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Dear Stakeholder

Office of Rail and Road's (ORR) conclusions to its consultation on the Draft Enforcement Policy for Highways England

1. We consulted on the *Draft Enforcement Policy for Highways England* from 3 July 2015 until 25 September 2015. We received 12 responses in total including professional associations, road safety groups, as well as Highways England, Transport Focus and the Department for Transport (DfT). A list of who responded to our consultation and a detailed summary of their views can be found in Annex A.
2. This letter sets out a summary of the responses to the consultation and how we have addressed a number of the points raised in the accompanying final Enforcement Policy for Highways England.
3. Overall, respondents supported the concept of having a clearly set out policy to govern the way in which we would conduct our enforcement activities, recognising that setting out clear expectations would help to ensure compliance from Highways England. Some respondents thought we had got the balance right in the policy between accuracy and readability. Others thought we could do more to make the policy an easier read.
4. Respondents supported our approach of having a staged enforcement process, with a range of informal and formal enforcement tools at our disposal. Respondents were clear that we should view formal enforcement activity as a severe sanction and should explore all the enforcement tools at our disposal to deter non-compliance.
5. Some respondents did not agree that our draft Enforcement Policy should contain provisions relating to fines. Where there was opposition, most of these respondents reiterated the view that fining should be a last resort and should be aimed at having a reputational rather than financial impact. Three respondents suggested that if we were intending to fine Highways England, an approach compatible with ensuring a fine had a reputational rather than a financial effect, would be to link the fine to the remuneration of its senior management.
6. Some respondents commented on the level of fines in our draft Enforcement Policy, suggesting that there needed to be better differentiation between the level of fines for

the three middle categories of seriousness to reflect more clearly the seriousness of the contravention.

7. On reparations, respondents' views were mixed with opposition focusing mainly on avoiding slowing down any enforcement process as a result of protracted negotiations, proposals and counter-proposals.

Consideration of responses and changes to the final Enforcement Policy

8. We have carefully considered respondents' views to our consultation on the draft Enforcement Policy and have made amendments where we consider it is appropriate. We have made changes in the areas below.

Clarity, style and format

9. We have made a number of amendments to improve the readability and clarity of the policy. We have added diagrams to illustrate features of the policy where we consider this is helpful and have tightened the language in a number of places.

Fining Highways England

10. A key theme among some of the respondents was whether it was appropriate to fine Highways England.
11. Section 11 of the Infrastructure Act 2015 gives ORR, as the Highways Monitor, the power to issue Highways England with a notice and/or a fine if ORR is satisfied Highways England has contravened or is contravening compliance with the Road Investment Strategy and/or statutory directions and guidance issued by the Secretary of State to Highways England. Given the legislation, and in accordance with the requirements of the joint statutory guidance issued to ORR from DfT/HM Treasury¹ on the exercise of ORR's enforcement powers, the purpose of the Enforcement Policy is to provide guidance on how we would use these statutory powers, not the rationale for why we have them.

Seriousness of the contravention and the level of fines

12. A number of respondents questioned whether it was appropriate for there to be no differentiation in the level of fines we could impose for 'less serious', 'moderately serious' and 'serious' contraventions by Highways England.
13. We stated in the draft Enforcement Policy that for these three categories we would not normally impose a fine exceeding £2.5 million. Whilst we did not differentiate financially between these levels of seriousness, we stated that 'less serious' and 'moderately serious' contraventions would be at the lower end of this scale.

¹ https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/411076/statutory-guidance-on-fines.pdf

14. We accept that providing more certainty around the differentiation between the levels of seriousness and the potential contraventions would be helpful for Highways England and other stakeholders.
15. We are therefore amending the indicative fine levels for 'less serious' and 'moderately serious' to £0.5 million and £1 million respectively. We believe this reflects the original policy in a clearer way and delivers on several respondents' requests for differentiation between these levels.

Linking fines with Executive remuneration

16. Given our view that requiring Highways England to pay a fine to the Secretary of State for a contravention would, in most circumstances, be aimed at achieving a reputational rather than financial impact, we have considered further the point made by some respondents that any fines should be linked to Highways England's Executive remuneration.
17. Whilst any decision on such issue is for Highways England and DfT to decide, we would expect that any enforcement action that we impose on Highways England would be considered as a barometer of its performance and the performance of its senior management. We have set out this stance in the Enforcement Policy.

Reparations

18. In July 2015, we consulted openly on whether or not we should include reparations in our enforcement toolkit. Whilst we recognise respondents were mixed on whether we should be able to accept reparations, their concerns largely focused on a lack of clarity on what it would entail, how we would prevent reparations being used to deliver pre-existing commitments, what the principles would be and whether reparations would slow down any enforcement process. A number of respondents offered suggestions on what some of these principles should be. We have considered these and other suggestions as we have finalised our policy and have further engaged with a number of parties who expressed some of the strongest views on reparations.
19. On balance, and at this early period in the regulatory regime for Highways England, we think there are more risks in narrowing our enforcement options than arise from broadening them. Consequently, we have made provision for accepting reparations either in lieu of a fine or as mitigation in the event we impose a fine. We have drafted the text on reparations to provide clarity on the principles that would apply, and a commitment to engage government to seek their views to ensure, for example, that an offer is not funded elsewhere. We have also set out clearly that any offer of reparations should be made as early in the process as possible and any offer that

threatens to delay the timely conclusion of enforcement action would be unlikely to be accepted.

20. The final Enforcement Policy sets out that we would monitor closely how Highways England is delivering upon any agreed reparations.

Next steps

21. The final Enforcement Policy will be published and take effect on and from 9 December 2015.
22. We recognise that our enforcement approach will need to adapt over time in light of operational experience. Given this, and in accordance with good regulatory practice, we will commence a review of our Enforcement Policy for Highways England within two years of the date of publication.
23. In the interim period, we will continue to work closely with Highways England and, where appropriate, government, to ensure a predictable and transparent approach to our enforcement activities.

Yours sincerely

David Hunt
Head of Economics and Policy – Highways Monitor

Annex A – summary of responses to the consultation on the Draft Enforcement Policy for Highways England

The respondents to the consultation on the Draft Enforcement Policy for Highways England are listed below:

Table 1 - respondents

Number	Organisation/individual	Date received
1	Aggregate Industries UK Ltd (Aggregate)	30/07/2015
2	Department for Transport (DfT)	24/08/2015
3	RAC Foundation	02/09/2015
4	Royal Society for Prevention of Accidents (ROSPA)	22/09/2015
5	Highways England (HE)	23/09/2015
6	Highways Term Maintenance Association (HTMA)	23/09/2015
7	Sheffield City Region	25/09/2015
8	Civil Engineering Contractors Association (CECA)	25/09/2015
9	Chartered Institution for Highways and Transportation (CIHT)	25/09/2015
10	Association for Consultancy and Engineering (ACE)	25/09/2015
11	Road Safety Foundation	25/09/2015
12	Transport Focus	25/09/2015

The questions we asked and the summarised responses we received are set out below.

Q1. Do you have any general comments on the policy, for example, comments on how ORR can improve the format and style of the document to make it a more practical reference document?

Generally respondents thought the policy was well-written and the format was clear, logical, understandable and well-structured. Other comments include:

- HTMA and CECA both suggested that a simpler and more concise version (in addition to the existing policy) be produced for wider stakeholders. RAC Foundation

suggested a one-pager be provided explaining how ORR will exercise its functions that will deliver Highways England's compliance with its obligations.

- ROSPA, HTMA, CECA, CIHT and ACE all thought a flow-chart and graphics would provide further clarity to the enforcement policy.
- It was suggested by RAC Foundation that the SoS/HMT Guidance was annexed to the Draft Enforcement Policy as well as being hyperlinked.

Q2. Do you agree that ORR's enforcement role should also be forward-looking and identify potential non-compliance with the RIS and/or Statutory Directions and Guidance before there is a contravention?

Where the question was answered, all respondents agreed ORR's role should be forward-looking and identify potential non-compliance before there is a contravention. Other comments include:

- Sheffield City Region thought it may be prudent for ORR to make additional enquiries as a method to help identify related risk.
- RAC Foundation thought it important ORR, DfT, Highways England and Transport Focus did not have an overly 'contractual' mind-set bound by strict legal interpretation of the Licence and thought it would be "quite shocking" for ORR to feel the need to go beyond non-statutory enforcement activity in the beginning.
- HTMA and ACE thought there should be a focus on achieving procurement and delivery milestones.

Q3. Do you agree with ORR's staged approach to enforcement and whether we have captured all relevant and necessary activities and action? Should anything else be listed?

Where the question was answered, all respondents agreed with ORR's staged approach to enforcement. Other comments include:

- RAC Foundation thought the distinction between Stage 1 and Stage 2 could be more clearly drawn if Stage 1 was confined to being 'internal' and 'informal'.
- ROSPA stated that for Stage 2, it would expect as a minimum for ORR to hold meetings with Highways England and this would be an integral part of the process when requesting Highways England to take action.
- ROSPA also stated it was vital ORR could bypass stages if deemed necessary and appropriate.
- ACE felt some additional detail on approach and methodology, including timelines, would assist understanding.

Q4. Do you think the policy should allow for consideration of an offer of reparations by Highways England to be taken into account? If yes, do you think the policy should provide for an offer of reparations to be taken into account in the following situations on a flexible basis depending on the circumstances of each case?

- **During consideration of whether to issue a fine.**
- **As a mitigating factor once it has been decided that a fine is appropriate when determining the amount of the fine.**

Of the eight respondents who responded to this question, responses were mixed.

Those who were more supportive of reparations made the following points:

- Sheffield City Region considered Highways England's funds should be retained in the industry and not be lost due to a contravention.
- CIHT thought reparations should only be taken into account once a decision to fine has been made and not as a factor in deciding whether to issue a fine to avoid a bargaining process creating uncertainty as to whether a fine will be issued.
- Transport Focus stated:
 - Reparations must be genuinely additional to what Highways England is already required to deliver.
 - Reparations should be designed to benefit particular road users who have lost out because of the failure in question.
 - There should be effective road user input, including consultation with Transport Focus about the package of remedies to be offered.
 - There should be mechanisms to spot emerging perverse behaviours.
- RAC Foundation felt the focus should be on reparations as the imposition of a fine should be regarded as a badge of collective failure. It was suggested that fine income could be used to offset VED rates or money taken from Highways England redistributed to local government for highway expenditure.

Those who were less supportive of reparations made the following points:

- ROSPA felt ORR should simply adjust any fine considering relevant mitigating and aggravating factors rather than having reparations.
- ROSPA also considered that a reduced fine as a result of a reparation payment could be seen as a less severe penalty which may undermine the credibility of the policy.
- HTMA considered that the decision to fine should not be negotiable.
- Both ACE and HTMA felt ORR action should be predictable with ORR setting the procedure and process and following it.

- CECA stated that reparations could muddy the waters on the rules and result in lengthy legal processes between Highways England and the damaged party.
- ACE felt reparations were not consistent with having a clear, predictable enforcement policy.

Q5. Do you consider there are any other situations where an offer of reparations should be taken into account?

Of the respondents who commented, HTMA felt that if there were reparations they should not be taken into account in any other situations, except for exceptional circumstances beyond Highways England's control and it should be kept simple and straightforward as escalation should not be open to interpretation. Sheffield City Region felt reparations should be limited to where fiscal resolution is appropriate.

CIHT thought reparations should be allowed only in circumstances where the service provided by Highways England has proved to be clearly at fault but the fault occurred in a way that was not foreseen and therefore not subject to the original process. Transport Focus thought the arrangements should give ORR flexibility.

Q6. Do you think the seriousness categories set out in the table in Chapter 5, paragraph 5.22 of the policy are appropriate and helpful to Highways England and stakeholders? Do you agree with our approach to assessing the seriousness of non-compliance?

Respondents who commented on this question thought the seriousness categories were appropriate and agreed with our approach to assessing the seriousness of non-compliance.

Other comments include:

- Action taken by Highways England to remedy the contravention should be taken into account. (Sheffield City Region)
- There should be a link between the seriousness of the contravention and the timeframe for resolution. (Sheffield City Region)
- ORR could clarify and highlight what conditions contribute towards failure. (Sheffield City Region)
- ORR could clarify indicators used to inform seriousness of contravention and how this will be calculated and by whom. (Sheffield City Region)
- ORR could provide clearer guidance on potential contraventions. (HTMA and CECA)
- Having additional detail to describe and differentiate each of the levels may be helpful. (ACE)

- The categories should be reviewed periodically in light of operational experience. (Transport Focus)

Q7. Do you agree with our indicative scale of fines set out in Chapter 5 of the policy and our expectation that fines imposed on Highways England will generally be set at a level to have a reputational as opposed to punitive impact?

With regard to the indicative scale of fines, of the respondents who commented on this question most agreed with our draft policy. However, both HTMA and CECA thought fines for 'serious' contraventions should be more significant and suggested an amount of £10 million.

HTMA and CECA also suggested a 'three strikes' rule for £2.5 million offences which could be used to trigger a larger fine. ACE questioned why the three intermediate levels all have the same maximum fine level and thought different maximum levels in each category might be more appropriate. ROSPA thought there should be no maximum cap for each level of fines.

With regard to whether fines should be set at a level to have a reputational as opposed to punitive impact, of the respondents who responded to this question, all agreed with this approach. However, Aggregate felt that fines could delay/postpone the RIS with reduced funds to deliver and this could affect confidence in the scheme by businesses bidding for contracts.

HTMA, CECA and RAC Foundation thought any fine on Highways England should be linked to Executive remuneration although overall RAC Foundation did not agree with fines. RAC Foundation thought it made no sense to contemplate taking money from a company wholly funded by the taxpayer and that it would be road users who would feel the consequence.

Q8. Do you agree that fines should be a last resort and, as a general rule, intended to be used infrequently and for serious and very serious breaches as per the seriousness categories set out in the table in Chapter 5, paragraph 5.22 of the policy?

Of those who responded to this question, all agreed fines should be a last resort although RAC Foundation stated they would like that to be made clearer in the Enforcement Policy.