

10 November 2017

Dear Stakeholder

ORR's economic enforcement policy and penalties statement

Thank you for responses to our consultation on changes to ORR's economic enforcement policy and penalties statement (enforcement policy). This letter sets out our conclusions.

Changes to our enforcement policy were required to reflect The Railways (Access, Management and Licensing of Railway Undertakings) Regulations 2016 (the A&M Regulations). The A&M Regulations implement EU Directive 2012/34/EU - the recast of the First Railway Package. The Recast Directive repeals and consolidates previous EU legislation and makes some substantive changes to the law.

This consultation began on 6 December 2016 and closed on 7 February 2017.

We decided to delay publication of the final policy to allow for further consultation during the summer to account for the Northern Irish A&M Regulations. Feedback from stakeholders suggests that a standalone enforcement policy for Northern Ireland would provide the necessary clarity they seek in relation to these regulations¹. We have therefore decided to publish an enforcement policy for licence holders and relevant operators in Great Britain and will publish a separate policy and penalties statement specifically for relevant operators in Northern Ireland in due course.

The responses

We received responses from²:

- Network Rail;
- Transport Scotland;
- DB Cargo (UK) Limited; and
- Heathrow Airport Limited ('HAL').

Our conclusions on the main issues are set out below.

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

² <http://orr.gov.uk/rail/consultations/closed-consultations/policy-consultations/changes-to-orrs-economic-enforcement-policy-and-penalties-statement>

Did respondents support the general revisions to the enforcement policy?

The respondents welcomed the revised enforcement policy and were broadly supportive of the objectives and proposed content. Both Network Rail and Transport Scotland highlighted the need for future changes to ensure the enforcement policy remains fit for purpose for the next price control, Control Period 6 (CP6).

In our consultation on the Overall Framework for regulating Network Rail in CP6³ we advised that we will be undertaking a review of our economic enforcement policy and penalties statement to ensure it is fit for purpose for the next control period as part of our PR18 programme. This review will include engagement and consultation with all relevant stakeholders, including Network Rail and Transport Scotland.

Did the policy help you understand the impact of The Railway (Access, Management and Licensing of Railway Undertakings) Regulations 2016 on our enforcement function?

Both DB Cargo (UK) Limited and HAL asked for clarification on specific areas of the enforcement policy.

DB Cargo (UK) Limited asked if parties to connection contracts are also now subject to the provisions of the enforcement policy and if they are, to make this explicit in the enforcement policy.

Whether or not parties to connection contracts are subject to the provisions of the enforcement policy depends on whether the party to the connection contract satisfies the definition of a 'facility owner'⁴.

The Railways Act 1993 (the Act) sets out that parties to connection contracts are simultaneously facility owners of their own network and beneficiaries of the facility owner of the adjacent network (as set out in section 17(6) of the Act).

We consider that in most cases, parties to connection contracts will satisfy the definition of a 'facility owner' and in turn will be in scope of the enforcement policy. We have added this clarification to the policy (see paragraph 34).

HAL considers that the A&M Regulations do not apply to the Heathrow Spur⁵ and therefore HAL do not think it should be referred to as a 'relevant operator' in the enforcement policy. In 2013 we wrote to HAL to confirm that the Access and Management Regulations apply in relation to the Spur. We consider that HAL satisfies the definition of an infrastructure owner and is required to comply with the A&M Regulations and have therefore not removed HAL from the list of examples in the enforcement policy.

³ Overall Framework consultation July 2017: http://orr.gov.uk/_data/assets/pdf_file/0007/25279/overall-framework-for-regulating-network-rail.pdf

⁴ A facility owner is essentially a party 'which has an estate in or interest in, or right over, a railway facility and whose permission to use that railway facility is needed by another before that other may use it'.

⁵ A stretch of railway infrastructure linking Heathrow Airport to the Great Western Main Line to Paddington.

HAL also sought confirmation of qualifying turnover for penalties. In our revised enforcement policy we explain that the amount of penalty ORR can impose must not exceed 10% of the licence holder's turnover. HAL asked if this was specific to turnover relating to rail activities.

The Railways Act 1993 (Determination of Turnover) Order 2005⁶ makes it clear that for the purposes of calculating a penalty, only turnover derived from railway business activities in GB during a business year (after deduction of trade discounts, value added tax and other taxes directly related to turnover) can be taken into consideration. Railway business activities includes the provision of railway services and the ownership or operation of a railway asset together along with any business carried on incidental to that business. Part 2(2) of the Order sets out in more detail the type of railway business activities this could apply to.

Did respondents have any general comments on how ORR can improve the format and style of the enforcement policy document?

Network Rail did not think it was necessary to define each of the parties in scope of the term 'relevant operator' as this is already defined in the A&M Regulations. While we understand that there may not be a need to define all of the parties in scope, we consider that it is helpful, particularly as our enforcement role may be new to many of these parties. We may decide to revisit this point when considering changes for CP6 as parties within scope may be more familiar with our enforcement policy by then, but for now we think it is appropriate that the definitions are retained.

Conclusion

Once again, I would like to thank stakeholders for their responses. The enforcement policy has now been finalised and is available on our website⁷.

Yours faithfully

Graham Richards

⁶ The Railways Act 1993 (Determination of Turnover) Order 2005:
<http://www.legislation.gov.uk/uksi/2005/2185/made>

⁷ http://orr.gov.uk/_data/assets/pdf_file/0018/4716/economic-enforcement-statement.pdf