particularly companies where there are shareholders, deterring non-compliance in a range of sectors. This view was also highlighted in our discussions with ORR's consumer expert panel<sup>14</sup>.

## Penalty funds

101 As part of our enforcement decision-making, we must consider all of our duties, which include our duties to passengers, freight customers and taxpayers. However, we do not have any powers to use financial penalties to provide benefit or redress for the harm caused directly to the customer. The RA 1993 Act does not provide ORR with any discretion to use financial penalties imposed within the rail industry.

102 The penalty fund must be paid to the Secretary of State and accounting rules requires these to be provided to the HM Treasury (Government's non-consolidated fund). However, Government can choose to re-invest these funds in rail. For example, following our last enforcement action, where we imposed a penalty on NR (£53.1m) in July 2014, the Government decided to re-invest the funds into Wi-Fi improvements for rail passengers.

103 The potential threat of a penalty and the associated reputational damage to a company can be a useful incentive to offer forms of reparation to the customers it has harmed. This is why many regulators have included options in their policies for early admission and offers of reparations.

## Level of penalties

104 The table below shows the level of penalties imposed by ORR, against the licence holder's revenue generated during the last eight year period. (Note: all penalties imposed have all been under 1% of the company's turnover):

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<sup>14</sup> The ORR has consumer and economic expert panels which discuss policy issues: <http://orr.gov.uk/about-orr/who-we-work-with/expert-advisors>

**Table 3 – Level of penalties imposed to date and turnover percentage**

Year	£ Penalty imposed by ORR (all on NR)	Proportion of licence holders turnover
2013/14	£53.1m	0.8%
2012/13		
2011/12		
2010/11	£3m	0.05%
2009/10		
2008/09	£14m	0.2%
2007/08	£2.4m	0.04%
2006/07	£0.25m	0.004%

105 It is unclear whether or not the penalties we have imposed have been sufficient to incentivise NR to return to compliance and deter future non-compliance.

106 We note Ofgem has decided recently to raise penalty levels to be a more effective future deterrent, but it has also been given formal consumer redress powers. This supports our view that there is benefit in having a range of regulatory tools and flexibility in using them.

107 ORR's research of other regulators has highlighted that there can also be positive action achieved through incentivising a company to publically acknowledge failure with an admission of its failings, apology and offer of redress which could also bring some form of benefit to the customers harmed. Many include in their policies opportunities to consider offers of early redress and reparations from their licence holders. This is discussed in the next chapter.

### **5.3 Penalties statement – Levels of seriousness**

108 Our review has found that our current penalties statement, whilst applicable to all licence holders, is not currently drafted to fully reflect the financial implications that a penalty determination could have on all licence holders. This is because the table references actual sums of money currently based on NR's turnover. This does not show the range of licence holders the implications of the current seriousness definitions very well. We therefore also need to consider if these are appropriate for the range of licence holders; including much smaller companies.

109 It is also worth noting that ORR appears to be the only regulator which currently provides a level of granularity of its decision-making by providing an example table of seriousness of breach<sup>15</sup> and likely financial penalty starting points. This is currently included to provide a guide for licence holders, although it is currently drafted in such a way as to focus on NR and examples of our action taken against them to date.

110 The table currently sets out 5 levels of seriousness of breach. These reflect increasing severity, however the highest level 'very serious' covers a wide range of penalty starting point from 0.5% up to 10% of turnover. There is a question, taking account of the types of actions taken to date, whether we should consider further categories or revise the levels of turnover under these categories.

## 5.4 Penalties and reclassification

111 Our application of penalties, which to date have been due to NR breaches of licence, has been a contentious issue, particularly due the public funding involved in the rail industry. Such application is likely to be under further scrutiny now that NR's debt has been reclassified.

112 The recent change to NR's borrowing arrangements could mean that financial penalties have an impact on its financial sustainability. This is because the DfT loan facility is capped at £30.3 billion in CP5. Whilst this facility has been designed to provide a contingency buffer, unforeseen costs resulting from a penalty could push the company beyond its available funding. This means that HM Treasury approval would be required for any further borrowing. This would be the same issue for both financial penalties and any offers of reparations made by the company to us as part of any enforcement action.

## 5.5 Conclusions and areas of improvement

113 We take seriously licence non-compliance and the harm which can be caused by it. We believe financial penalties are an important part of a regulator's enforcement toolkit – although in many cases a penalty will likely be our last resort for enforcement. We see benefit in exploring the use of other tools, such as a more effective use of

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<sup>15</sup> See Annex B for link to current published economic enforcement policy

reparations and enforcement orders to create a package of effective enforcement. However, we also recognise that the seriousness of a breach, or the particular circumstances of a case, might require a financial penalty as the most suitable sanction rather than offers of reparations or a mix of both. Our research findings support this view.

114 We do however consider there is a need for further improvements to the penalties statement. We therefore propose at the very least to update it to include:

- A reference to percentage of turnover, not actual financial numbers, to ensure consistency for its range of licence holders and consider if these are appropriate for much smaller companies;
- More general examples to reflect what could be considered under each seriousness level for all licence holders; and,
- General updates to reflect any proposed improvements to the offers of reparations process (see next chapter).

## 5.6 Questions

### Question 4

**Is the seriousness of breach table in the policy statement helpful to licence holders and wider stakeholders?**

### Question 5

**Do you think the seriousness categories in the penalties statement remain appropriate?**

### Question 6

**Would raising ORR's percentage of turnover starting point (beyond the percentages shown in our current penalty statement) for determining penalty amounts under its seriousness levels act as a stronger deterrent to future non-compliance?**

### Question 7

**Do you support the general revisions proposed to the penalties statement to ensure it covers all licence holders?**

### Question 8

**Do you have any other general comments on the penalties statement?**

# 6. Reparations

## Summary

This chapter explains the current use of offers of reparations within our enforcement policy. It highlights options to improve the process and flexibility in considering such offers from licence holders where enforcement action is considered necessary.

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### 6.1 Introduction

115 In 2012 we carried out a consultation and revised our economic enforcement policy to include a reference to ‘offers of reparation’ as part of the penalties statement. Such offers would be considered as a mitigating factor in assessing an enforcement penalty amount.

116 Our current policy states that it actively encourages a licence holder to offer reparations as early as possible, which could even precede an investigation. Reparations may, therefore, be offered at different stages of our investigation and enforcement process. However, our policy currently states that we can only consider reparations as a potential mitigating factor to be considered when calculating a penalty.

117 Our current processes expect the licence holder to submit a detailed plan of proposed reparations or account of reparations made already so that we are clear what is being offered or has been done.

118 When considering reparations as a mitigating factor, ORR needs to ensure the offer has three component parts:

- **Genuinely additional** (for example, to the franchise agreement or all the commitments already made to us, funders, operators etc.). In order to confirm that reparations are not already part of an existing franchise commitment ORR must consult the relevant franchising authority, for example DfT, Transport Scotland, Transport for London (TfL) or London Underground Ltd. (LUL). We also check to

ensure that the offer is additional to existing commitments made through periodic reviews or other obligations.

- **Appropriately targeted and proportionate** to the harm done. That is, are reparations being offered sufficient to compensate for the harm done to some meaningful degree and are they targeted at those that suffered as far as practicable and we will consult the appropriate passenger organisations in considering this.
- **Deliverable** that is, we need to be clear how the licence holder proposes to deliver the reparations.

119 We consider the impact of the non-delivery of reparations on the industry and passengers and how we can mitigate these risks.

120 We also need to monitor closely the delivery of reparations and be ready to take remedial action for non-compliance. We may agree that a franchising authority or another body is best placed to do this monitoring. Monitoring arrangements and repercussions of non-compliance should be set out to the licence holder. Reparations may be contractualised or mentioned in an order, but it is most likely that they will be public commitments with a reputational incentive to deliver what is promised. Potential remedies could include imposing a financial penalty for non-compliance and 'naming and shaming'.

121 We believe that the three component parts of reparations as currently understood by us – genuinely additional, appropriately targeted and proportionate to the harm done and deliverable – remain appropriate and we do not intend to make major changes to these.

122 However, we think that 'appropriately targeted and proportionate to the harm done' is a desirable element of any offer of reparations, but should be flexibly applied. A flexible approach would enable an offer of reparations benefiting, for example, the group of passengers who have suffered harm, as well as a wider group not being automatically ruled out on the basis that the offer is not sufficiently targeted.



## 6.2 Offers of reparations to date

123 Since adopting options for reparations into the policy, ORR has yet to approve a formal offer of 'reparations' as stipulated in its policy and guidance.

124 It has proved challenging for licence holders to offer reparations that would fit within these criteria – this has been in part due to the types of breaches and the systemic issues involved.

125 We consider that a reason why reparations do not work as well as they do for other regulators, is because our current policy only allows for reparations to be considered as a mitigating factor. This is after we have decided that a penalty is appropriate and the starting point for the penalty has been determined. In practice a licence holder has not been incentivised enough to offer reparations and the process does not currently allow for offers to be considered earlier in the process.

126 As mentioned in chapter 5, following the reclassification of NR, offers of reparations could also have an impact on headroom of financial loan agreement in the same way as financial penalties.

## 6.3 Transparency of reparations

127 As discussed in the previous chapter, a balance between reputational levers and incentivising compliance is a key factor in effective enforcement. Also important is that any arrangements for receiving and considering offers of reparations are transparent.

128 The current process requires a consultation process when we are minded to accept an offer of reparations and any revisions to the existing policy would build on ensuring a transparent and clear process and criteria for accepting reparations, including as part of any early offers to redress harm.

## 6.4 Early admission and remedy

129 An early admission, apology and offers of reparations for harm caused could provide both reputational incentive for future compliance and benefit to customers. This is a practice and approach used by many other regulators and can lead to efficiencies in the process.

130 We are keen to encourage maturity in company behaviours and for the industry to come forward early in the enforcement process to admit and acknowledge its failings.

131 We note under competition law numerous competition authorities (including the European Commission and the CMA) achieve this by stating in their policy documents that any commitments offered by the business under investigation are more likely to be accepted if offered at the early stages of the investigation.

## 6.5 Conclusions

132 We are keen to incentivise early admission and redress offers by establishing in our policy that the absence of such offers will be considered when deciding whether a financial penalty is appropriate.

133 There is scope to improve our enforcement process and add a stage into the current process which would enable consideration of reparations after a breach has been identified (either by us or by way of early admission by the licensee) but before we have decided that a penalty is appropriate.

## 6.6 Questions

### Question 9

**Do you agree that licensees should be encouraged to make early admissions and to provide public apologies?**

### Question 10

**Do you agree ORR should revise its enforcement processes to enable offers of reparations to be considered in each of the following circumstances on a flexible basis depending on the circumstances of the case?**

- a) **Early in the investigation process where a licence holder provides an admission, apology and suitable offers of reparations;**
- b) **Before considering a penalty; and,**
- c) **As a mitigating factor once it has been decided that a penalty is appropriate and the level of penalty is being set?**

## **Question 11**

**Do you agree that ORR's enforcement policy and penalties statement should incentivise non-compliant licence holders to offer early admission and offers of reparations by stating that the absence of such offers will be considered when:**

- a) deciding whether a financial penalty is appropriate; and**
- b) identifying factors informing the level of any penalty.**

# 7. Enforcement orders

## Summary

This chapter describes the options we have in using our enforcement powers to impose enforcement orders and the proposals for using these more flexibility

### 7.1 Enforcement orders imposed to date

134 Since 2006 ORR has imposed a total of four final enforcement orders and one provisional order. All enforcement orders have been issued to NR during this period. Below is a summary table of enforcement orders imposed by ORR:

Table 4: ORR enforcement action 2006-2014: Orders			
Date	Issue	Action taken	Outcomes
23/07/2012	Weaknesses in NR's Network Rail's plan to deliver performance targets for the long distance sector in 2013-14.	This order includes a payment of a reasonable sum should Network Rail fail to meet its commitments, set on a sliding scale of £1.5m for each 0.1 of a percentage point that it falls below the target. Final order issued under section 55 of the Railways Act 1993 requiring NR to deliver the committed target, including further review and development of its plans.	LD improvement plan –NR also volunteered to produce and implement similar plans for other sectors when performance deteriorated. Further breaches in delivery of LD and LSE performance found in 2012-2013 and 2013-14.
19/01/2012	NR's failure to deliver performance targets for the freight sector.	Final order issued under section 55 of the Railways Act 1993, requiring NR to set up and facilitate a recovery board comprising of relevant freight operators to agree the steps to take to remedy the breach, within a specified timescale.	Freight recovery board was set up with NR and industry to hold NR account for improvements– seen by ORR and industry as success – Board was kept in place when order was completed – engagement also helped to change to more effective measure in CP5
19/01/2012	Weaknesses in NR plan to deliver performance targets for the long distance sector for 2011-12 and 2012-13.	Final order issued under section 55 of the Railways Act 1993, requiring NR to produce and implement a plan setting out the steps it will take in the remainder of 2011-12 and for 2012-13 to deliver the outputs.	NR complied with order to produce a recovery plan – where ORR did not think the plan would be effective for 2013-14 it used further order to incentivise PPM improvement in LD sector.
22/04/2008	Weaknesses in NR's planning and execution of engineering projects requiring possessions. (Condition 7 of the network licence, 2008)	Final Order issued under section 55 of the Railways Act 1993, requiring Network Rail to produce and implement a plan to address weaknesses.	NR improved its possession planning processes and management of engineering programmes during the rest of the control period.

28/02/2008	The likelihood of NR failing to provide infrastructure capability to deliver significant timetable improvements for December 2008 (Condition 7 of the network licence, 2008).	Provisional Order issued under section 55 of the Railways Act 1993, requiring Network Rail to produce and deliver a plan and output in relation to the WCRM project.	The use of the provisional order to get NR to focus quickly and take remedial action - then followed up by the final order for long term improvements.
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135 Imposing these orders has been a useful tool in making the licence holder, NR in these cases, focus on the issues and develop and produce plans to recover. However in some cases the implementation of the plans by the licence holder has not always been fully effective. There are risks that a plan is produced to address our concerns, rather than being embedded in the core of the company to help recover and deliver its obligations, will not deliver in practice.

136 Arguably, and a view of many of those involved at the time, one of the most successful orders ORR imposed on NR was the requirement to develop the freight recovery board. This allowed the industry to work with NR and help us hold NR to account in improving freight performance. The industry reported that it found the Board useful and when the compliance had been restored the freight community and NR chose to continue the board now known as the Joint Freight Board. This regulatory and industry engagement has also led to a new freight measure being developed for CP5.

137 The use of the provisional order for the West Coast Mainline project in 2008, was follow up by a final order, enabling swift action to be taken when the issue came to light and then followed up to ensure there was a longer term plan in place to address systemic weaknesses. This was an effective use of ORR's order powers and these were combined with other enforcement action (penalty) given the seriousness and harm caused by the Christmas possession overruns. This was a very public and high profile failing on NR's part affecting large sections of the network. There were significant lessons learnt by the licence holder as a result of this and a network availability regulatory output which ORR continued to monitor during CP4.

138 We have imposed two enforcement orders on NR relating to the delivery of long distance (LD) performance. The first order required NR to develop a recovery plan, but when the plan was not considered robust for the latter years of CP4, another order was made requiring further development of the plan. This further plan required delivery by the end of CP4 and aimed to incentivise NR to recover and deliver its LD regulatory PPM outputs. This was the only time we have used a sliding scale

reasonable sum (penalty) as a regulatory tool; in this case to try to incentivise the company to deliver in the last two years of the control period. We also used influencing, through our annual publications and Monitor documents, to further pressurise NR to improve performance. However performance did not improve and further enforcement action was required.

## 7.2 Regulatory Approach

139 We have set out in our key publications in the first year of CP5, including the final determination and Monitor documents, that its monitoring approach will be risk based, proportionate, forward looking and targeted.

140 This forward looking approach includes using data and forecasting more effectively – therefore helping to identify issues earlier. This approach is therefore likely to lead to earlier engagement and interventions by the regulator, and may also lead to more potential for current and future breaches being identified in relation to relevant licences holders.

141 This enforcement policy review therefore plays a key part in ensuring that our relevant policies are flexible and sustainable, enabling ORR to practically apply its greater forward looking regulatory focus.

## 7.3 Application of provisional orders – current approach

142 A key issue for any regulator is being able to use its regulatory tools in the most effective and timely manner.

143 The current policy interprets the Act in such a way that we consider the use of provisional orders only in ‘urgent’ cases. Having reviewed the policy and the Act, we consider there is scope to consider using provisional enforcement orders in a more effective and timely way.

144 According to the legislation, we must make a provisional order if it ‘appears’ that certain criteria are met. This contrasts with the requirement for a final order, in respect of which we must be ‘satisfied’ that the (different) criteria are met. It is clear therefore

that there is scope for conducting a shorter initial investigation before making a provisional order.

## 7.4 Conclusions

145 Enforcement orders have been generally successful in holding a licence holder to account and to take necessary steps to remedy its failings.

146 It is important that action, (such as putting in place a recovery plan) imposed under any such order, becomes an integral part of the behaviour of the licensee. This is not to say that if specific action is imposed in an order, that action should become the licensee's sole means of remedying and recovering its licence breach; the action is not intended to be seen as a separate regulatory burden. The necessary additional effort, focus and delivery by the licence holder to comply with the requirements of an order should be a practical incentivising tool to support its return to and sustain compliance.

147 We consider that provisional orders offer a real opportunity to take targeted and swift actions in circumstances where it is clear that the required process for making a final order will impact on the loss and damage suffered by any person as a result of the licence breach.

148 We propose to use enforcement orders more innovatively to get licence holders to remedy issues as quickly as possible – utilising a range of activities which engage the industry, where appropriate to remedy issues; these could include taskforces, recovery boards, joint recovery plans.

## 7.5 Questions

### Question 12

**Do you agree ORR should revise its enforcement policy and processes to reflect a more effective use of provisional and final orders, in particular, to enable ORR to be more proactive and forward looking?**

# 8. General updates and revisions to the policy document

## Summary

This chapter describes the general drafting updates we propose to make to the current policy document.

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### 8.1 Introduction

149 The economic enforcement policy and penalties statement is one of our key published regulatory policy documents. It is essential that it is updated and is in a format that is easy to read.

150 In addition to the issues discussed in the earlier chapters, we have identified some areas we need to look at to improve the enforcement policy document generally.

### 8.2 General updates

151 The policy format and drafting is being reviewed and updates made to ensure it:

- Is practical, informative and user friendly for all, particularly licence holders;
- Reflects any of the latest changes in the text, such as ORR's Competition Act duty;
- Is consistent with our regulatory language and latest corporate document style; and
- Web links and references are checked and consistent with ORR's new website.

152 Updates will also be made to our internal guidance documents to include any changes to processes in the policy.

### **Question 13**

**Do you have any general comments on how ORR can improve the format and style of our current published policy document to make it a more practical reference document?**



# 9. What will happen next?

## Summary

This chapter describes the next steps in the consultation process and the engagement opportunities.

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### Engagement and views

153 We very keen to hear the views of all of our stakeholders as part of this policy review. In particular, we would like to hear from the industry, including relevant licence holders, governments and passenger and consumer groups on the proposals set out in this document.

154 We have an engagement programme associated with this consultation and welcome opportunities to meet with representatives through individual meetings and / or presentation and discussion sessions with industry groups during the consultation period.

### Stakeholder Workshop – 12 January 2015

155 We will also be holding a **stakeholder workshop event on 12 January 2015, 10:00 – 13:00**, ORR Offices, One Kemble Street, London WC2B 4AN.

156 If you would further information or would like to attend this workshop please contact the policy project team at: [ORReconomicenforcementreview@orr.gsi.gov.uk](mailto:ORReconomicenforcementreview@orr.gsi.gov.uk)  
Telephone: 020 8272 3871 or register on line via the following link:  
<https://adobeformscentral.com/?f=VNK3zCFEBNkKe9ytoVfYYg>

157 A further workshop in January 2015 may also be offered if demand requires it.

## Next Steps

158 This consultation commences on Monday 8 December 2014 and the final date for responses is 16:00 on Friday 6 February 2015.

159 Following the consultation period concluding, our analysis, conclusions report and proposed revised policy is expected to be agreed by ORR's Board for publication by the end of March 2015.

# Annex A: Summary of consultation questions

Chapter	Question No.	Detail
<b>3 - A policy for all licence holders</b>	<b>Question 1</b>	Do you agree with ORR's view that it should continue to have one economic licence enforcement policy and penalties statement which covers all licence holders?
<b>4 – Intervention and industry engagement</b>	<b>Question 2</b>	Do you agree ORR should be more transparent in highlighting issues and its activities in taking early intervention; for example publishing more of our intervention correspondence and associated documents? Including more information on which we make our judgement?
	<b>Question 3</b>	What kinds of activities, (such as those discussed in this chapter) would better incentivise the industry and licence holder to raise issues and resolve these before formal enforcement was needed?
<b>4 – Penalties statement</b>	<b>Question 4</b>	Is the seriousness of breach table in the policy statement helpful to licence holders and wider stakeholders?
	<b>Question 5</b>	Do you think the seriousness categories in the penalties statement remain appropriate?
	<b>Question 6</b>	Would raising ORR's percentage of turnover starting point (beyond the percentages shown in the current penalty statement) for determining penalty amounts under its seriousness levels act as a stronger deterrent to future non-compliance?
	<b>Question 7</b>	Do you support the general revisions proposed to the penalties statement to ensure it covers all licence holders?
	<b>Question 8</b>	Do you have any other general comments on the penalties statement?
<b>5 - Reparations</b>	<b>Question 9</b>	Do you agree that licensees should be encouraged to make early admissions and to provide public apologies?
	<b>Question 10</b>	Do you agree ORR should revise its enforcement processes to enable offers of reparations to be considered in each of the following circumstances on a flexible basis depending on the circumstances of the case?  a) Early in the investigation process where a licence

		<p>holder provides an admission, apology and suitable offers of reparations;</p> <p>b) Before considering a penalty; and,</p> <p>c) As a mitigating factor once it has been decided that a penalty is appropriate and the level of penalty is being set?</p>
	<b>Question 11</b>	<p>Do you agree that ORR's enforcement policy and penalties statement should incentivise non-compliant licence holders to offer early admission and offers of reparations by stating that the absence of such offers will be considered when:</p> <p>a) deciding whether a financial penalty is appropriate; and</p> <p>b) identifying factors informing the level of any penalty.</p>
<b>6 – Enforcement orders</b>	<b>Question 12</b>	<p>Do you agree ORR should revise its enforcement policy and processes to reflect a more effective use of provisional and final orders, in particular, to enable ORR to be more proactive and forward looking?</p>
<b>8 – General updates</b>	<b>Question 13</b>	<p>Do you have any general comments on how ORR can improve the format and style of our current published policy document to make it a more practical reference document?</p>

# Annex B: Reference links

## ORR's current published economic enforcement policy and penalties statement (2012)

[http://orr.gov.uk/\\_data/assets/pdf\\_file/0018/4716/economic-enforcement-statement.pdf](http://orr.gov.uk/_data/assets/pdf_file/0018/4716/economic-enforcement-statement.pdf)

## Railways Act 1993

<http://www.legislation.gov.uk/ukpga/1993/43/introduction>

## Competition Act 1998

<http://www.legislation.gov.uk/ukpga/1998/41/introduction>

## Consumer expert panel

<http://orr.gov.uk/about-orr/who-we-work-with/expert-advisors/consumer-expert-panel>

<b>Consultee List</b>		
<ul style="list-style-type: none"> <li>• Abellio Greater Anglia Ltd</li> <li>• Alliance Rail</li> <li>• Alstom Transport UK Limited</li> <li>• Amey Fleet Services Ltd</li> <li>• 'Arriva Train Care'</li> <li>• Arriva Trains Wales Ltd</li> <li>• Associated British Ports</li> <li>• Babcock Rail Ltd (formerly First Engineering Ltd)</li> <li>• Balfour Beatty Rail Infrastructure Services Ltd</li> <li>• Bombardier Transportation UK Ltd</li> <li>• C2C Rail Ltd</li> <li>• Centro</li> <li>• Colas Rail Ltd (formerly Amec Spie Rail (UK) Ltd)</li> <li>• DB Regio Tyne and Wear Ltd</li> <li>• DB Schenker Rail (UK) Ltd (formerly English Welsh and Scottish Railway Ltd)</li> </ul>	<ul style="list-style-type: none"> <li>• Harsco Rail Ltd</li> <li>• Heathrow Express Operating Co Ltd</li> <li>• Heritage Railway Association</li> <li>• High Speed 1</li> <li>• High Speed 2</li> <li>• Hitachi Rail Europe Ltd</li> <li>• Hull Trains Company Ltd</li> <li>• Hutchinson Ports (UK) Ltd</li> <li>• London and Birmingham Railway Ltd (London Midlands)</li> <li>• London and South Eastern Railway Ltd</li> <li>• London Overground Rail Operations Ltd</li> <li>• London TravelWatch</li> <li>• London Underground Ltd</li> <li>• MDS Transmodal Ltd</li> <li>• Merseyrail Electrics 2002 Ltd (Merseyrail)</li> <li>• Merseyside Passenger Transport Services Ltd (Mersey Travel)</li> <li>• Mitie Technical</li> </ul>	<ul style="list-style-type: none"> <li>• Serco Caledonian Sleepers Limited</li> <li>• Sheffield (Supertram) Metro</li> <li>• Siemens Plc.</li> <li>• South East Wales Transport Alliance</li> <li>• South Yorkshire Passenger Transport Executive</li> <li>• Southern Railway Limited</li> <li>• Stagecoach Group plc</li> <li>• Stagecoach South Western Trains Ltd</li> <li>• Stobart Rail Ltd</li> <li>• Strathclyde Partnership for Transport</li> <li>• The Chiltern Railway Company Ltd</li> <li>• Transport for Greater Manchester</li> <li>• Transport For London</li> <li>• Transport Scotland</li> <li>• Tube Lines Ltd</li> <li>• Tyne &amp; Wear Passenger Transport Executive</li> <li>• Venice Simplon Orient Express Ltd</li> <li>• Volkerrail Ltd formerly Grant Rail Ltd</li> <li>• Welsh Government</li> <li>• West Coast Railway</li> </ul>

<ul style="list-style-type: none"> <li>• Department for Transport</li> <li>• Devon and Cornwall Railways Ltd</li> <li>• Direct Rail Services Ltd</li> <li>• Docklands Light Railway</li> <li>• East Coast Main Line Company Ltd</li> <li>• East Midlands Trains Ltd</li> <li>• Europorte Channel SAS</li> <li>• Eurostar International Ltd (formerly Eurostar (UK) Ltd)</li> <li>• First Greater Western Ltd</li> <li>• First ScotRail Ltd</li> <li>• First/Keolis Transpennine Ltd</li> <li>• Freight Transport Association</li> <li>• Freightliner Heavy Haul Ltd</li> <li>• Freightliner Ltd</li> <li>• GB Railfreight Ltd</li> <li>• Glasgow Prestwick International Airport Ltd</li> <li>• Govia Thameslink Railway Limited</li> <li>• Grand Central Railway Company Ltd</li> </ul>	<p>Facilities Management Limited</p> <ul style="list-style-type: none"> <li>• MTR Corporation (Crossrail)Limited</li> <li>• National Assembly for Wales</li> <li>• Network rail</li> <li>• Network Rail Infrastructure Ltd</li> <li>• Nexus (Tyne and Wear metro)</li> <li>• North Yorkshire Moors Railway Enterprises plc.</li> <li>• Northern Rail Ltd</li> <li>• Nottingham Tramways</li> <li>• NXET Trains Limited (c2c Rail Ltd)</li> <li>• Passenger Focus</li> <li>• Passenger Transport Executive Group</li> <li>• Peak Rail PLC</li> <li>• Pre Metro Operations Ltd</li> <li>• QS Rail Ltd</li> <li>• Rail Delivery Group</li> <li>• Rail for London Limited</li> <li>• Rail Freight Group</li> <li>• Renaissance Trains</li> </ul>	<p>Company Ltd</p> <ul style="list-style-type: none"> <li>• West Coast Traincare Ltd</li> <li>• West Coast Trains Ltd (trading name: Virgin Trains)</li> <li>• XC Trains Limited</li> </ul>
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