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Dear Gary

## **Economic Enforcement Policy & Penalties Statement Review: Consultation on options for improvement**

Passenger Focus, the independent watchdog representing the interests of rail passengers in Great Britain, is pleased to respond to this consultation.

### **General comments**

Passengers' overriding concern is that licence holders do all that they reasonably can to comply with their obligations and that enforcement action is not actually required. We therefore support the principle of ORR working with licence holders to ensure early intervention and recovery before a problem impacts on passengers. In circumstances where the rail industry is seen not to be delivering what passengers expect, many passengers are clear that they expect 'something to be done'. However, some feel that fines simply suck funds out of the industry to the detriment of passengers. This is clearly a risk and we therefore believe reparations that represent genuinely additional expenditure in areas of direct benefit to passengers are preferable to outright fines.

### **Question 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?**

Passenger Focus has no particular view about whether there should or shouldn't be a single set of arrangements for all licence holders. ORR will need to be mindful, however, that the financial and reputational incentives may be different for a licence holder owned by a PLC than for others.

### **Question 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?**

Passenger Focus strongly supports greater transparency in these areas.



**Question 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?**

Passenger Focus agrees that a key way of ensuring that issues are raised and potentially resolved before formal action is needed is for ORR to engage with licence holders on a regular basis. A consideration for ORR going forward, and particularly in relation to being proactive in working with train operators regarding their licence obligations, is the level of resource devoted to the activity. For example, we welcomed the decision to increase the staffing allocated to monitoring the passenger information licence obligations, but there remains a question about ORR's capacity to engage proactively with over 20 separate train companies in the depth that may be necessary to achieve the aim.

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

No specific comment, but please see second paragraph under Question 6.

**Question 5: Do you think the seriousness categories in the penalties statement remain appropriate?**

The seriousness categories appear to be appropriate.

**Question 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 noncompliance?**

Passenger Focus cannot answer this with any degree of certainty, but on the face of it the higher the sum at risk the greater the management effort to mitigate that risk. We do, though, recommend that ORR ponders two questions. Would a higher penalty make ORR more reticent about imposing a penalty for fear that it would be viewed as disproportionate? Would a higher penalty give an incentive for licence holders to seek obligations that are less clear-cut and more difficult to enforce?

Whatever the decision, we suggest that it may be beneficial for ORR to help licence holders understand more about the categories and turnover percentages, particularly within train companies. It may be quite wrong, but we have a sense that the notion of "up to 10% of revenue" may have led to greater efforts by train operators to resist passenger information licence conditions than had it been widely understood that, in practice, it was more likely to be "from 0.04% of revenue".

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

Yes.



**Question 8: Do you have any other general comments on the penalties statement?**

No.

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

Yes, on the grounds that early admission is likely to lead to earlier action to remedy things in passengers' favour. If delivered genuinely and alongside a clear statement of what will be done to put it right, a public apology will help build trust with passengers. In some situations the need to avoid making public apologies may be a powerful incentive to ensure compliance.

**Question 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; b) Before considering a penalty; and, c) As a mitigating factor once it has been decided that a penalty is appropriate and the level of penalty is being set?**

We support changes to allow ORR to accept offers of reparation, if it deems them appropriate, at all three of the stages listed. Please also note our opening comments about genuinely additional remedies being preferable to fines.

**Question 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; and b) identifying factors informing the level of any penalty.**

Subject to ongoing awareness of the risk of incentivising perverse behaviour (that is, a culture of "so long as we put our hand up before we are caught we'll get off lightly"), our comments in answer to Question 9 apply.

Yours sincerely

**Guy Dangerfield**  
Passenger Issues Manager