

ORR Economic Enforcement Policy and Penalties Statement Review

Response from Rail Freight Group

January 2015

1. Rail Freight Group (RFG) is pleased to respond to the ORR's consultation on its economic enforcement policy and penalties statement. No part of this response is confidential.
2. For rail freight, an effective economic enforcement regime is important to ensure that the ORR can hold Network Rail to account in terms of the economic outputs it is required to deliver through its licence. Freight operators are also licence holders, and ORR should equally have a fair and effective policy for any breaches of those licences (noting that ORR's parallel roles in enforcing safety and competition issues are not part of this consultation).
3. The recent enforcement action on Network Rail over freight performance, which led to the establishment of the Freight Joint Board, now part of the RDG Freight Group, has been deemed a success, and may be a useful model for the future in some situations.

Specific Questions

Q1 Do you agree with ORR's view that it should continue to have one economic licence enforcement policy and penalties statement which covers all licence holders?

4. We agree with this approach which provides consistency and clarity. However ORR must remain aware of the different size and nature of those businesses captured by the policy and hence the likely effectiveness, and consequences, of any action it takes.

Q2 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?

Q3 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?

5. We agree that transparency is important, and that reputational risk is a key incentive in driving behaviour. Publication of league tables and associated information is important and we support this, where the data can be accurately sourced and validated.
6. We consider that there is a place for the publication of correspondence and early dialogue, but that care must be taken to ensure this is managed appropriately. There is a risk that the threat of publication will prevent licence holders making an early approach to ORR, and in divulging information. Given the high profile of the

railways, it is also important that ORR assesses the benefit of early publication where no conclusion has yet been reached, against the adverse publicity that such a move will cause. It seems likely that this will need to be judged on a case by case basis.

Q4 Is the seriousness of breach table in the policy statement helpful to licence holders and wider stakeholders?

Q5 Do you think the seriousness categories in the penalties statement remain appropriate?

Q6 Would raising ORR's percentage of turnover starting point (beyond the percentages shown in the current penalty statement) for determining penalty amounts under its seriousness levels act as a stronger deterrent to future non-compliance?

Q8 Do you support the general revisions proposed to the penalties statement to ensure it covers all licence holders?

Q9 Do you have any other general comments on the penalties statement?

7. We agree that a staged approach to penalties is appropriate and agree with the modifications. We do not support increasing the percentage thresholds as we consider the maximum to already be sufficiently large.
8. We note that to date penalties have only been leveraged against Network Rail. The unique funding structure of Network Rail means that the impact and effectiveness of financial penalties is different to other licence holders including the privately owned freight operators. ORR should be mindful of this when considering the range of enforcement actions to take, and of the financial consequences of the fine particularly on smaller operators.
9. We note that ORR cannot direct any fine to be re-invested in the railway, although the Secretary of State can, and has, done so. Where a breach has had material impacts on the freight sector, ORR and DfT may wish to consider how any fine can be directed to improvements for freight, noting that DfT does not have any contracts with freight operators as it does for passenger operators.

Q9 Do you agree that licensees should be encouraged to make early admissions and to provide public apologies?

Q10 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 once it has been decided that a penalty is appropriate and the level of penalty is being set?

Q11 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 etc.

10. We support this approach, noting as above, that any harm to freight operators and/or customers should be included in considerations and in suitable reparations.

Q12 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?

11. It is unclear how such a move would work in practice, and whether a greater use of provisional orders would make ORR more proactive, compared to its current approach of, for example, raising issues in writing and through the regulatory escalator. This may require further consideration.

Q13 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?

12. No comment.