

HTMA response to consultation questions:

1. Do you have any general comments on the policy, for example, comments on how ORR can improve the format and style of the document to make it a more practical reference document?
 - The document is a heavy read, rightly so for a legal procedural document. We would suggest a simpler and more concise version is produced for wider stakeholder engagement. Graphics could be used to help explain the process – including repeated symbols to link themes.
2. Do you agree that ORR's enforcement role should also be forward-looking and identify potential non-compliance with the RIS and/or Statutory Directions and Guidance before there is a contravention?
 - Yes and we believe the role should have a particular focus on achieving procurement and delivery milestones. For example, are the planned dates being met for issue, receipt and decisions for OJEU notices, PQQ's, ITT's, contract awards and construction starts? These will provide forward-looking indicators for the forecast spend in a period against the target in the RIS. Meeting these milestones is essential to give HTMA members and the wider supply chain certainty and confidence to invest and gear up.
 - Monitoring of safety performance should be pro-active and focus on leading indicators. The threat of enforcement action will cause Highways England (HE) to review its process and make improvements before enforcement action becomes due.
 - There should be analysis of trends for non-motorised users – for example how are cyclists, equestrians, pedestrians considered and accommodated in HE schemes
 - There should also be monitoring against government targets for skills and diversity.
 - Enforcement action should be proportional and predictable, i.e. HE should know in advance what to do to be able avoid/prevent it.
3. Do you agree with ORR's staged approach to enforcement and whether we have captured all relevant and necessary activities and action? Should anything else be listed?
 - Yes, it shows appropriate escalation
4. Do you think the policy should allow for consideration of an offer of reparations by Highways England to be taken into account? If yes, do you think the policy should provide for an offer of reparations to be taken into account in the following situations on a flexible basis depending on the circumstances of each case? During consideration of whether to issue a fine; or as a mitigating factor once it has been decided that a fine is appropriate when determining the amount of the fine.
 - No, the decision to issue a fine should not be negotiable provided that the enforcement action was foreseeable. When determining the size of a fine, it may be appropriate to take reparations into account but only on an exceptional basis.

- ORR action should be predictable. ORR should set the procedure and process and then follow it. This should drive the right behaviours and create emphasis and focus on Highways England getting the performance right in the first place.
 - Any fines should be proportionate.
5. Do you consider there are any other situations where an offer of reparations should be taken into account?
- Generally no, except for extraordinary circumstances completely beyond HE's control – war, terrorism, Government or political change, HM Treasury re-allocating funds, introduction of road-user charging etc.
 - Keep it simple and straightforward – escalation should not be open to interpretation
6. Do you think the seriousness categories set out in the table in Chapter 5, paragraph 5.22 of the policy are appropriate and helpful to Highways England and stakeholders? Do you agree with our approach to assessing the seriousness of non-compliance?
- Yes and it would be helpful to provide additional objective guidance statements of potential levels of contravention.
 - For example:
 - Possession/closure over-runs, cumulative across England – by less than 2 hours; 2-6 hours etc.
 - Clearance of accidents – 80% cleared within an hour (this will cause HE to encourage Home Office to speed-up clearing scenes of crime etc)
7. Do you agree with our indicative scale of fines set out in Chapter 5 of the policy and our expectation that fines imposed on Highways England will generally be set at a level to have a reputational as opposed to punitive impact?
- ORR must have the power to levy fines – “having the power” will enable ORR to fulfil its obligations
 - The key is for enforcement “to be proportionate” – it needs to be material enough to secure attention of Highways England and their Directors to resolve an issue and drive action.
 - Fines need to be significant enough to cause reputational impact and be seen as serious in the eyes of public opinion – probably £20m/£25m is appropriate for “very serious” contraventions.
 - There should be personal as well as corporate impact – Directors’ personal performance bonuses should be impacted by fines.
 - The fines for “Serious” contraventions should be more significant – up to £10m.
 - A “three strikes” rule for £2.5m offences could be used to trigger a larger fine.

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8. Do you agree that fines should be a last resort and, as a general rule, intended to be used infrequently and for serious and very serious breaches as per the seriousness categories set out in the table in Chapter 5, paragraph 5.22 of the policy?
- Yes, they should be a last resort. The intention should be to drive improvement, the right behaviour of compliance and the achievement of performance measures.
 - The risk of unintended consequences needs to be carefully managed and corrected. Clarity and foresight in advance are vital to minimising this risk.

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