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Samantha McClelland Hodgson and Gary Taylor,
Economic enforcement policy review project,
Operations and Network Regulation,
Railway Planning and Performance,
Office of Rail Regulation,
One Kemble Street,
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W2B 4AN.

2nd February 2015

Dear Samantha/Gary,

Economic Enforcement Policy and Penalties Statement Review

This letter sets out TfL's responses to the questions posed in the ORR's consultation on their review of their Economic Enforcement Policy and Penalties Statement. TfL is content for its responses to be published and shared with third parties.

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?

TfL agrees with this statement, provided that the Statement is drafted so as to cover the diverse range of activities licenced by the ORR.

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?

TfL would welcome this approach, as it would make the process of investigation more transparent.

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?

Regular reporting of compliance using a variety of data sources will give

operators greater opportunities to review and benchmark their performance, encouraging them to be proactive when managing poor performance prior to formal enforcement action, particularly if the reporting is made available to the public.

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

TfL considers that the seriousness of breach table is helpful to all parties, as it indicates the scale of penalties that operators face for different types of non compliance. Without this guidance the penalty payments could potentially be unlimited. This would discourage participation in the rail industry as well as increasing the insurance costs of operators, both of which are clearly undesirable. Care should always be taken to ensure the size of any penalty outweighs any financial gain an operator makes as a result of non compliance, as stated in para 4.17 of the current Economic Enforcement Policy and Penalties Statement.

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

TfL considers that the categories proposed remain appropriate. Further guidance could be given on how the categories relate to local and strategic (system wide) failings.

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 non-compliance?

The key test is whether or not the size of the penalty is greater than the financial benefit to the operator of non compliance. Penalties should always be greater than the savings arising from non compliance; this should always be the case to incentivize compliance.

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

TfL supports these general revisions, including the expression of penalties in terms of percentage of turnover. These will ensure the relevance and transparency of the table to all licenced undertakings.

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

TfL has no other comments to make on the penalties statement.

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

TfL agrees that this is desirable, provided that operators are not pushed into making such admissions prior to investigations being completed. It is important that the investigative process remains fair and balanced.

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?**

TfL agrees that the above approach is acceptable, provided that the value of any reparations/penalties paid always exceeds the value of any non compliance to the operator. The operator must also always address the issues behind the non compliance as part of any enforcement process.

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.**

As stated previously, the key point is that any penalty levied must exceed the value of non compliance to the operator.

Question 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?

TfL agrees that this approach is appropriate, provided that it leads to swifter action to resolve issues once they have been identified.

Question 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?

TfL has no comment to make in response to this question.

Yours sincerely,

**Alan Smart,
Principal Planner – Rail Development,
Rail and Underground Transport Planning, Transport for London.**