

Samantha McClelland Hodgson
Office of Rail Regulation
One Kemble Street
London
WC2B 4AN

09 December 2015

**Economic enforcement policy and penalties statement
Consultation on options for improvement**

Dear Samantha,

Govia is one of the leading rail operators in the UK and is a joint venture between the Go-Ahead Group (65%) and Keolis (35%). Govia has extensive experience running complex and challenging rail operations. Govia currently runs four major rail franchises: Govia Thameslink Railway (GTR), Southern, Southeastern and London Midland. Govia is the UK's busiest rail operator, currently providing around 35% of all passenger journeys. As a key provider of rail services, we welcome the opportunity to make representations regarding the ORR's economic and enforcement policy and penalties statement consultation.

This response represents the views of the four Govia-owned Train Operating Companies (TOCs) – GTR, Southern, Southeastern and London Midland - as well as Go-Ahead Group plc.

Govia supports enforcement that is proportionate, transparent and that will add value to the industry.

Govia would support early transparent intervention from the regulator, removing the need for formal regulatory action. There is value if ORR is able to share details of early intervention with the industry where it can be proven that benefits can be applied elsewhere. ORR needs to drive a cultural change within the industry whereby interventions are viewed as constructive, in the same manner as safety bulletins issues by Rail Accident Investigation Branch (RAIB); a method of alerting the wider industry of potential issues that it may not have been aware of.

In the ORR's *Economic enforcement policy and penalties statement review - consultation on options for improvement* (page 4); it sets out that financial penalties are to be used as the last resort. However, the ORR also has powers to withdraw a licence which is not highlighted.

The ORR has clearly taken time to consider reparations, but has been unclear as to who would be the beneficiary to these offers of redress. In the example of a Network Rail licence breach, is it reparations to TOCs or passengers? Consideration of how reparations are spent in/on the industry to compensate those impacted by a breach needs further development.

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We support and encourage more 'innovative' use of enforcement orders, provided they are targeted at the right issue (and not the symptom). We would also seek clarification on the 'innovative' nature of ORR's future enforcement. The ORR would also need to consider whether it has the required resources to investigate and target this across such a large and diverse rail network.

The current economic enforcement powers available to the ORR may expose Train Operating Companies (TOCs) to double jeopardy. The current franchise system ensures the franchisee is regulated by contract and/or the market. Therefore, any breach is governed by these mechanisms, as well as the potential penalty from the ORR.

The responses to the specific consultation questions set out by the ORR are answered in Annex A.

If there are any points raised in this response that you would like to discuss in further detail please contact Richard Evans, Head of Rail Policy (richard.evans@go-ahead.com).

Yours sincerely

Charlie Hodgson
Managing Director - Rail Development

Annex A:

Responses to the ORR's consultation questions

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?

The change in NR's classification appears to be a driving factor behind this question. NR is still required to deliver the inputs and outputs it is funded to deliver in CP5. In that sense, it is no different to its position in CP4 when ORR had one policy for all licence holders. Therefore there is not a compelling reason to change this in CP5.

TOCs have a range of differing commercial contracts (Overground, CrossRail, Govia Thameslink Railway are all gross cost, other TOCs take revenue risk), some can also be publicly funded, and whilst the obvious example is Directly Operated Railways (East Coast), ORR should also consider TOCs in revenue support or drawing more subsidies from government than it pays back. Again, consistency is most appropriate, and we can see no reason to have separate policies for these licence holders.

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?

Yes. Early intervention can benefit not only the licence holder concerned, but if the details of the intervention are shared, it could benefit licence holders and their customers elsewhere. There is recognition that in some cases commercial sensitivity may prevent this, but a RAIB style bulletin being published would be beneficial.

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?

Early constructive dialogue is important. The Rail Delivery Group and other industry groups should be used to identify shared learning and shared problem resolution before formal enforcement was needed. This could take the shape of a 'task and finish' group, a joint board to provide oversight and governance, or a peer review and audit working group, but once complete, this mechanism should be able to confidently approach ORR with its findings and demonstrate how it has resolved the issue.

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

Yes, it is useful. Some clarity in the policy about how ORR would approach repeat lower order breaches would be beneficial, also confirmation this breach table also applies to TOCs would also be helpful.

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

Yes.

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?

The current percentage of turnover starting point is appropriate. It is of a significant level to deter breach, from both a financial and reputational perspective.

The proportion of turnover related to seriousness levels could mean that there could be a case where a proportional penalty was proposed for a likely future breach, i.e. a penalty will increase or decrease depending on variance to planned output, this in turn could mean ORR having to reverse fit the level of seriousness to the actual penalty once the final penalty calculations are made.

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

Yes.

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

No.

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

Yes, provided those apologies are accompanied with a description of what actions were being taken to resolve the issue and what the committed financial spend to resolve these issues is to be.

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;

Yes, provided the reparations are used only to remedy the breach and there is transparency about where the reparations are funded from.

b) Before considering a penalty; and,

Yes, provided that reparations are used only to remedy the breach and there is transparency about where the reparations are funded from and that affected stakeholders have been consulted and agree with the size and use of reparations.

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c) As a mitigating factor once it has been decided that a penalty is appropriate and the level of penalty is being set?

If a penalty is appropriate, it should be levied; however to drive the right behaviours this should be netted off against any prior financial action/mitigation taken proactively by the party in breach.

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;

Yes.

b) identifying factors informing the level of any penalty.

No. If a penalty is appropriate, it should be levied. An offer of reparations should not be a factor in a case that requires a financial penalty.

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?

Yes. In particular, provisional orders should be used in matters where a licence holder is imminently about to undertake an action that has not been approved by ordinary contractual process, and therefore promoting the right behaviour.

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?

No.