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Dear Richard

## **Enforcement Policy for Highways England**

Transport Focus, the independent watchdog representing the interests of users of the Highways England network, is pleased to respond to this consultation.

### **General comments**

Passengers' overriding concern is that Highways England does all that it reasonably can to comply with its obligations and that enforcement action is not actually required. We therefore support the principle of ORR working with the licence holder to ensure early intervention and addressing problems *before* they impact on road users. In circumstances where Highways England are seen not to be delivering what is required, some users will feel that 'something needs to be done'. However, many will be aware that fines imposed on a publicly-owned, publicly-funded company may be detrimental to users' interests because less money is then available for investment, maintenance etc. We therefore believe reparations that constitute genuinely additional expenditure in areas of direct benefit to road users are preferable to large fines.

**Question 1: 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?**

No comments.

**Question 2: 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?**

Transport Focus agrees that ORR should seek to identify potential problems early – so remedial action can be taken before there is an impact on road users.



**Question 3: 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?**

Beyond agreeing that a staged approach seems appropriate, we have no comments.

**Question 4: 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? i. during consideration of whether to issue a fine ii. As a mitigating factor once it has been decided that a fine is appropriate when determining the amount of a fine.**

Transport Focus believes ORR should be able to accept offers of reparation, if it deems them appropriate, and that the policy should be sufficiently flexible to cover the circumstances listed and others on a case by case basis. We say this because it should allow the value of the fine to benefit those who have been disadvantaged by Highways England’s failing – likely to be the road user – rather than being paid into the HMG Consolidated Fund. However, ORR will need to ensure four things:

- i. that the reparations offered are genuinely additional to what Highways England is already required to deliver
- ii. that the reparations are, as far as is reasonably practicable, designed to benefit the particular road users who have lost out because of the failure in question.
- iii. that there is effective road user input, including consultation with Transport Focus, about the package of remedies to be offered
- iv. that there are mechanisms to spot emerging perverse behaviours (that is, a culture of “failure isn’t a big problem, because we’ll get the fine money to spend on something else”).

**Question 5: Do you consider there are any other situations where an offer of reparations should be taken into account?**

No specific comments, but the arrangements should give ORR flexibility.

**Question 6: 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?**

The arrangements to determine the seriousness of a non-compliance appear appropriate, although we recommend that they are reviewed periodically in the light of operational experience. Transport Focus believes it is always helpful to stakeholders, whether organisations or individuals, when processes to be followed are set out transparently.



**Question 7: 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?**

While it is impossible to know for sure, Transport Focus believes it is a reasonable assumption that Highways England will have as much desire to avoid negative stories about having been fined as to avoid the financial impact of the fines themselves, particularly as it is a publicly-owned, publicly-funded company and any fine is paid to the ultimate owner of the business. We therefore support ORR's approach set out in Chapter 5.

**Question 8: 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?**

Transport Focus agrees with this approach, with the proviso that it is in conjunction with the forward-looking, spotting-problems-before-they-emerge approach covered by Question 2. ORR must guard against taking an interest in *only* the very serious non-compliances.

Finally, Transport Focus encourages ORR to help road users and stakeholders understand what Highways England has been charged with delivering. Put simply, help people answer the question "what is the state buying on my behalf?" We believe this is an important element of transparency. We also believe that it will be helpful context and enhance public understanding in the event that enforcement action is necessary.

I hope this is helpful.

Yours sincerely

**Guy Dangerfield**  
Road User Director