

Impact assessment

Below is a general guide to how the impact assessment should be structured.

Impact Assessment of the review of ORR's enforcement policy and penalties statement

Date: October 2015

Stage: Final

PID reference:

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Section 1: The issue

It is important to ensure that ORR's enforcement policy and penalties statement is up to date and continues to be effective.

Our published economic enforcement policy and penalties statement explains the legal framework, purpose of our monitoring and enforcement and the application of our policy. It was last updated in July 2012. The policy is owned by ORR's Board and all decisions made using the policy are reserved matters for the Board

We also have an internal enforcement guidance document which will also be reviewed as part of this work.

Since the 2012 review of our policy, there has been a significant amount of change within the industry, most notably the reclassification of NR's debt. There have also been changes within the regulatory environment, with regulators reviewing the most effective use of their enforcement powers, particularly in relation to the use of reparations. These changes in the regulatory environment need to be reflected in our enforcement policy. It is also good practice to review our policies to ensure that we have current and effective regulatory tools.

Investigations during CP4 demonstrated that we have an enforcement process in place to enable ORR's Board to make enforcement decisions. However the policy and processes involved highlighted a need for greater clarity in areas such as the application of reparations. Also, given the size of the penalty imposed for long distance sectors failures at the end of CP4, it is prudent to review the categories and examples set out in the penalties statement.

Section 2: The objectives

We want to ensure that ORR's economic enforcement policy and penalties statement are up to date, fit for purpose in CP5 and consistent with ORR's strategic objectives – most notably supporting a better service for customers, promoting an increasingly dynamic and commercially sustainable rail sector and being a high performing regulator.

The purpose of enforcement is to ensure delivery and secure compliance with public interest obligations. Enforcement is one of ORR's key functions, and we use our powers firmly but fairly and in a timely manner. ORR monitors the industry's compliance with obligations in licences to ensure that the public interest is protected. We aim to ensure that monitoring and enforcement is proportionate to the issue.

As a matter of policy, we focus on systemic issues. Monitoring takes several forms, including analysis of regular reports on industry performance, including those from independent regulatory reporters, discussions with industry stakeholders on current issues, and investigation of complaints. Where there is an area for concern, we adopt a staged approach of investigation and escalation, leading ultimately to the consideration of enforcement action by ORR's Board.

Ultimately, the option of enforcement provides an assurance to passengers, freight customers, and funders that the railway will be held accountable for delivery, and acts as an incentive for the industry to deliver in accordance with the public interest.

The revised policy will provide clarity for all parties on ORR's approach to enforcement and what can be expected as part of any required investigation and enforcement action.

We aim to have a revised policy published by December 2015.

Section 3: Options generator and analysis

As part of our review we have considered a number of key areas where we believe that revising our policy would ensure a more transparent policy which can be used by ORR. In summary these key areas are:

- A practical approach to reparations and options for early redress;
- One policy for all; and
- Effectiveness of ORR's pre enforcement activity

Below we set out the considerations and assessment of the impacts that potential changes in these key areas could bring. These options have been considered in the context of benefits, costs and overall impact that a change would result in.

As part of this we have also considered those stakeholders who will be affected by the revised enforcement policy. These are:

Stakeholder	Impact
Licence holders TOC,FOCs, Network Rail	Our use of enforcement action is directed at licence holders who are deemed to be in breach of their licence. The option to fine licence holders has always been a consideration under the legal framework and powers which the ORR has. The option to clarify ORR's policy on reparations would ensure that licence holders understand better the potential to offer early redress to quickly address areas of concern.
Passengers/Consumer groups	An important consideration of the use of penalties is to try to target a benefit for those passengers who have been most affected by a licence being found in breach of its licence.
DfT and Government	NR's borrowing arrangements changed in September 2014, and the company now borrows direct from Government instead of the markets. This is an important factor when the application of a penalty or acceptance of reparations on a publically funded body is considered the most appropriate action following a licence breach.
Office of Rail and Road t	Through our enforcement policy we set expectations about how we will carry out our enforcement role. ORR's reputation will be impacted by the way that we carry out enforcement activity.
Supply Chain	Any penalties imposed on Network Rail will result in fewer funds available to spend through its supply chain.

Our analysis of the option we have considered as part of the review. It is worth noting that ORR held a stakeholder workshop on 12 January 2015 to consider these issues and to gather the opinions of those most affected by revising our policy. As part of our analysis of options we have included key points raised by the consultation.

Does ORR need to review the current enforcement policy?

The first area we considered was whether the policy required a review. Our analysis and the impacts of these options are:

Option 1: Do nothing – i.e. keep ORR’s current enforcement policy unchanged

Benefits

ORR’s policy is well established having been in place since 2012.

Impact

- Significant changes in the regulatory landscape means that the policy is not as current as leaves uncertainty to stakeholders.

Cost/disadvantages

Policy is unclear on a number of areas which are considered to be important in current regulatory/government policy (e.g. reparations) [see options below]

Impact

- ORR is seen to be slow at responding to changes in industry.
- Lack of transparency for ORR’s stakeholders.

Policy is not aligned to enforcement functions for ORR’s other functions – Roads.

- ORR’s approach to enforcement is not aligned and leads to confusion.
- ORR’s policy

ORR’s policy does not align with other regulatory bodies.

- Risks damaging ORR’s reputation for adoption of best practice and reducing its credibility with stakeholders.

Impact on which stakeholders

All stakeholder listed above

Option 2: Undertake a full review of the policy document

Benefits of this option

Updating our enforcement policy is in line with best practice seen in other sectors and aligns with best practice principles of transparency and consistency

Impact

- Stakeholders are given certainty about how ORR will fulfil its legal responsibilities on enforcement.

New enforcement policy responds to an industry and regulatory regime which has experienced significant change since the policy was last revised.

- Demonstrates that ORR is aware of the changing regulatory landscape and has an enforcement policy which reflects these changes.

- Start of a new control period
- Reclassification of Network Rail.

Recognises that ORR’s role and functions have changed since current policy was published.

- Aligned approach across ORR’s functions on enforcement.
- Assures stakeholders that we have consideration for a number of different areas of enforcement

- ORR’s role in monitoring Highways England.

Costs/disadvantages

Full review is resource intensive for ORR

Impact

- Resources may be diverted to other work leading to delays in publishing policy.

Impact on which stakeholders

All stakeholder listed above

Following consideration of the issues highlighted above and the feedback we received from stakeholders we agreed that our preference is option 2.

We then looked at the impact of changing specific areas of our policy

Specific areas of change in reviewing our policy

Once we established that our preference was to undertake a full review of the enforcement policy, we considered the specific areas we would look to change and the associated impacts.

Areas for consideration and their impact

Area	Impacts – Pros and cons for consideration
Provide greater clarity on ORR's policy and process for reparations	<ul style="list-style-type: none">• Provide greater clarity and understanding for licence holders and other stakeholders. This should ensure that licence holders feel able to offer suitable reparations if considered appropriate.• Sets clear definition of reparations and how ORR would consider this approach.• ORR's Board could consider reparations as a genuine offer of redress rather than as a mitigation of a penalty, ensuring swifter decisions are made• Offers of redress earlier in the enforcement process could save considerable time and resources for ORR and the licence holder.• Clearer process is consistent with ORR's regulatory peers.• A prescribed process could remove flexibility in applying policy.• The process could be seen as shortcutting the process. Offers of reparations must be additional and value for money.• Similar to a penalty, reparation could deflect resources away from work in another area of the licence holders business.
ORR maintains a one policy for all licence holders	<ul style="list-style-type: none">• Ensures consistency of approach and means that ORR is fair and consistent in applying its enforcement policy for all licence holders.• A single policy which is fair and flexible to changing circumstances is important.• Consistent approach adopted by other regulators who monitor public and private sector bodies.
Greater transparency of ORR's activity in advance of taking formal investigation steps	<ul style="list-style-type: none">• Transparency of ORR's activity.• Helps licence holders understand the process.• Providing greater transparency around the actions taken could act as appositive incentive for ensuring licence holders are not named and shamed.

Stakeholder feedback from consultation on these key areas

Reparations

- Overwhelming support for licence holders to be encouraged to make early admissions and to provide public apologies. Transport Focus support this action as early admission is likely to lead to early action to remedy issues for the benefit of passengers
- Properly planned and executed reparations, where the rail user can see and enjoy the tangible benefits, is a far better outcome than a fine and the ORR must be more proactive in encouraging this approach from the rail industry.

One policy for all

- Majority of responses agreed that we should continue to have one policy for all licence holders. The main driver for this was to ensure that there was consistency

and clarity in ORR's approach to economic enforcement.

- Transport Scotland supported this approach but stressed that the policy should be flexible to take account of changing circumstances.

Transparency of intervention

- The RDG stated that they fully support the approach of early intervention set out in the consultation document and believe that a relationship of mutual understanding can be developed to ensure clarity of approach for all licence holders.
 - Nearly all responses welcomed the potential for greater clarity in ORR's enforcement process.
 - Beneficial to have more clarity on how organisations can bring issues to ORR's attention at the earliest opportunity.
 - Transport Focus feel that early engagement with licence holders is important but cast doubts as to whether ORR is sufficiently resourced to engage proactively with a large number of licence holders on an individual basis.
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Taking the points raised above into consideration we made an assessment against the correct approach to take when reviewing these aspects of the policy:

Evaluation of options for specific areas of change

Reparations

Option 1: Do nothing – do not revise policy stance on reparations

Option 2: Provide greater transparency of how ORR considers reparations

We considered the impacts that revising our approach to reparations could have. In considering the do nothing option it was recognised that our policy is not helpful or transparent in highlighting how ORR considers offers of redress, when licence holders could/should undertake an offer and the criteria for approving offers of reparations. In light of this our preference is to update our policy to provide greater transparency.

We recognise that reparations do have associated difficulties, including the assurance that an offer is genuinely value for money and targeted to address those who have been harmed. We also recognise the potential for an offer of redress to be similar to penalties in respect that it is money which has to be diverted away from another area of a licence holders business.

Feedback from our consultation and the lessons learned from ORR's experiences of taking enforcement action suggests that there are positive affects through having a clear policy on reparations. An early admission and offers of reparations for harm caused could provide both reputational incentive for future compliance and a real benefit to customers. This is a practice and approach used by many other regulators and can lead to efficiencies in the process.

One policy for all

Option 1: Do nothing – maintain a single policy document for all licence holders

Option 2: Create separate policies for publically and privately funded companies

Our consultation considered whether the changes in NR's borrowing arrangements is a reason to develop separate enforcement policies, because the monopoly company is

subject to different financial arrangements to the other privately-funded companies we regulate.

We have considered that the section 4 duties have always underpinned ORR's decision-making in the context of enforcement. One of those duties is to have regard to the funds available to the Secretary of State. However, we are required to balance all relevant section 4 duties as part of our enforcement decision-making, and the weight we place on each will depend on the facts of the individual case. We recognise that reclassification raises questions as to whether using penalties on a public body is relevant and this is where having separate policies could be seen as appropriate. One of the main aims of this review was to ensure that our approach to enforcement is consistent across all licence holders and we believe that having a policy which is fair and flexible can be applicable to all, including public bodies.

Feedback from the consultation suggested that the majority of responses supported a single policy as it ensured a consistent approach is adapted to enforcing licences.

Greater transparency of ORR's activity in advance of taking formal investigation steps

Option 1: Do nothing – do not include detail in the policy.

Option 2: Policy should include more information on how ORR monitors issues and escalates.

Consultation responses recognised the benefit of ORR providing more transparency around the actions taken ahead of launching formal enforcement action. We agreed with this view and welcomed this feedback.

Providing greater clarity on our role and the actions we take will help our stakeholders gain a better understanding of the process for monitoring and escalating issues.

Section 5: Evaluation

The expected outcomes are:

- A revised enforcement policy and penalties statement which is fair, flexible and transparent.
- Increased transparency in understanding the enforcement process
- A policy which is joined up and consistent with ORR's other enforcement functions.

Overall Impact on licence holders

The impact on stakeholders/licence holders will very much depend upon whether they meet their licence obligations. Our role, as enforcement authority, will be to investigate possible licence breaches and take appropriate action in line with the enforcement policy to ensure that licence holders comply with their obligations.

We are legally obliged to monitor and enforce such compliance, and the options we have assessed, both encourage compliance and allow us to take more stringent enforcement action where the circumstances dictate that it is warranted.

Impact on ORR

There is the potential that the revised policy may result in time efficiencies. For example we consider that licence holders have not been incentivised enough to offer reparations early enough. This could result in swifter action and shorter time periods for making decisions. We will need to assess this once the revised policy has been implemented. Should this change then this could result in changes to the way we undertake and resource this work.

Impact on health and safety

We consider there to be no impact on health and safety from reviewing this policy. We have a separate Health and Safety enforcement policy.

Geographic impacts

We do not consider that the policy would have a distinct geographic impact.