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| Impact Assessment of the Enforcement Policy for Highways England | |
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Available at: <http://orr.gov.uk/highways-monitor/enforcement-policy-for-highways-england>

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Section 1: The issue

- 1.1 The Office of Rail and Road (ORR) carries out monitoring and enforcement activities as Monitor of Highways England in accordance with the provisions of Part 1 of the Infrastructure Act 2015 (the Act).
- 1.2 We have enforcement powers under the Act to ensure that Highways England complies with:
- the Road Investment Strategy (the RIS)¹; and
 - statutory directions and has regard to guidance given by the Secretary of State (Statutory Directions and Guidance.) The licence issued to Highways England by the Secretary of State (the Licence) constitutes Statutory Directions and Guidance.
- 1.3 Where we are satisfied that there has been or is a contravention we may:
- give notice to Highways England as to the contravention and the steps Highways England must take in order to remedy it; and/or
 - require Highways England to pay a fine to the Secretary of State.
- 1.4 As our Highways Monitor role is new we do not currently have an enforcement policy in place.
- 1.5 The Secretary of State for Transport and HM Treasury have jointly issued guidance² to ORR as to the manner in which it is to carry out its activities, including its enforcement functions. The guidance states:
- “The Monitor should publish its own policy on enforcement, setting out the different types of enforcement activity that it can undertake, and how these will be applied on a consistent and proportionate basis”.*
- 1.6 ORR and DfT have agreed and published a Memorandum of Understanding³ (MoU) which states:
- “[The Monitor] will make public its policy on enforcement, setting out the different types of enforcement action that it can undertake, and how these will be applied on a consistent and proportionate basis”.*
- 1.7 This impact assessment considers the impact of setting out and publishing an enforcement policy for Highways England.

Section 2: The objectives

- 1.8 The objectives of setting out our Enforcement Policy for Highways England are:
- To provide transparency about how we intend to enforce compliance by Highways England with the RIS and/or Statutory Directions and Guidance.

¹ https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/382808/dft-ris-overview.pdf
<https://www.gov.uk/government/publications/road-investment-strategy-for-the-2015-to-2020-road-period>

² https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/411076/statutory-guidance-on-fines.pdf

³ https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/411801/mou-orr.pdf

- To set out an enforcement framework which takes a proportionate and staged approach to enforcement, including consideration of non-statutory enforcement action and a process of escalation before consideration of statutory enforcement action, which also considers the seriousness of the contravention.
- To have regard to guidance given by the Secretary of State and HM Treasury as to the circumstances in which ORR should impose a fine on Highways England in accordance with its powers under the Act.

Section 3: Option generation and appraisal

1.9 We have considered the following options:

- Option 1: Do nothing, i.e. ORR / Highways Monitor does not establish and publish an enforcement policy for Highways England;
- Option 2: ORR / Highways Monitor publishes an enforcement policy which sets indicative upper limits for the scale of fines at a level intended primarily to provide reputational incentives; and
- Option 3: ORR / Highways Monitor publishes an enforcement policy which sets indicative upper limits for the scale of fines at a level which has very significant financial implications (not exceeding £250 million - approximately 10% of annual funding).

Stakeholders impacted by this policy decision

1.10 The key stakeholders affected by our enforcement policy, with particular reference to our policy on fines are:

| Stakeholder | Impact |
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| Highways England | Our powers to enforce, including use of notices and fines, are directed at Highways England. Any decision to fine will result in Highways England using part of its funding to pay the fine to the Secretary of State who will ensure the fine goes to the consolidated fund. This will potentially remove funding from the industry. |
| Office of Rail and Road | Through our enforcement policy we set expectations about how we will carry out our enforcement role. ORR's reputation will be impacted by the way that we carry out enforcement activity with respect to Highways England. |
| Secretary of State and DfT | The Secretary of State / DfT have issued guidance (jointly with HM Treasury) on the circumstances in which the payment of a fine should be required. Any decision to fine will need to be coordinated with any actions being taken by the Secretary of State. Fines will be paid to the Secretary of State who will ensure the fine goes to the consolidated fund. |
| HM Treasury | HM Treasury has issued guidance (jointly with the Secretary of State / DfT) on the circumstances in which the payment of a fine should be required. Fines will be returned by the Secretary of State to the consolidated fund. |
| Highways England's supply chain | Any fine imposed on Highways England will result in fewer funds available to spend through its supply chain. |
| Strategic road network users, government and wider stakeholders | Any fine imposed on Highways England will result in fewer funds available to deliver the objectives of the RIS and Highways England's strategic duties and obligations, and may therefore impact delivery. |

Analysis of options

| Option 1: Do nothing, i.e. do not establish and publish an enforcement policy for Highways England | |
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| Advantages | Impact |
| <ul style="list-style-type: none"> Leaves complete discretion about how we carry out our role, including the levels of fines that we might impose. | <ul style="list-style-type: none"> Allows ORR to respond to the specific circumstances of performance issues in any way it sees fit. |
| Disadvantages | Impact |
| <ul style="list-style-type: none"> Does not align with the approach ORR has taken for rail and would be inconsistent. | <ul style="list-style-type: none"> Creates the impression that ORR is not joined-up in its approach across rail and road. |
| <ul style="list-style-type: none"> Does not align with the principles of better regulation, including transparency and consistency. | <ul style="list-style-type: none"> Risks damaging ORR's reputation for transparency and adoption of best practice, reducing its credibility with stakeholders. Leaves uncertainty for Highways England, government and stakeholders. |
| <ul style="list-style-type: none"> Does not align with approach taken in other regulatory sectors. | <ul style="list-style-type: none"> Risks damaging ORR's reputation for adoption of best practice, reducing its credibility with stakeholders. |
| <ul style="list-style-type: none"> Uncertainty for Highways England (and other stakeholders) may lead to perverse behaviours. | <ul style="list-style-type: none"> Without certainty about how ORR will fulfil its legal responsibilities on enforcement, Highways England may not give sufficient management attention to delivering against the RIS and complying with the Licence and Statutory Directions and Guidance. This could result in worse performance for its stakeholders. For example, increased user delays would have a very significant impact on the UK economy. Congestion on the strategic road network currently costs £2 billion each year. A 1% increase would represent £20 million. Uncertainty may lead to Highways England taking an overly risk-averse approach to delivery, incurring unnecessary costs. For example, it may renew assets early to ensure that there is no risk of failing to deliver its KPI on keeping the network in good condition, rather than realising efficiency by under-spending against the Statement of Funds Available. Underspend of 1% against the Statement of Funds Available would be roughly £25 million each year, which might not necessarily be efficiently invested. |
| <ul style="list-style-type: none"> Does not follow guidance issued by Secretary of State and HM Treasury. | <ul style="list-style-type: none"> Potentially fails to meet ORR's legal obligations to have regard to guidance published by the Secretary of State and HM Treasury. |
| <ul style="list-style-type: none"> Does not comply with our MoU with DfT. | <ul style="list-style-type: none"> Risks damaging industry relationships. |

Option 2: ORR / Highways Monitor publishes an enforcement policy which sets indicative

| upper limits for the scale of fines at a level intended primarily to provide reputational incentives | |
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| Advantages | Impact |
| <ul style="list-style-type: none"> • Publishing an enforcement policy is in line with best practice seen in other sectors and aligns with best practice principles of transparency and consistency. It also has regard to guidance issued by SoS and HM Treasury and the ORR / DfT MoU. | <ul style="list-style-type: none"> • Stakeholders are given certainty about how ORR will fulfil its legal responsibilities on enforcement. • ORR meets its legal obligation to have regard to guidance given to it by the Secretary of State and HM Treasury. • ORR meets expectations set out in the ORR / DfT MoU. |
| <ul style="list-style-type: none"> • Setting indicative upper limits for the scale of fines at a level intended primarily to provide reputational incentives has regard to stakeholder concerns about diverting funding from the sector. • Proposed level of fines is broadly consistent with ORR's approach to rail economic enforcement. | <ul style="list-style-type: none"> • Proposed levels of fines for technical or de minimis, less serious, moderately serious and serious non-compliances are in a range up to £2.5m, approximately 0.1% of annual funding, and as such their impact is primarily reputational. • Proposed levels of fines for very serious non-compliances (not normally exceeding £25m) are up to approximately 1% of annual funding but it is expected that fines of this level will only be used in exceptional circumstances. • Fines primarily provide reputational incentives and are set at levels which limit the diversion of funds from the sector. • ORR's policies for rail economic enforcement and Highways England enforcement show consistency of approach. |
| Disadvantages | Impact |
| <ul style="list-style-type: none"> • Potentially limits ORR's discretion in carrying out enforcement going forwards. • Without precedents and experience of setting fines under the new regime it is not clear if the indicative upper limits for the scale of fines will be appropriate. | <ul style="list-style-type: none"> • There may be less scope for ORR to respond to the specific circumstances of performance issues. |

Option 3: ORR / Highways Monitor publishes an enforcement policy which sets indicative upper limits for the scale of fines at a level which has very significant financial implications (not exceeding £250 million - approximately 10% of annual funding)

| Advantages | Impact |
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| <ul style="list-style-type: none"> Publishing an enforcement policy is in line with best practice seen in other sectors. It aligns with best practice principles of transparency and consistency. It also has regard to guidance issued by SoS and HM Treasury and the ORR / DfT MoU. | <ul style="list-style-type: none"> Stakeholders are given certainty about how ORR will fulfil its legal responsibilities on enforcement. ORR meets its legal obligation to have regard to guidance given to it by the Secretary of State and HM Treasury. ORR meets expectations set out in the ORR / DfT MoU. |
| <ul style="list-style-type: none"> Setting indicative upper limits for the scale of fines at a level which has very significant financial implications (up to £250 million for very serious non-compliances) provides strong incentives for Highways England to deliver its objectives, and aligns with upper limits set in legislation for other sectors. | <ul style="list-style-type: none"> A very serious non-compliance might lead to up to £250 million of funding being taken from the sector. This would have a very significant impact both reputationally and financially. This provides a sharp incentive on Highways England to comply with its statutory duties. |
| Disadvantages | Impact |
| <ul style="list-style-type: none"> It potentially limits ORR's discretion in carrying out enforcement going forwards. Without precedents and experience of setting fines under the new regime it is not clear if the indicative upper limits for the scale of fines will be appropriate. | <ul style="list-style-type: none"> There may be less scope for ORR to respond to the specific circumstances of performance issues. |
| <ul style="list-style-type: none"> Significant fines result in substantial diversion of funds from the sector. | <ul style="list-style-type: none"> Any fine would result in funding being removed from the sector potentially putting Highways England's delivery of the RIS, compliance with the Licence and other Statutory Directions and Guidance at greater risk. Setting indicative upper limits for the scale of fines at £250 million approximately equates to 10% of annual funding which might be taken from the sector. Fines of up to 10% of annual funding are unlikely to be considered proportionate. Highways England might take an overly risk-averse approach to delivery, incurring unnecessary costs. For example, it may renew assets early to ensure that there is no risk of failing to deliver its KPI on keeping the network in good condition, rather than realising efficiency by under-spending against the Statement of Funds Available. Underspend of 1% against the Statement of Funds Available would be roughly £25 million each year, which might not necessarily be efficiently invested. |
| <ul style="list-style-type: none"> Setting indicative upper limits for the scale of fines at a level which has very significant financial implications (up to £250 million for | <ul style="list-style-type: none"> ORR has an inconsistent approach between rail economic enforcement and enforcement policy for Highways England. |

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| very serious non-compliances) does not show consistency with our approach to rail economic enforcement. | |
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Evaluation of issues for specific policy areas – reparations

1.11 We consulted openly on including reparations as part of our enforcement toolkit in July 2015. We have considered two options:

Option a – do not include reparations in our policy

1.12 This option would not provide any principles, processes or rules around reparations in the Enforcement Policy. Consequently it would be difficult for us to consider any offer of reparations and in effect would prevent us from being able to accept any such offer. This would therefore mean that in the event we thought a financial penalty may be appropriate for a relevant contravention, fining Highways England would be our only option.

Option b – include reparations in our policy

1.13 This option would require us to set out the principles, processes and rules associated with reparations being offered by Highways England. It would mean that other options aside from a simple financial penalty could be considered in the event of a relevant contravention or could be used as mitigation for any potential fine.

Option appraisal

1.14 In assessing the options for our Enforcement Policy for Highways England, we have considered the following:

Practice and legislation in other regulatory and monitoring regimes

- In the energy and aviation sectors, for example, the scale of fines for a licence breach is limited by legislation to 10% of applicable turnover. Regulators in these sectors have not set out an indicative scale of fines that they may impose for a contravention.
- In rail, legislation also limits fines to 10% of turnover. Our rail economic enforcement policy sets out the scale of fines based on the seriousness of the incident, drawing on previously issued fines. In rail, the largest fine we have issued to Network Rail in the last five years is £53.1m, representing the reasonable sums that Network Rail was required to pay for performance in 2013-14.
- Several regulators make provision for accepting settlement offers or offers of redress, including rail.

The specific circumstances of Highways England

- The industry framework for Highways England is different to most other sectors in that Highways England is a government-owned company, entirely funded by government.
- A fine would have the effect of moving funds away from the management and improvement of the strategic road network, to the consolidated fund.

The need to balance flexibility with certainty

- We may want to retain discretion in the scale of any fines issued to respond to the circumstances of individual cases.
- We may want to retain flexibility on which route we choose to deal with a contravention by Highways England, whether that is reparations, fines or one of our other enforcement tools.

- Notwithstanding this, it is also important to provide Highways England, government and stakeholders with a level of certainty about how we will act, the likely levels of fines that may be imposed and the principles that we will apply to any offer of reparations.

Whether fines primarily provide reputational incentives

- The potential for fines provides strong incentives for Highways England to comply with the RIS, the Licence and Statutory Directions and Guidance, primarily from the adverse publicity generated. Fines may also be considered in Highways England's performance related pay scheme for senior management and by the Secretary of State as shareholder of Highways England.
- The imposition of larger fines which go beyond having a primarily reputational effect to also having a more significant financial impact can be considered to reflect the value of the impact of Highways England's actions, or to punish poor management.
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Published road reform framework documentation

- The guidance issued by the Secretary of State and HM Treasury on the circumstances in which the payment of a fine should be required.
- The published ORR / DfT MoU.

Preferred option

1.15 We do not consider that Option 1 (Do nothing) is viable as it does not align with the approach we have taken in rail and the approach taken by other regulatory bodies. It also potentially fails to meet ORR's legal obligation to have regard to guidance given to it by the Secretary of State and HM Treasury. Publishing an enforcement policy for Highways England sets clear expectations as to how we intend to carry out our enforcement role and is in line with our transparency agenda.

1.16 Our preferred approach is Option 2 (ORR / Highways Monitor publishes an enforcement policy which sets indicative upper limits for the scale of fines at a level intended primarily to provide reputational incentives). This approach has regard to stakeholder concerns about fines removing funding from the sector (whereas Option 3 does not). Option 2 is proportionate to our role and shows consistency with our approach to rail economic enforcement. It also provides stakeholders with some certainty about how we will act in exercising our role while maintaining some flexibility to enable us to respond appropriately and proportionately to cases depending on the particular individual circumstances.

1.17 We do not consider that Option 3 has sufficient regard to stakeholder concerns about larger fines removing funding from the sector. It may not be proportionate or appropriate to the specific characteristics of the highways regime.

1.18 We believe that at this early stage of the regulatory regime in roads, it would not be sensible to limit our enforcement options by ruling out reparations as per Option a. Whilst we expect that reparations would be acceptable in limited circumstances, there may be situations where accepting an offer of reparations is preferable to fining Highways England, or indeed may be used to mitigate any fine. Whilst several respondents to the July consultation were opposed to reparations, their main concerns related to the concern this could slow the process down or make it more complex and confusing. Our policy deals with these concerns. We therefore consider Option b, which would provide for reparations in our policy, is appropriate.

Section 4: Evaluation

1.19 Following publication of the final policy, we will review the impact of the enforcement policy in two years' time to ensure it is appropriate and meets the objectives outlined above.

1.20 The evaluation will consider:

- Whether the staged approach to enforcement is working to address non-compliance without the need for statutory enforcement action.
- Whether setting out limits which fines will not normally exceed provides sufficient clarity for stakeholders while providing a sufficiently flexible framework for ORR's decisions.
- Whether setting the indicative level of fines to have a reputational effect has provided the desired incentives.
- Whether there are any impacts associated with the ability for us to accept reparations.
- Whether our approach to enforcement is providing Highways England with the appropriate incentives.