



Holding Network Rail to Account

27 March 2019

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1. Introduction

1. The Office of Rail and Road (ORR) is the combined economic and health and safety regulator for Great Britain's rail network and the regulatory body for railway services in Northern Ireland. The ORR is also the economic monitor for England's strategic road network.
2. Our core purpose is to protect the interests of rail and road users, improving the safety, value and performance of railways and roads today and in the future.
3. This policy is applicable to Network Rail and sets out how we will hold it (including routes, the System Operator (SO) and other relevant business units) to account against the network licence¹. This includes how we monitor performance to identify if we need to take action, and sets out the actions we may take to secure improvement – which could include both early intervention and use of our formal enforcement powers. The policy also contains the penalties statement required by section 57B of the Railways Act 1993 (the Act.).
4. The policy reflects the approach to regulating Network Rail in Control Period 6 (CP6) that we set out in our 2018 Periodic Review (PR18). It may be useful for Network Rail's customers and other stakeholders to understand how we monitor compliance and the circumstances that might lead us to take direct action.
5. Network Rail has other obligations that it must comply with, including compliance with the Access and Management Regulations. Our approach to enforcing those obligations is set out in a separate policy². There are also separate enforcement policies for our functions under Health and Safety³ and Competition⁴.

¹ Network Rail's Network licence: <http://orr.gov.uk/rail/economic-regulation/regulation-of-network-rail/network-licence>

² Approach to enforcement for Network Rail's compliance with its Station Licence and Access and Management Regulations: http://orr.gov.uk/data/assets/pdf_file/0018/4716/economic-enforcement-statement.pdf

³ ORR's Health and Safety enforcement policy: <http://orr.gov.uk/rail/health-and-safety/investigation-and-enforcement/enforcement-powers>

⁴ ORR's Competition enforcement policy: http://orr.gov.uk/data/assets/pdf_file/0019/21367/competitionact-guidance.pdf

2. Our aim and approach

Our aim

1. Network Rail operates under its network licence, which requires it to comply with the licence conditions set in the public interest. These licence conditions underpin our approach to holding Network Rail to account and in monitoring and assessing compliance. Network Rail has three core obligations within the licence, relating to:
 - Securing the operation, maintenance, renewal and enhancement of the network in order to satisfy the reasonable requirements of its customers and funders.
 - Engaging with all stakeholders in ways appropriate to their reasonable requirements.
 - Providing information to enable train operators to meet their obligations to passengers, so that passengers can plan and make their journeys with confidence.
2. In monitoring and assessing Network Rail's compliance with its licence we want to create a balanced set of incentives for the company that reflects its business structure and public sector status, and provides clear benefits for good performance and effective sanctions for underperformance. Reputation (both corporate and individual) can play a significant role in shaping incentives so, for example, we will use comparisons across Network Rail's routes to incentivise good performance through our public reporting.
3. We will take direct action to address poor performance where necessary. We will always aim to take action to resolve concerns and secure improvements promptly without the need to resort to formal enforcement, particularly to minimise harm to passengers or freight customers. However, ultimately we can use our statutory powers (which include imposing financial penalties) as a last resort.
4. Our approach to monitoring, escalation and enforcement aims to:
 - **Create incentives for Network Rail to:**
 - **Take prompt action to address any poor performance;** and
 - **Identify and share best practice and foster innovation**, in particular, developing an environment of healthy competition between the leadership of routes to be high-performing.
 - **Promote good stakeholder engagement by Network Rail, and encourage collaborative working with the wider industry.**

- **Address poor performance through direct regulatory action where needed**, aiming to resolve concerns at the earliest stage possible and minimise the impact of poor performance on passengers and freight customers.

Our approach

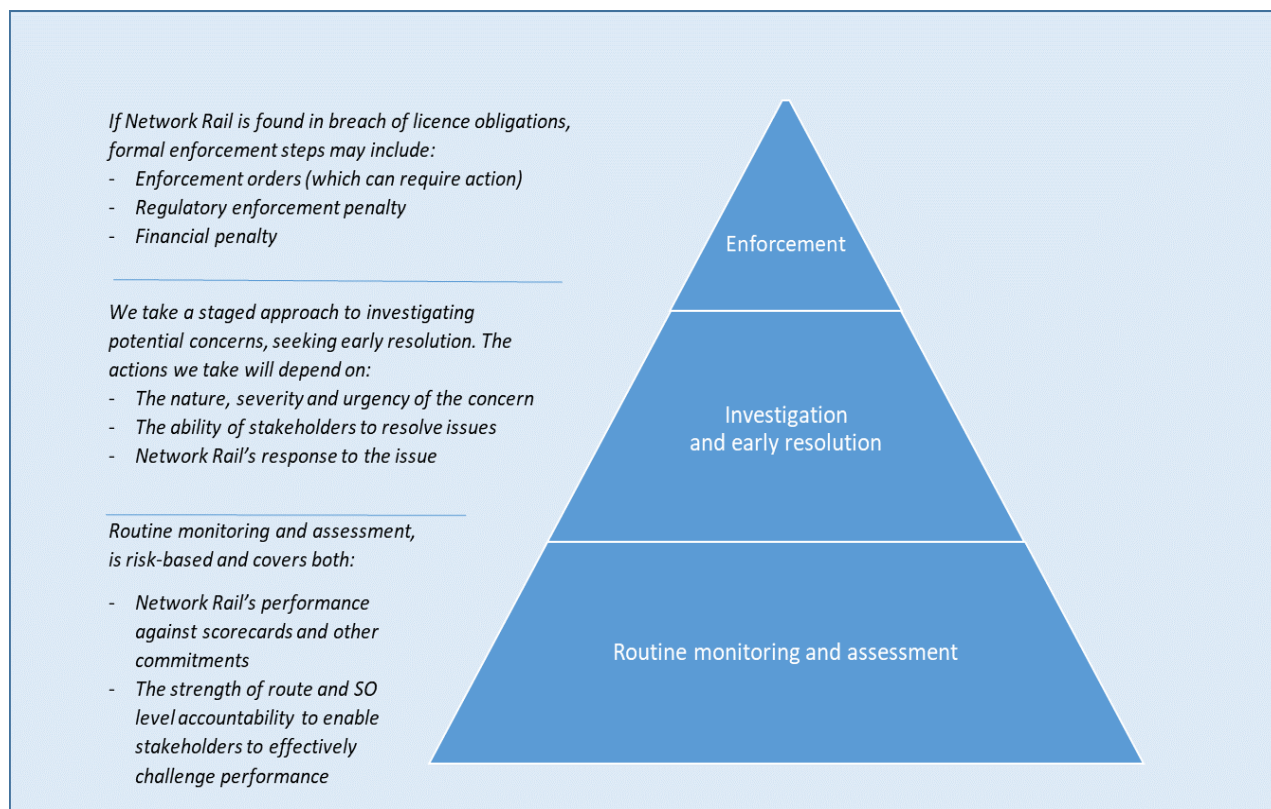
5. Changes made by Network Rail to its operating structure during CP5 have led to the creation of more-distinct route businesses. Each route business is responsible for engaging with and delivering to its customers, enabling closer alignment on a day-to-day basis, which should improve outcomes for passengers and freight operators.
6. Network Rail has also established a SO whose functions centre around maintaining the benefits of an integrated national network, including long-term planning and timetabling.
7. From the start of CP6, Network Rail's revised network licence reflects and embeds these business structures along with the governance arrangements needed to support clear accountability. This document outlines our approach to the monitoring and enforcement of these licence obligations.
8. From CP6 we are placing particular emphasis on the importance of effective stakeholder engagement, given that delivering customer and stakeholder priorities will ultimately benefit passengers and other end-users. We expect Network Rail's stakeholders to be able to engage with the routes/SO to influence priorities and challenge performance. For this to happen there needs to be the right structures and behaviours for stakeholders to understand, assess, challenge and improve Network Rail's performance at route and SO-level.
9. An important aspect of stakeholder engagement is Network Rail's introduction of route and SO scorecards to align its priorities with those of customers, and incentivise its management to deliver these priorities. We expect Network Rail to agree scorecards with its customers, and to take the lead in reporting on its performance against these.
10. Our approach to monitoring, escalation and enforcement is subject to how well Network Rail routes and the SO engage with their customers and other stakeholders. As part of our judgements over how to prioritise our monitoring/assessment and interventions in areas of poor performance, we will consider whether there are effective mechanisms for customers and other stakeholders to engage with and influence Network Rail to agree and deliver appropriate action.
11. More generally, our approach is informed by principles of regulatory best practice⁵, and in particular, will be:

⁵ Principles for Economic Regulation, April 2011, available [here](#).

- **risk-based**, meaning that we focus our resources where we consider the risks are greatest.
- **targeted** at specific concerns and the part(s) of Network Rail's business that we consider responsible, whether that is a particular route, business units in the corporate centre, or ultimately Network Rail's Board. This is to reinforce accountability and strong performance incentives at all levels within Network Rail.
- **proportionate**, so that any actions we take reflect the scale and nature of the problems we are seeking to address and the likely costs and benefits to different parties of taking action; and
- **transparent**, so that we are clear with stakeholders about our view of Network Rail's performance, whether we have any concerns and what action we are taking.

12. The rest of this document sets out our policy in each of the three broad stages illustrated in Figure 2.1 below.

Figure 2.1: Summary of holding to account policy

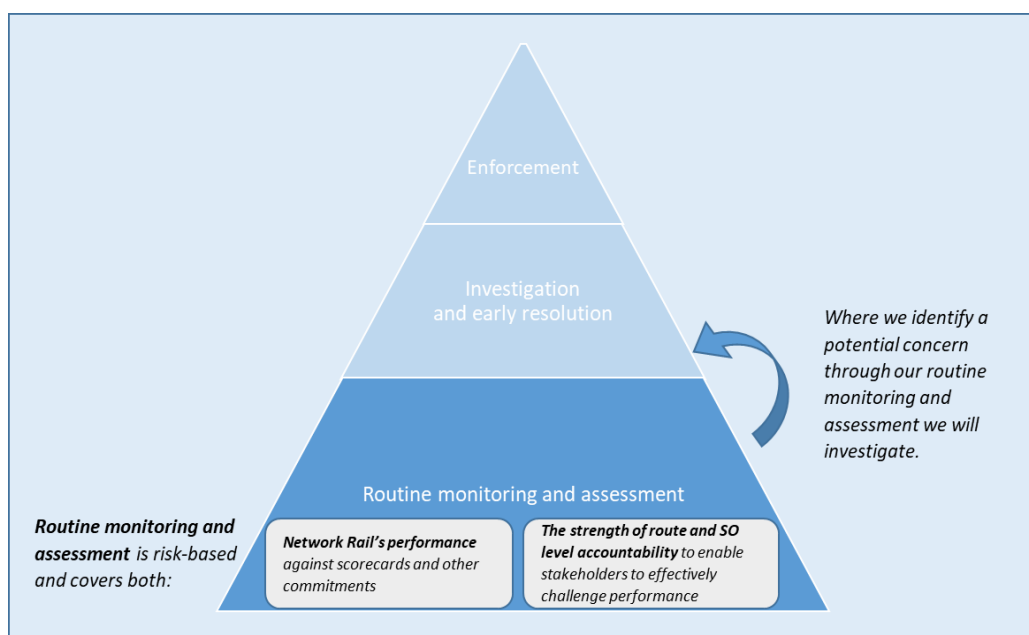


3. Routine monitoring and assessment

Introduction

1. ORR routinely monitors Network Rail’s performance across the main areas of its activity to assess how it performs, and is likely to perform, against its obligations and whether we need to take any action.
2. In areas where there is strong route and SO-level accountability to stakeholders, centred around scorecards, we will reflect this in prioritising our own scrutiny. In CP6 we will routinely monitor and assess both:
 - **Network Rail’s performance** against its own scorecard targets and other commitments; and
 - **the strength of route and SO accountability** (including Network Rail’s institutional and governance arrangements) to enable Network Rail’s customers and other stakeholders to effectively challenge performance and influence priorities.
3. The next two sections set out the scope of our activity in each of these areas respectively. Our monitoring and assessment in both areas will help inform judgements about actions we will take if performance is not acceptable (Figure 3.1).

Figure 3.1 The routine monitoring and assessment phase



4. We recognise there are certain circumstances where stakeholders may not be well placed or as focused on challenging Network Rail’s performance (e.g. in ensuring asset condition is sustained for the benefit of future rail users) and in these areas,

there may be less scope for ORR to take into account the quality of Network Rail’s engagement with stakeholders.

Monitoring and assessing Network Rail’s performance⁶

5. Figure 3.2 summarises the most significant areas where we will routinely monitor and assess Network Rail’s performance, including performance of the routes and the SO.

Figure 3.2: Scope of routine monitoring and assessment of Network Rail’s performance

Performance against scorecards and other key metrics	Financial performance and cost efficiency	Other information
<ul style="list-style-type: none"> • Annual targets agreed with customers • Comparisons between routes • Performance against CP6 baseline trajectories • Regulatory minimum floors 	<ul style="list-style-type: none"> • Efficiency • Financial Performance Measure • Other complementary measures 	<ul style="list-style-type: none"> • Leading indicators • SO annual narrative report • Scotland HLOS tracker • Network Rail’s delivery of plans for maintaining the network • Capability in key areas (ORR or NR assessments)

Performance against scorecards and other key metrics

6. Network Rail’s scorecards set out what it is seeking to deliver for its customers and funders, and how it is performing against those measures. Where scorecards contain a balanced set of measures, enable comparison between routes and reflect HLOS requirements appropriately, we can make significant use of them in how we regulate Network Rail.
7. We will place particular weight on how Network Rail performs against scorecard targets that have been agreed with customers (see paragraph 22 below) for example:
 - Where a route/SO out-performs against a customer agreed target, we will recognise this in our monitoring/assessment and reporting;
 - Where a route/SO under-performs against a customer-agreed target, we will consider the reasons for this, and where appropriate what plans the customer and the route/SO have in place to address under-performance, and whether there is a need for additional steps to support improved performance.
8. Where annual targets are not agreed, we will focus to a greater extent on the performance levels that we have set out in the form of ‘baseline trajectories’ (these

⁶ By performance, we mean overall performance, not ‘train performance’.

reflect our expectations in the key areas of network sustainability and delays for passengers and freight).

9. We will also assess Network Rail's performance against its own annual targets for other measures on its scorecards, and its aggregate performance against scorecards.

Regulatory minimum floors

10. For the start of CP6 we have set a 'regulatory minimum floor' for three of the consistent route measures that we are requiring geographic routes to include in their scorecards. These cover each route's contribution to:
 - train performance for passengers services;
 - train performance for freight services; and
 - network sustainability.

As well as route-level minimum floors, there is also a minimum floor for freight performance across Great Britain.

11. A regulatory minimum floor signals a point below which we will be highly likely to consider a formal investigation into whether or not Network Rail is breaching its licence conditions⁷. The floor is set at a level at which we consider performance to be unacceptable. We will monitor regulatory minimum floors on an ongoing basis.
12. Depending on the available evidence, including whether routes, the SO and customers are taking effective, agreed actions to remedy any under-performance, we may choose to escalate before performance falls below a minimum floor.
13. We do not plan for there to be any changes to minimum floors throughout CP6. However, in the event of formal enforcement action for poor performance, we may consider it appropriate to establish a new floor to ensure there is a meaningful forward-looking threshold as a basis to continue holding to account.

Financial performance and cost efficiency

14. To monitor Network Rail's financial performance and cost efficiency, we will look across a range of different, complementary measures (both quantitative and qualitative) to come to a fuller view of Network Rail's performance. However, we are likely to consider two measures in particular:

⁷ For example, whether Network Rail is doing everything reasonably practicable to deliver the reasonable requirements of its customers and funders. Reflecting that there are specific HLOS targets for passenger performance in Scotland, the role of the consistent route measure for passenger performance (or CRM-P) CP6 baseline trajectory will be different in Scotland.

- **Cost Efficiency:** this compares expenditure on core business activities (operations, maintenance, renewals and supporting functions) to the value of outputs on a like-for-like basis over time;
- The **Financial Performance Measure (FPM):** this compares income and expenditure to the financial assumptions underpinning routes'/SO's CP6 funding. This will be the main measure for comparing routes'/SO's financial performance. The baseline financial assumptions underpinning FPM include efficiency improvements that the routes/SO are expected to achieve. If a route/SO has spent less and/or received more income than the baseline (for what it has delivered), it will report financial outperformance, and vice versa.

Other information

15. Our monitoring of Network Rail's performance will also take account of any supplementary information required to provide a rounded and balanced assessment.
16. This may include the use of certain leading indicators. Leading indicators provide insight into the likelihood of Network Rail's commitments being delivered throughout CP6. The role of leading indicators in our monitoring and assessment of Network Rail's performance will be to act as an early warning of issues before they materialise. Where we identify unwelcome trends, anomalies or reported issues we may carry out a targeted investigation to ensure early resolution on those areas. Such indicators may be especially important in circumstances where Network Rail's customers are not well equipped to challenge the company.
17. We will use leading indicators in a number of areas, for example:
 - **Monitoring engineering and asset performance:** ORR has developed a risk-based assurance framework to carry out its monitoring of asset and engineering performance in CP6 which includes an annual forward agenda/work plan for the year ahead;
 - **Our monitoring of the System Operators performance** will incorporate leading indicators specific to timetabling resource and capability; and
 - **Train service performance:** performance and CRM-P trajectories will help us understand likely future performance, which will provide an indication of the likelihood of scorecard performance targets being met.
18. Not every aspect of Network Rail's performance can be captured through quantitative metrics and we will need to make use of qualitative information in how we assess Network Rail's performance. These include:
 - Certain aspects of the SO's performance not captured on its scorecard (e.g. the quality and effectiveness of the SO's advice when working with funders,

franchising authorities and operators on how the network should be used or developed).

- The requirements in Network Rail’s Scottish High Level Output Statement (HLOS) tracker, which captures the requirements Network Rail is expected to deliver in Scotland (some of which are not capable of being captured on its route scorecard)⁸. Each of these requirements are individually enforceable under its licence.
- Network Rail’s delivery against its plans for maintaining the network, its maintenance of the capability of the network and the reports that it provides in relation to its role in addressing issues associated with reactionary delay, cancellations and network availability.
- Network Rail’s capability in a number of key areas. Our areas of focus may change during CP6, but in recent years we have, for example, focused on monitoring capability in asset management. Such assessments are important leading indicators of performance and can also support comparison of best practice across routes.

Monitoring and assessing the strength of route and SO-level accountability

19. As well as monitoring and assessing Network Rail’s performance, we will monitor and assess the ability of customers and stakeholders to challenge and hold routes and the SO to account (figure 3.3).

Figure 3.3: Scope of routine monitoring and assessment of the strength of route and SO-level accountability

Quality of stakeholder engagement	Agreed objectives and priorities	Clear accountability and responsibilities	Quality of performance information
<ul style="list-style-type: none"> • Quality of stakeholder engagement by routes and the SO (this includes both ongoing monitoring and annual assessment) 	<ul style="list-style-type: none"> • Is there customer agreement to scorecards? • Is there customer agreement to plans to address performance concerns, where applicable? 	<ul style="list-style-type: none"> • Ability of routes / SO to hold national functions to account • Compliance with other licence requirements supporting clear accountability (including the managing change condition). 	<ul style="list-style-type: none"> • High quality data (looking at data assurance) • Accessible, frequent data that meets the needs of stakeholders

⁸ A copy of Scotland HLOS tracker for illustrative purposes is available [here](#).

Quality of stakeholder engagement

20. We expect Network Rail routes and the SO to engage meaningfully with their customers and other stakeholders (see Annex A for a definition stakeholder). We also expect customers and stakeholders to engage constructively with Network Rail.
21. Network Rail's approach to engagement needs to be tailored to the needs of different stakeholders, and we support innovation in this respect. We will not prescribe how routes or the SO should engage with stakeholders, but have set out high-level principles for Network Rail's stakeholder engagement in our PR18 final determination (reproduced in Annex A).
22. Our ongoing monitoring and assessment of the quality of routes'/SO's stakeholder engagement will use intelligence gathered from our interactions with the routes/SO and their stakeholders, including parties' views on the quality of engagement. We will also take account of proceedings at route-level railway boards and the SO's Advisory Board using their regular reporting (including minutes of meetings and Annual Reports)⁹. Network Rail has committed that the chairs of these groups will engage with ORR regularly.
23. Separately, we will also assess and report annually, in greater depth, on the quality of the routes'/SO's stakeholder engagement in particular areas (our annual assessments will not provide real-time reporting or cover all aspects of the quality of engagement).

Agreed objectives and priorities

24. Agreed targets underpin clear accountability. Where routes or the SO have reached agreed targets with their customers, set out in scorecards, we will consider this an important indicator of strong route and SO accountability and will place weight on these. In the event of poor performance, we will expect to see evidence that the routes/the SO have a clear improvement plan agreed with their customers and are working together to implement this.

Clear accountability and responsibilities

25. Network Rail's licence sets out clear expectations about the responsibilities of routes and the SO. It also places a number of specific requirements on Network Rail to ensure that routes and the SO have appropriate autonomy to carry out their responsibilities so that they can be meaningfully held to account. These include a requirement to enable routes and the SO to choose how to procure the goods and

⁹ Routes' railway boards are chaired by an independent member and made-up of senior representatives from the route, the relevant operators, the SO, the FNPO, Transport Focus and, where appropriate, local or national funders. Among other things, the boards hold the routes to account, including by way of escalating concerns within Network Rail or to ORR.

services they need, including those provided by central functions (unless Network Rail demonstrates this would be inconsistent with the licence or another legal enactment).

26. The extent to which we closely monitor Network Rail's supporting national functions will depend on whether we are confident that routes and the SO are fully empowered to deliver on their performance commitments (including whether Network Rail's internal governance and accountability arrangements allow routes/the SO to influence and exert commercial discipline on supporting national functions).
27. The balance of ORR's monitoring between routes/SO and Network Rail's supporting national-level functions will vary. While our focus will be on the routes and SO, Network Rail remains a single company and all of its activities are subject to regulation in accordance with Network Rail's licence. Where central functions are not sufficiently responsive to the needs of routes/SO we could increase our monitoring of those function's performance and could carry out further investigation (for example, to test adherence to licence commitments).
28. Certain changes to routes'/SO's funding and/or what they need to deliver have the potential to undermine our ability to compare them and hold them to account. Ultimately, this risks undermining effective delivery to customers and funders. We therefore have put in place a Managing Change Policy, which Network Rail must follow when making relevant changes. This policy will mean changes are made in a transparent manner and with (where appropriate) discussion about changes before they happen. Compliance with the Managing Change Policy is a licence requirement because it supports clear accountability and responsibilities.

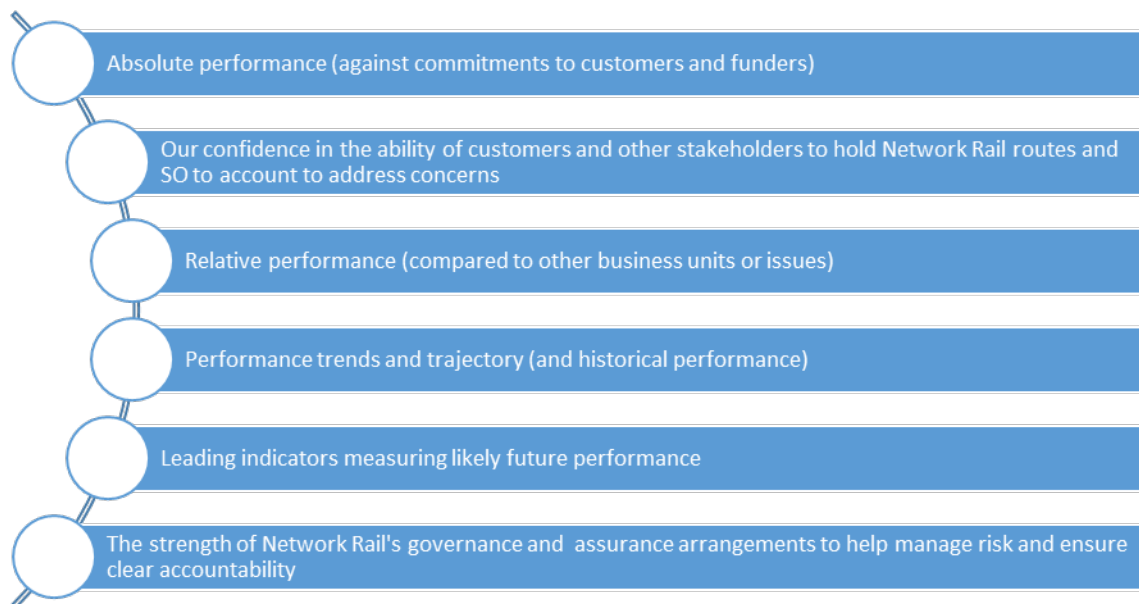
Quality of performance information

29. To be able to challenge performance, customers and other stakeholders need good information, including:
 - **high quality data**, underpinned by reliable data systems ensuring there is consistent measurement and targeting across routes/SO and over time;
 - **clear and readily available information**. Customers need up to date performance information in a format they can easily interpret. For example, to support our use of scorecards, Network Rail has committed to creating and maintaining clear definitions for the measures used on scorecards; and
 - **timely information**, allowing performance problems to be identified and resolved early.

Risk-based, targeted, monitoring and assessment

30. The scope and extent of our routine monitoring and assessment will necessarily vary over time and across different issues and parts of Network Rail's business. In some areas we may need to take a more focused approach, and in other areas it may be appropriate to monitor at a high level. The amount of monitoring we do on any business unit or issue will be informed by, but not limited to the areas set out in Figure 3.4 below.

Figure 3.4: Factors we will consider in targeting our monitoring



Collecting information from Network Rail

31. In addition to data collected through the route scorecards, we will review a wide range of Network Rail's data. We will also gather information on specific areas of concern, and intelligence through engagement with Network Rail and its stakeholders.
32. We will confirm the routine monitoring information we require through our Data Protocol. Network Rail must provide all routine information to us having ensured compliance, consistency and comparability. We will also use data published by Network Rail to support our monitoring.
33. We may require Network Rail to undertake assurance on data quality and notify ORR of any weaknesses or inconsistency in data sets. We will carry out our own assurance as appropriate including through the deployment of independent reporters.

What we will publish

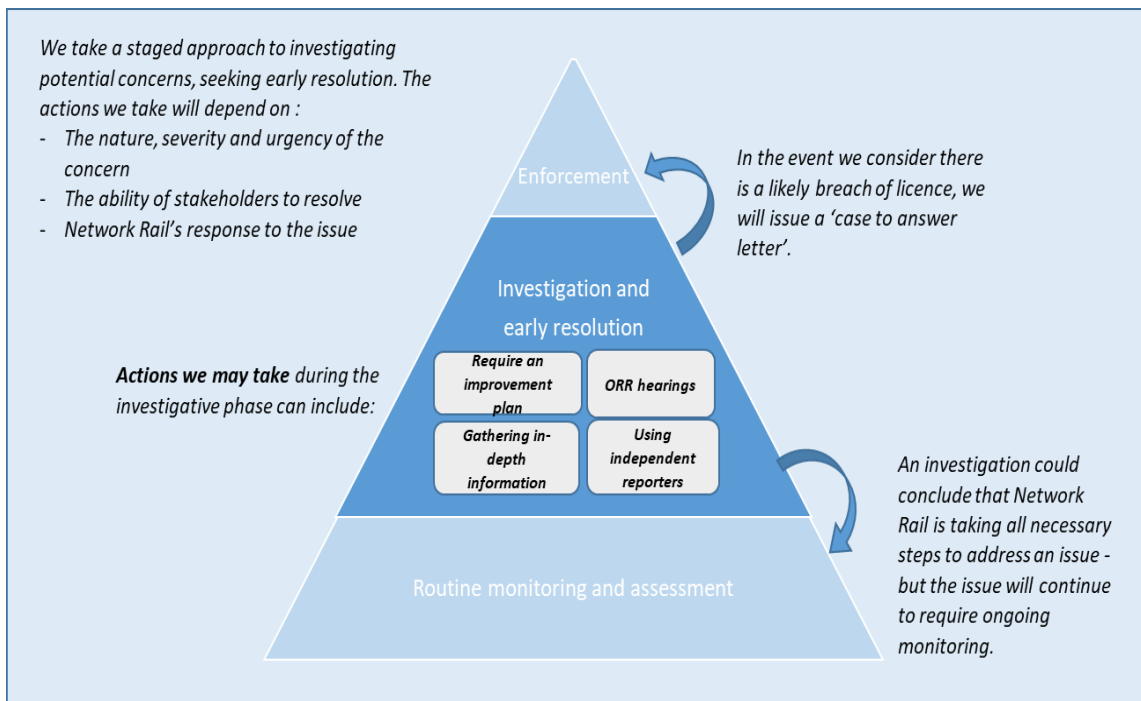
34. The choice of what we report is distinct from what we monitor. In general, the scope of our reporting will vary depending on the coverage, quality, accessibility and timeliness of Network Rail's own reporting, so that we have the option to reduce the scope of our reporting where Network Rail's own performance reporting is strong, and vice versa.
35. Our public reporting aims to:
 - provide transparency on Network Rail's performance to meet the needs of funders, parliaments and the wider public;
 - support Network Rail's customers and stakeholders in holding the company to account, including by reporting on factors affecting the strength of route/SO accountability;
 - leverage reputational incentives for Network Rail management to reinforce positive performance and tackle poor performance. This might include, for example, comparing performance between units, over time and against expectations;
 - encourage and facilitate the spread of best practice across Network Rail routes; and
 - fulfil statutory obligations to publish certain information.
36. We will continue to evolve the form, content and timing of our reports and we are open to exploring ways to make our reports more useful to our different audiences. As a minimum, we will always publish an annual review of Network Rail's performance.

4. Investigation and early resolution

Introduction

1. Where we identify a potential concern through our monitoring, or from stakeholder representations, we will investigate to understand the nature of the concern and decide whether we need to take any action.¹⁰
2. This chapter outlines how we investigate concerns, the actions we may take to resolve concerns early, and the potential outcomes of an investigation. As illustrated in Figure 4.1, the outcome of this phase could be a decision on whether there is a licence breach (formal enforcement action is covered later in Chapter 5). Alternatively, we could decide that no further action is necessary and resume routine monitoring and assessment.
3. We will take a risk-based and staged approach to investigation. The actions we could decide to take will vary, depending on the nature, severity and urgency of the issue, the ability of stakeholders to intervene and Network Rail's response to the issue.

Figure 4.1: The investigation and early resolution phase



¹⁰ ORR has a duty under section 68 of the Railways Act to investigate any complaint made to us (unless we deem it to be frivolous or vexatious).

Assessing concerns

4. Where we identify a potential concern, we will consider a number of factors to determine whether we need to take action, as set out in figure 4.2 below. Our initial inquiries will focus on assessing these factors, and as we gather more information, we will revisit our assessment.

Figure 4.2: What we will consider when assessing concerns

The nature, severity and urgency of the issue	Ability of customers and other stakeholders to hold to account and resolve	Network Rail's response to the issue
<ul style="list-style-type: none">• What is the actual or potential harm to passengers, freight customers, funders or other stakeholders?• What do the relevant licence obligations require of Network Rail?• Is the issue systemic (meaning it could be a symptom of a wider concern)?	<ul style="list-style-type: none">• Is the issue of a nature that customers and stakeholders can realistically address?• Is stakeholder engagement and route/SO accountability effective, inclusive, transparent and well-governed?• Have stakeholders agreed to improvement plans/actions proposed by Network Rail?	<ul style="list-style-type: none">• Is there senior management commitment?• Is there clarity over the part(s) of the business responsible for addressing concerns?• Are there clear and timely actions to address concerns in a proportionate way?

5. Specifically, we will prioritise taking action on those issues where:
- there is significant harm, or risk of harm, to passengers, freight customers, funders or other stakeholders, or where the concerns could be systemic, potentially suggesting a more widespread problem;
 - Customers and other stakeholders are not well placed to hold Network Rail to account to resolve the issue, or there is no agreement by customers to the steps Network Rail proposes to take; and
 - Network Rail's response does not demonstrate senior management commitment, clear responsibility within the business and clear and timely actions that are proportionate to the concern.
6. In establishing the nature of the concern, we will consider what the relevant licence conditions require. For example, some licence requirements, such as the overarching network management duty (condition 1) require Network Rail to achieve their purpose *'to the greatest extent reasonably practicable, having regard to all relevant circumstances'*. In practice, we have high expectations of Network Rail but we will also consider the constraints Network Rail is operating under in forming our judgements.

7. Our regulatory duties mean we must also consider if we are best placed to act and whether or not it would be more appropriate to proceed under the Competition Act 1998 (CA98)¹¹.

Actions we may take

8. If we decide it is appropriate to investigate further, we will take a proportionate and risk-based approach, with a range of possible actions that we may consider appropriate depending on our assessment of concerns. Figure 4.2 illustrates the actions we may take. The specific steps are described in more detail below.

Gathering in-depth information

9. After our initial assessment, the first step of the investigative phase will normally be to request in-depth information from Network Rail, through correspondence and/or meetings. This is likely to be in addition to the information gathered through our routine monitoring. If necessary, we may use our statutory information gathering powers.
10. Where appropriate, we will engage with affected parties to gather evidence, for example, if the issue involves failure to meet scorecard targets agreed by customers then we will approach the affected passenger or freight operators for their views.

Use of independent reporters

11. We may use independent reporters to get a better understanding of certain concerns or provide us with specialist advice¹². It may be that any recommendations from a reporter can be implemented by Network Rail without the need for us to escalate an issue further. In this case, we will monitor Network Rail's progress in addressing the recommendations. Further escalation may be required if we do not get adequate assurance that it is addressing the reporter's recommendations.

ORR hearings

12. We may choose to hold a hearing between the route/SO and affected parties to gather evidence and explore the issues further to enable swift resolution where possible. At a hearing, we will set out the concerns under investigation. Hearings can provide an opportunity for the different parties to present their positions, to collect evidence from each party, and for stakeholders to question Network Rail on the issue under investigation.

¹¹ We are not permitted to make a final order, make or confirm a provisional order if we are satisfied that the most appropriate way of proceeding is under the Competition Act.

¹² Network Rail's licence includes a condition allowing ORR to require Network Rail to appoint and pay for a reporter to conduct a review into any matters ORR reasonably requires. ORR approves the terms of reference, and the reporter's contract includes a duty of care to ORR. ORR always discusses the scope and content of a review with Network Rail beforehand.

13. The timing, scope and exact format of hearings will be determined by ORR based on the nature of the issue under investigation. Hearings will be ‘on the record’ and we expect to publish a written record of proceedings on our website (respecting commercial confidentiality).

Require a formal improvement plan

14. In the interests of resolving concerns speedily, and considering the issues of the individual case, we may during or in conclusion to an investigation, write to Network Rail to explicitly call on it to establish a formal improvement plan (and/or set up an improvement board, to oversee progress, especially where we want stakeholders to be involved). This approach may facilitate stronger stakeholder engagement and could help to address performance problems without the need for further escalation.
15. We would monitor progress against the improvement plan or findings from the improvement board to ensure that all aspects are being delivered, taking further action as necessary.

Possible outcome of investigative phase

16. There are three possible outcomes from the investigative phase
 - **Close down:** Our investigation concludes no further action is needed and routine monitoring resumes.
 - **Secure early action and monitor progress:** Our investigation concludes that there is evidence that Network Rail is doing everything reasonably practicable to address the issues at this time, but we could require work by Network Rail to resolve issues, for example through an improvement plan. We would monitor progress as part of our risk-based monitoring (routine monitoring phase). We would also share any lessons with any relevant parts of Network Rail. Further investigation could be initiated if further concerns are raised as part of our monitoring, and/or new complaints are raised.
 - **Potential licence breach – issue ‘case to answer’ letter**¹³. Where we think we may formally pursue a potential licence breach, we will write to Network Rail to confirm this. This is known as a ‘case to answer letter’. This sets out the evidence that we have found and next steps in the enforcement process. The purpose of the letter is to provide Network Rail the opportunity to respond formally with its views on our findings, prior to ORR’s Board considering the matter.

Engagement with Network Rail during the investigative phase

¹³ Example case to answer letter: http://orr.gov.uk/data/assets/pdf_file/0005/28427/2018-06-29-orr-cs-case-to-answer-letter-to-network-rail.pdf

17. Investigations will be targeted at the relevant parts of Network Rail's business (these could include routes, the SO or other national-level functions), whilst keeping Network Rail's corporate centre, Executive and Board informed as appropriate.
18. Following our initial assessment of potential concerns, if we decide to investigate further, we will identify which part(s) of Network Rail have primary responsibility. Considering the individual circumstances of the case, we will engage with Network Rail on the issues and stages of our investigations. Our actions may include the following:
 - Writing to the responsible business units (in the form of an 'initiation letter' which would formally set out our concerns and scope of the investigation), copying Network Rail centre, its Executive and Board.
 - Addressing requests for information to the responsible business units (notifying Network Rail centre, and escalating any non-compliance as failure to provide information could ultimately result in an information notice being served and/or a breach of licence)¹⁴.
 - Discussing with the responsible business units and Network Rail centre the scope of any reviews by independent reporters that we wish to commission.
 - Keeping the responsible business unit informed of progress and timescales of our investigations (there is no set timescale for an investigation, as it depends on the nature of the issues).
 - Confirming in writing the outcome of the investigation to the responsible business units, notifying Network Rail centre, Executive and Board. In the event we consider there is a likely breach of licence, we will address the 'case to answer letter' to the responsible business units (again, notifying Network Rail centre, Executive and Board).
19. As investigations progress, and more evidence becomes available on the causes of the issue being investigated, we may identify different business units that are responsible and will confirm this in writing to them, and treat them as above. If it is ever unclear which parts of Network Rail are responsible, we will direct our

¹⁴ We expect the accountable unit(s) to respond to our information requests to the timescales we require. In the event of non-compliance within a reasonable timescale, we will escalate to Network Rail centre and may apply our information gathering powers. Failure to provide us with this information would continue to constitute a licence breach. We have powers under the Act to request information from Network Rail but expect Network Rail to continue to cooperate with requests for further information without us having to invoke these powers.

communications and requests to Network Rail centre, highlighting gaps in accountability, where necessary.

Communicating our investigations publicly

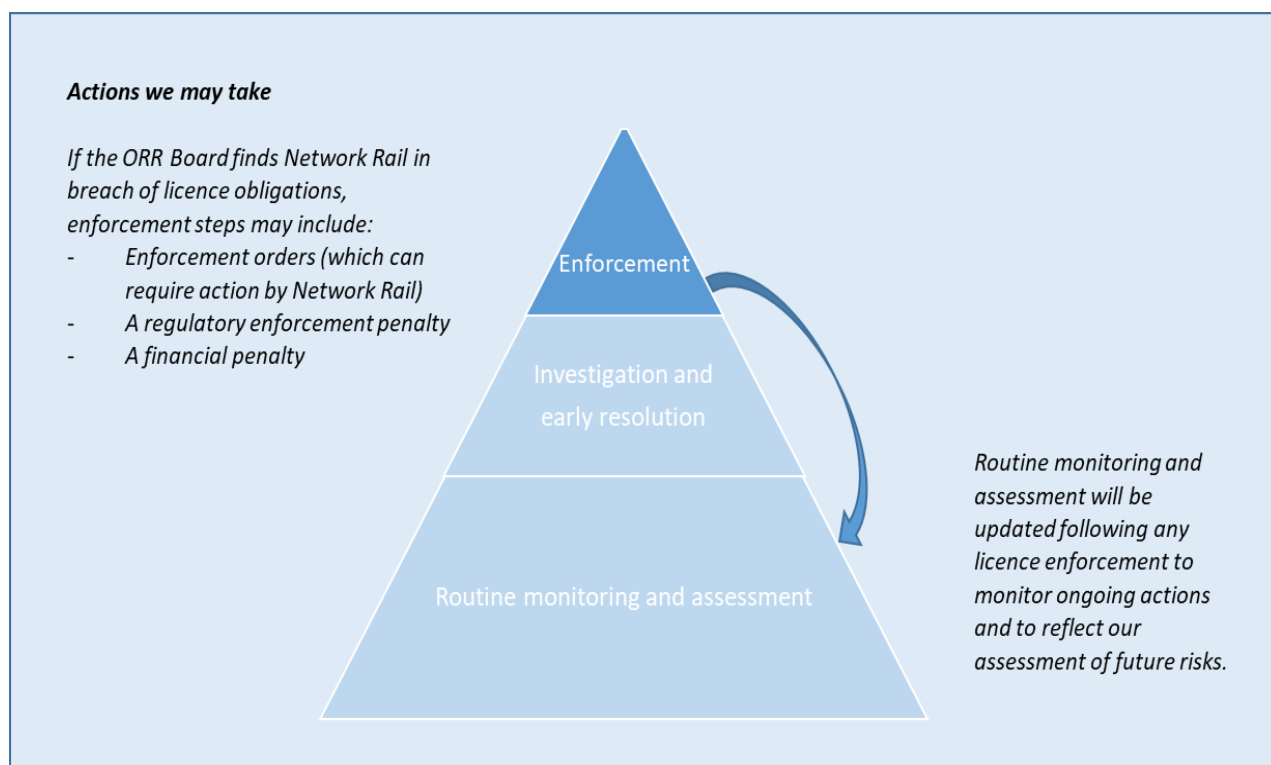
20. For transparency, our standard policy is to publish appropriate details of the initiation of, and the outcomes of concluded investigations, including:
 - notifying stakeholders where we have issued an ‘initiation letter’, which will include summary details of the scope of our investigation and the responsible business units where we are directing our inquiries;
 - records of ORR hearings;
 - final reports from independent reporters; and
 - the outcome of investigations, including any ‘case to answer’ letters.
21. Where appropriate, we may also publish correspondence from Network Rail and other stakeholders, as well as providing periodic updates on progress with investigations (such as expected timescales).

5. Enforcement

Introduction

1. The final decision on whether there is, or has been, a licence breach, and what action to take, is made by ORR's Board. This chapter describes the regulatory actions ORR can consider, and how these decisions are taken.
2. Figure 5.1 below sets out the possible outcomes at this stage. It may be that ORR's Board decides to take enforcement action that requires Network Rail to do or stop doing something which then becomes subject to routine monitoring.

Figure 5.1: The Enforcement phase



Our approach

3. The potential regulatory actions if ORR's Board is satisfied there is a *past, current* or *likely future* licence breach are set out in figure 5.2. Some of these actions are subject to certain legal requirements, explained further below.

Figure 5.2 Potential regulatory enforcement actions

Issue an enforcement order	Financial penalty	Route / SO financial sanctions
<ul style="list-style-type: none"> • A statutory power to orders Network Rail to take steps to achieve compliance with licence requirements • May require Network Rail to establish an improvement board or plan • May set out a reasonable sum (financial penalty) that is due if the order is not complied with. • Only used for a current or likely future licence breach. • May issue a provisional order (e.g. if urgent need for NR to do something) 	<ul style="list-style-type: none"> • A statutory power to impose a financial penalty (under powers in the 1993 Railways Act) • Penalties are paid to HM Treasury, under government budgetary rules • Penalties can only be issued for a past or current licence breach • Reflecting Network Rail's ownership and funding, ORR may decide to scale any financial penalty to make it capable of being funded from Network Rail's management bonuses. 	<ul style="list-style-type: none"> • As a non-statutory alternative to a financial penalty, we may choose to impose a sanction (reduction) to the Financial Performance Measure of the relevant route or SO. • Such a sanction would not remove actual funding from the railway. The Financial Performance Measure is used by Network Rail as an important component of its management bonuses, which may therefore be adversely affected. • We would only use for a past or current licence breach.

- In deciding the appropriate steps to take, we may consider holding a hearing to allow affected parties and Network Rail an opportunity to state their views on what would be the most appropriate action following a licence breach.
- The actions we may take depend on whether the licence breach is *past*, *current* or *likely future*, as set out in figure 5.3 below.

Figure 5.3 Available enforcement actions

Type of licence breach	Enforcement order (provisional or final)	Financial penalty	Route/ SO financial sanctions
Past		✓	✓
Current	✓	✓	✓
Likely future	✓		

Enforcement orders

- If ORR's Board finds Network Rail is contravening or is likely to contravene a licence condition(s) then, under section 55 of the Railways Act, we **must** (subject to certain exceptions set out below) issue an enforcement order requiring Network Rail to take action to bring them into compliance. This could include instructions to:
 - specifically stop doing something; or

- start doing something (which could for example include a requirement to set up an improvement board).

An enforcement order will set out our findings on the reasons for the licence breach and the parts of Network Rail's business we consider responsible.

7. We may attach conditions to an enforcement order, including specifying a reasonable sum (a financial penalty) that is payable if the order is not complied with. Failure to comply with an enforcement order also constitutes a licence breach, and may expose Network Rail to legal action by third parties.
8. Where appropriate, we may make a **provisional enforcement order** where there appears to be a licence breach. In deciding if it is appropriate, we will take into consideration our Section 4 duties, the circumstances of the breach and, in particular, judge the extent to which any person is likely to sustain loss or damage during the time it takes to make an enforcement order. A provisional order cannot last longer than three months (it must then be confirmed as a final order, or it ceases).
9. The only exceptions to the legal requirement to make an enforcement order are if:
 - To do so would be in conflict with ORR's duties under section 4 of the 1993 Railways Act;
 - Network Rail has agreed to take, and is taking, all steps that we consider can secure or facilitate compliance with a licence condition and we consider that it is not appropriate to make an enforcement order;
 - the licence breach will not adversely affect the interests of users of railway services or lead to an increase in public expenditure and we consider it is not appropriate to make an enforcement order; or
 - it is more appropriate to take action under the Competition Act 1998.
10. In any of the above circumstances, **we are not allowed to** issue an enforcement order. If we find there is a current or future likely licence breach, but judge that one of the above exemptions apply, we will issue a notice to set out the reasons for our judgement.
11. Once ORR's Board has decided to make an enforcement order (or confirm a provisional order), we will give notice, setting out details of the licence breach and proposed order. The notice must set out the period for representations to be made, which the Act states cannot be less than 21 days.

Financial penalties

12. ORR has legal powers to impose a financial penalty of up to 10 percent of Network Rail's turnover¹⁵. However, taking account of the public sector status of Network Rail, and that it is funded by taxpayers and railway users, we consider that a financial penalty would always be a last resort.
13. The potential circumstances in which we might therefore consider imposing a financial penalty are where we are satisfied that a penalty is necessary:
 - to change Network Rail's future behaviour; or
 - to deter future non-compliance.

These factors relate to our confidence in Network Rail's management (at Board, company, route or the SO-level) to take the appropriate action now and in the future.
14. We will take into account that levying a financial penalty has both a financial and a reputational effect. A *de minimis* penalty could still have a significant reputational effect.
15. In considering the scale of a financial penalty our starting point will always be:
 - the extent of actual and potential harm caused to third parties, particularly to passengers and freight operators; and
 - the culpability of Network Rail, including whether it has acted intentionally negligently or recklessly. For this we will pay particular attention to the actions and behaviour of senior management, the Executive and the Board.
16. We would then consider any mitigating (e.g. proactive steps taken by Network Rail to remedy the harm caused by the breach) or aggravating factors (e.g. repeated non-compliance or attempts to conceal non-compliance).
17. We then need to consider the impact levying a penalty might have on changing Network Rail's behaviour and the impact of the size of the penalty on railway users and funders.
18. Given that Network Rail is funded by taxpayers and railway users, and taking into account all our Section 4 duties, we may choose to scale any financial penalty so that it is capable of being funded by management bonuses (of the responsible business units or national functions). While it is for Network Rail to decide how to fund any penalty, this would have the effect of enabling Network Rail to protect the funding available for the operation, maintenance and renewal of the network.

¹⁵ Under [Section 57A of the Railways Act 1993](#).

19. The Railways Act 1993 requires ORR to prepare and publish a statement of policy with respect to the imposition of penalties and the determination of their amount. This statement is set out in Annex B.
20. We will issue a notice and consult with Network Rail and stakeholders when we intend to impose a penalty. If Network Rail proposes mitigations (such as reparation offers) during, or at any stage prior to consultation, we will consider whether the actions proposed are:
 - targeted and proportionate to the harm, for example to passengers and freight users;
 - additional to existing commitments and deliverable, not simply reducing resources for other valuable activities. Where a mitigation involves redistributing Network Rail's resources, it needs to demonstrate this would result in improved value for money, and would not harm the interests of other parties.
21. Following consultation with Network Rail and stakeholders, if ORR's Board still considers it appropriate to impose a penalty, we will publish a final notice. The final notice will confirm that ORR's Board has decided to impose a financial penalty on Network Rail and confirm the penalty amount.

Route/SO financial sanctions

22. As an alternative to a financial penalty, ORR's Board may decide to issue a financial sanction. We will treat route/SO financial sanctions in a similar way to financial penalties, as a last resort. We will also apply the principles and procedures set out in Annex B to route/SO financial sanctions.
23. Financial sanctions would need to be included in the reporting of financial performance in the regulatory financial statements (and therefore scorecards) of the relevant Network Rail routes (including the FNPO) and SO. Unlike a financial penalty, this is not a statutory power, but would be covered under the regulatory accounting guidelines that we set.
24. A financial sanction would require Network Rail to record a deduction to the financial performance measure (FPM) at ORR's direction as set out in ORR's regulatory accounting guidelines. Decisions on management pay are for Network Rail, and subject to shareholder oversight. However, Network Rail currently uses the FPM as an important component in calculating performance-related pay (i.e. employee and management bonuses), so in addition to acting as a strong reputational incentive, financial sanctions have the potential to provide a direct financial incentive for the responsible Network Rail's route or SO.

25. To the extent that financial sanctions provide an effective incentive, they could reduce the need to resort to financial penalties. However, issuing a financial sanction does not preclude ORR subsequently issuing a financial penalty.
26. The size of any sanction will depend on the specific circumstances of a licence breach. In setting the size of a financial sanction, ORR will consider:
 - the severity of the impact of the licence breach, in particular, the harm to railway users and funders;
 - the responsiveness of Network Rail management;
 - which parts of Network Rail may, as a consequence of the sanction, see performance-related pay affected and whether this is justified; and
 - the impact on staff incentives and behaviours now and in the future.

Communicating our decisions

27. We will be transparent about decisions made by ORR's Board, publically setting out decisions on licence breaches and enforcement actions, including the reasons for the decisions and what ORR expects of Network Rail.
28. We will formally notify Network Rail's Executive and Board of all enforcement actions. Network Rail will be required to provide updates on actions the company is taking to secure compliance with the licence.
29. In all public statements, where appropriate to do so, we will identify the responsible units within Network Rail. If this is not possible because responsibilities are unclear, we will highlight this and ask Network Rail's Executive or Board to consider further.

Accountability for our decisions

30. We are accountable to the public for our actions through Parliament and through the courts. We have an obligation to comply with the rules of administrative law and good public administration. Ultimately our decisions may be subject to judicial review and scrutiny by the courts. Network Rail has a specific right of appeal to enforcement orders or financial penalties under section 57 of the Act¹⁶.

¹⁶ [Section 57F of the Act](#).

Annex A: Principles of good stakeholder engagement

Definition of stakeholder

1. Network Rail's stakeholders include:
 - any person with which Network Rail has (now or in the future) a significant relationship;
 - any person who may be impacted by the activities of Network Rail; and
 - any person who has expressed a serious interest in providing railway services, facility or network.
2. We expect that Network Rail, in complying with its licence obligations will consider that stakeholders include, but are not restricted to:
 - passengers, and their representative groups;
 - freight customers;
 - all operators (including passenger, freight, open access, heritage, charter and prospective operators);
 - line-side neighbours;
 - current and potential and national and local funders; and
 - all sub-national and statutory transport bodies.

The routes and the SO should also engage with their suppliers as appropriate.

3. Notwithstanding the above (and the principles of good stakeholder engagement set out below), it remains the responsibility of Network Rail to decide which of its stakeholders to engage with and how it should do so.

Principles of good stakeholder engagement

4. In general, we will not be prescriptive about how Network Rail engages with its stakeholders. Rather, we will expect it to follow our broad principles of good stakeholder engagement:
 - **effective**, in that it supports delivery of a safer, more efficient and better used rail network (in terms of performance and capacity), including by ensuring that stakeholders' views are duly taken into account. For example, when engaging on strategic matters (such as annual business planning) Network Rail should

ensure that its engagement allows its stakeholders to influence its priorities. Network Rail should also engage with stakeholders in a way that enables them to challenge its performance (where necessary);

- **inclusive**, in that the engagement seeks to involve all relevant stakeholders in a fair and proportionate manner and adopts different approaches to reflect stakeholders' differing capacities and interests;
 - **well-governed**, in that it is underpinned by effective processes and governance arrangements that encourage meaningful engagement and accountability, as well as providing mechanisms for challenge and escalation; and
 - **transparent**, in that Network Rail (i) provides sufficient information to its stakeholders to enable them to engage properly with it; and (ii) is able to demonstrate how it has engaged with its stakeholders and how this has influenced its actions and delivery. Further:
 - in their engagement on performance, the routes / SO should provide accurate and appropriate information and data to enable stakeholders to understand, influence and challenge its performance in an effective and timely way; and
 - in their engagement on annual business planning and other strategic matters, the routes / SO should keep a record of key points made by different stakeholders and explain how it has acted on these (or, if not, why not).
5. Engagement should also be proportionate to what it is seeking to achieve, so that money on engagement is well spent.

Annex B. Penalties statement

1. The Act requires ORR to “prepare and publish a statement of policy with respect to the imposition of penalties and the determination of their amount”¹⁷ ¹⁸. We must have regard to this statement when deciding whether or not to impose financial penalties and in determining their amount. We have also extended this statement to incorporate the approach we will take when deciding whether or not to impose financial sanctions and in determining their amount.
2. As a last resort, ORR may impose a financial penalty or sanction. In all decisions to impose a penalty or sanction and set the size of a penalty or sanction we will have regard to:
 - our duties under Section 4 of the Railways Act 1993. These include ORR’s duties to act in a manner which we consider will not result in Network Rail having difficulty financing its activities and the duty to have regard to the funds available to the Secretary of State; and
 - the penalty principles set out in the Macrory Report¹⁹.
3. Additional factors specific to the decision to impose a penalty or sanction and the decision on the size of a penalty or sanction are set out below.

Deciding whether to impose a financial penalty or sanction

4. We may impose a penalty or sanction where we are satisfied that this is necessary:
 - to change Network Rail’s future behaviour; or
 - to deter future non-compliance.

These factors relate to our confidence in Network Rail’s management (at Board, company, route or the SO-level as relevant) to take the appropriate action now and in the future. The action or inaction of management which caused the licence breach is an important consideration.

¹⁷ It covers both the levying of a penalty and the inclusion of a reasonable sum (under section 55(7A)) in an individual enforcement order. References to a penalty should be understood to apply equally to a reasonable sum, where the context permits.

¹⁸ Penalties are paid to the Secretary of State for Transport, which are then returned to Her Majesty’s Treasury (HMT) under managing public money.

¹⁹ See the Macrory Report - ‘Regulatory Justice: Making Sanctions Effective’. The six penalty principles are: (i) aim to change the behaviour of the offender; (ii) aim to eliminate any financial gain or benefit from non-compliance; (iii) be responsive and consider what is appropriate for the particular offender and regulatory issue; (iv) be proportionate to the nature of the offence and the harm caused; (v) aim to restore the harm caused by regulatory non-compliance, where appropriate; and (vi) aim to deter future non-compliance.

Calculating the amount of a penalty or sanction

5. In assessing the appropriate size of any penalty or sanction, we will consider the seriousness of the breach by judging:
 - the actual and potential harm caused to third parties, particularly to passengers and freight customers and to the effectiveness of the regulatory regime; and
 - the culpability of Network Rail, including whether it has intentionally acted either negligently or recklessly, and in particular, the behaviour of senior managers and the Board.
6. We will then consider any mitigating or aggravating factors. Mitigating factors could include proactive steps to remedy the harm caused by the breach and prevent it recurring. Aggravating factors might include repeated non-compliance, or attempts to conceal non-compliance. We will also consider the extent to which Network Rail has cooperated with ORR during the investigation (in particular, senior managers of the relevant business units and the corporate centre) and is acting to remedy the breach.
7. The net effect of all mitigating and aggravating factors may be significant. Potentially, taken together these adjustments could reduce a penalty or sanction to zero.
8. Once we have judged the seriousness of the breach, we will then consider:
 - the likely impact of the size of a penalty or sanction on Network Rail's future behaviour (including the impact on staff incentives and behaviours now and in the future).
 - The likely impact of the size of any penalty or sanction on railway users and funders (now and in the future).

This includes considering any representations made to us by Network Rail as to how they would fund a penalty, and for sanctions, which parts of Network Rail may, as a consequence, see performance-related pay affected and whether this is justified.

9. Having considered the factors listed above, the ORR Board will determine an appropriate amount for a penalty or sanction.
10. Given Network Rail's public sector status, we will always consider whether it is more appropriate to scale the size of a penalty so that it is capable of being funded by resources that would otherwise be used for management bonuses (recognising that decisions on how to fund penalties are for Network Rail).
11. In practice, it is likely that it will always be more appropriate for us to scale the size of a penalty to be capable of being funded from management bonus pay. This however

does not remove ORR's discretion to impose larger penalties up to the limits established under the Act²⁰.

Consultation

12. ORR will issue a notice and consult with Network Rail and stakeholders to inform them when we propose to impose a penalty. We are required to consult for a minimum of 21 days. Our consultation will set out the proposed amount and the grounds on which the penalty is being imposed. We will consider any representations or objections made in response to the consultation.
13. ORR cannot modify a proposal to impose a penalty without Network Rail's consent, unless the modifications consist of a reduction of the amount of the penalty or a deferral of the date by which it is to be paid, or ORR has complied with certain additional requirements.
14. Although ORR is not legally required to consult on imposing a sanction, we will follow the same principle as for financial penalties, including consulting for a minimum of 21 days.

Confirmation of penalties or sanction

15. Following consultation with Network Rail and stakeholders, if ORR's Board still considers it appropriate to impose a penalty, we will publish a final notice confirming the decision and penalty or sanction amount. The final notice will also provide details of the grounds on which the penalty or sanction is imposed and specify the manner, the place and the date on which the penalty is to be paid.
16. A penalty or sanction must be imposed within the prescribed time limit. A copy of the notice relating to the penalty must be served on Network Rail within two years of the time of the breach.

²⁰ Under the Act, ORR may impose a penalty of up to 10 percent of turnover. The Railways Act 1993 (Determination of Turnover) Order 2005: <http://www.legislation.gov.uk/ukxi/2005/2185/made>



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