Holding the strategic highways company to account

4. Enforcement

Introduction

4.1 The ORR Board makes the final decision on whether National Highways is contravening or has contravened compliance with the RIS and/or SD&G under section 11 of the Act and what (if any) enforcement action to take.

4.2 The statutory enforcement actions available to us are to:

a. issue National Highways with an enforcement notice as to the contravention and the steps the company must take to remedy it; and/or
b. require National Highways to pay a fine to the Secretary of State (section 11(2) of the Act).

4.3 For the avoidance of doubt, where we find non-compliance, this does not necessarily mean that we will take statutory enforcement action as set out in paragraph 4.4. The course of action we choose to take depends on a wide range of factors set out in this document, in particular the provisions of paragraph 3.9, and also those at 4.9, alongside our duties under the Act and the statement in the RIS that National Highways will achieve targets to the greatest extent reasonably practicable. This chapter describes the statutory enforcement actions available to us, and the process we follow.

Our approach

4.4 Statutory enforcement action is applicable only where there is or has been an actual (as opposed to potential) contravention by National Highways of compliance with the RIS, and/or SD&G.

4.5 Fundamentally, the purpose of enforcement is to secure National Highways' compliance with the RIS and SD&G, and to deter future non-compliance. In doing so, the interests of road users, funders and wider stakeholders are protected.

4.6 We may choose to engage with certain stakeholders and take advice to inform our view on what would be appropriate enforcement action to take in a particular circumstance.

4.7 If the ORR Board is satisfied that National Highways is contravening or has contravened compliance with the RIS and/or SD&G it will consider if it is appropriate to issue a notice and/or a fine.

4.8 In deciding whether to issue a notice and/or a fine to National Highways for a contravention, the ORR Board will:

a. take full account of the particular facts and circumstances of the contravention;
b. take into account any representations, objections or evidence provided by National Highways; and
c. take into account the impact of our course of action on National Highways and on road users.

4.9 The ORR Board will also consider a range of factors in coming to its decision. Table 4.1 lists some of these factors. These are in addition to those listed at paragraph 3.9:

Table 4.1 Factors considered by the ORR Board for National Highways enforcement decisions

Factor	Detail
Attitude of	The attitude of National Highways to the contravention and the

Factor	Detail
National Highways	company's willingness to proactively take action to resolve it and, where we have undertaken enhanced monitoring, the company's response and behaviour during that process.
Representations	Any representations made by National Highways in response to our case to answer letter (paragraph 3.36).
Cost-benefit	Whether the cost of any required remedial action outweighs the detrimental impact of the contravention on users of the SRN, government and other affected persons.
Timeliness	The likely speed of resolving the non-compliance and the extent to which National Highways has a robust, adequately resourced plan to achieve compliance within a reasonable, agreed period of time. This will vary depending on the specific circumstances of the case.
Effectiveness	The likely effectiveness of any statutory enforcement action in remedying the non-compliance and/or deterring repetition.
Stakeholder views	Consideration of the views of any affected party/ies and/or other stakeholders, where appropriate.
Mitigating factors	Any mitigating factors put forward by National Highways and whether the non-compliance was wholly or partly within its

Factor	Detail
	control.
National Highways remuneration	Any decisions that National Highways may already have taken to reduce performance related pay (PRP) or variable pay.
Other	Any other factors (including aggravating or additional mitigating factors) relevant to the specific case.

4.10 Additionally, the ORR Board will take account of the principles set out in paragraph 1.46 and our duties in the Act, including the principle that regulatory activities should be targeted only at cases in which action is needed. It will also have regard to any statutory guidance issued to ORR by the Secretary of State for Transport and/or HM Treasury under section 13 of the Act, and, if considering a fine, our policy on fines as set out in this chapter. We will act in a manner best calculated to fulfil our legal duties.

4.11 The ORR Board may require further information prior to making a final decision on whether to take statutory enforcement action. In such a case we may write to National Highways stating that ORR is satisfied there has been a contravention and invite the company to make any further representations in relation to proposed statutory enforcement action and any further steps it has taken to remedy its non-compliance.

4.12 Any decision by the ORR Board to proceed or not to proceed with statutory enforcement action will be communicated to National Highways through a final decision letter.

4.13 We do not require the approval or authorisation of the Secretary of State for Transport before taking statutory enforcement action. However, it is our policy to inform the Secretary of State of the grounds on which we intend to take action and whether we will be issuing a notice and/or imposing a fine on National Highways and, in the case of a fine, the amount.

4.14 We would expect any statutory enforcement action we take to be taken into account by

National Highways when determining the performance of its senior management and therefore their remuneration.

Issuing a statutory enforcement notice

4.15 If we decide to proceed with statutory enforcement action, we would expect to issue National Highways with a notice under section 11(2) of the Act and monitor compliance with that notice before considering whether to impose a fine. We will generally consider issuing a notice as a means to secure compliance without the need to impose a fine.

4.16 When issuing a statutory enforcement notice to National Highways we will:

a. set out the requirement(s) in the RIS and/or condition(s) of the SD&G with which National Highways is or has been non-compliant;
b. specify the acts or omissions by National Highways that, in ORR's opinion, demonstrate non-compliance with the RIS and/or SD&G and the facts that, in ORR's opinion, justify us issuing a notice; and
c. specify the steps that National Highways must take to remedy its non-compliance and any associated timeframes; this is likely to include the requirement to develop and implement an improvement plan.

4.17 We will send the notice to National Highways and provide a copy to the Secretary of State. We will also publish the notice in such a manner as we consider appropriate.

4.18 We will monitor compliance with all notices we issue. If National Highways does not rectify its non-compliance we will consider:

a. levying a fine on National Highways for the ongoing non-compliance in accordance with our policy on fines (paragraphs 4.20-4.38); and
b. making public National Highways' failure to comply with the notice.

4.19 If we judge it appropriate, we may also give advice to the Secretary of State, under section 10(2) of the Act, regarding the failure by National Highways to achieve its objectives under the RIS and/or its failure to comply with (or have regard to, as the case may be) SD&G.

Issuing a statutory fine

4.20 As stated at paragraph 4.15, we will generally consider issuing a statutory enforcement notice as a step prior to issuing a fine. However, we can impose a fine on National Highways for non-compliance with the RIS and/or SD&G irrespective of whether we have issued a notice and may do so where we consider it appropriate.

4.21 It is for the ORR Board to determine the size of a fine and to ensure that it is proportionate to the non-compliance. Taking into account National Highways' status as a public body that manages a strategic public asset and is funded by taxpayers, we consider that a fine should always be a last resort.

4.22 In line with the statutory guidance issued to ORR by the Secretary of State and HM Treasury under section 13 of the Act, we will inform the Secretary of State where we consider that the size of the fine we intend to impose on National Highways is likely to risk delivery of the RIS or the company's strategic duties and obligations (paragraph 21(c) of the statutory guidance). However, for the reasons set out in paragraph 4.9 we do not envisage that we would seek to impose a fine at a level that would be likely to do so.

4.23 Any fines issued to National Highways under the Act are paid by the company to the Secretary of State, who will ensure they are paid into the Consolidated Fund (paragraph 5 of the statutory guidance).

Appropriateness of fines

4.24 The fundamental principle behind imposing a fine is to incentivise those in National Highways who are responsible for and can impact the company's performance and/or delivery to comply with the RIS and/or SD&G and to deter future non-compliance.

4.25 In deciding whether a fine is appropriate we will normally, as a starting point, consider the seriousness of the non-compliance with the RIS and/or SD&G. In doing so we will look at:

a. National Highways' culpability in the non-compliance, including whether the company has acted knowingly or intentionally in this regard; and
b. the actual and potential impact caused to third parties, including users of the SRN, communities located near the SRN and taxpayers because of the non-compliance.

4.26 We will also take account of the particular facts and circumstances of the non-compliance, including:

a. any representations and objections made to us;
b. any evidence provided; and
c. whether we have issued a notice in respect of the non-compliance, and what action, if any, National Highways has taken in response.

4.27 We will also:

a. take account of the six penalty principles set out in the Macrory report on regulatory justice (2006);
b. take account of the principles set out in chapter 3; and
c. have regard to any statutory guidance.

Calculating the amount

4.28 If we decide that it is appropriate to levy a fine on National Highways, we will determine the amount on a case-by-case basis, taking account of the seriousness of the non-compliance.

4.29 In reaching a conclusion as to the amount of the fine to be levied on National Highways we will seek to ensure that it is proportionate and take into account the fact that levying a fine has a reputational effect. The reputational effect can be a powerful tool to encourage then company's compliance and deter future non-compliance.

4.30 We will then consider any mitigating or aggravating factors. These may include:

a. the extent to which we consider that the non-compliance is within the control of National Highways' management and the extent of involvement of the executive, directors, senior management and/or the Board in the action(s) or inaction(s) that caused it, and/or their lack of appropriate involvement to remedy it;
b. any steps taken by National Highways to rectify its non-compliance and whether these were initiated proactively or in response to our action(s);
c. any steps taken by National Highways to minimise the risk of the non-compliance recurring;
d. the extent to which the specific non-compliance is a repeated or continuing occurrence;
e. the extent to which National Highways cooperated with any investigation we undertook with regards to the non-compliance;

f. any decisions that National Highways may already have taken to reduce PRP or variable pay; and
g. any reparations offered by National Highways not already taken into account as a means of determining whether a fine is appropriate (see Figure 4.1).

Figure 4.1 What are reparations?

National Highways reparations

'Reparations' are payments instead of a fine that go towards investing back into the network, rather than a fine that can be seen as less meaningful because it goes into the consolidated fund and therefore the benefit is not directly felt by road users.

There may be circumstances where National Highways offers reparations as an alternative to imposing a fine or as a mitigation in determining the amount.

Any offer should be made as early as possible including, where appropriate, ahead of any investigation by ORR.

We may consider reparations that National Highways offers later but would be unlikely to do so where it threatens the timely conclusion of any statutory enforcement action.

Where National Highways makes an offer of reparations, we may engage with government to seek views and consider the impact of potential non-delivery on users and wider stakeholders.

Any offer of reparations from National Highways should be:

1. genuinely additional to the commitments already made in the RIS and SD&G or any other existing commitments not covered by these;
2. appropriately targeted and proportionate to the harm done so far as is possible. In considering this we may consult with appropriate stakeholders;
3. deliverable; and
4. value for money.

An offer of reparations by National Highways will not necessarily be accepted by ORR.

4.31 Taken together, the net effect of these factors may be significant and have a material impact on the size of the fine. They could potentially reduce a fine, including to zero, or increase it, depending on the circumstances.

4.32 Having considered the factors described above, the ORR Board will determine an appropriate amount for a fine.

4.33 Given that National Highways is funded entirely by taxpayers we may choose to scale any fine so that it is capable of being funded from management remuneration (meaning discretionary pay, like PRP). While it is for the company to decide how to fund any fine, this would have the effect of enabling it to protect the funding provided, including through the Statement of Funds Available (SoFA), to deliver the RIS and SD&G. This however does not remove ORR's discretion to scale a fine by other means, if the ORR Board considers it appropriate.

4.34 We will seek to engage with the department to ensure that any fines we impose have an appropriate impact. This means that we will consider the size of any fines we impose in conjunction with any proposed course of action by the department in its role as shareholder of National Highways (paragraph 1.20).

Proceeding with a fine

4.35 If we intend to levy a fine on National Highways, we will publish in such manner as we consider appropriate a notification setting out:

a. our intention to impose a fine; and
b. the proposed amount of the fine.

We will send a copy of this notification to National Highways and provide a copy to the Secretary of State

4.36 We will give due consideration to any representations and objections that are made (and not withdrawn) in determining whether to proceed with a fine.

4.37 Having followed the steps set out above and if we have decided to impose a fine, we will issue a further notification to National Highways. This will:

a. state that ORR is imposing a fine on National Highways and the amount of the fine;
b. set out the condition(s) of the RIS and/or SD&G with which National Highways is or has been non-compliant;
c. specify the acts or omissions that, in ORR's opinion, constitute non-compliance of that/

those condition(s) of the RIS and/or SD&G and any other facts that, in ORR's opinion, justify the imposition of a fine and its amount;

d. specify the manner in which National Highways must pay the fine; and
e. specify the date (being not less than 14 days from the date of publication of this notification) by which National Highways must pay the fine.

4.38 We will publish the notification of the imposition of a fine in such manner as we consider appropriate. We will send a copy of this notification to National Highways and provide a copy to the Secretary of State.

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