



OFFICE OF RAIL AND ROAD



**ORR's Economic  
enforcement policy and  
penalties statement  
(draft for consultation)**

August 2017



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# Introduction

## Summary

This document sets out the Office of Rail and Road's economic enforcement policy and penalties statement relating to Rail.

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## Background

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 the railway services in Northern Ireland<sup>1</sup>**. The ORR is also the economic monitor for England's strategic road network.
2. We regulate railway operators because operating railway assets and providing passenger and freight services are activities of national importance and must be safeguarded in the public interest.

## Purpose of this policy

3. The purpose of this policy is to set out the ORR's enforcement policy as economic regulator for the mainline railway in Great Britain (GB) and **in Northern Ireland (NI)**. It also contains the penalties statement required by section 57B of the Railways Act 1993 (the Act) **and regulation 39 of The Railways Infrastructure (Access Management and Licensing of Railway Undertakings) Regulations (Northern Ireland) 2016**
4. We recognise that the industry, its funders, wider stakeholders, including passengers and freight customers, wish to understand how we shall use our powers, and our approach is therefore set out in the following chapters.
5. This policy and penalties statement was last reviewed and amended in **2017** following the introduction of **The Railways (Access, Management and Licensing of Railway Undertakings) Regulations 2016<sup>2</sup>** and **The Railways Infrastructure (Access Management and Licensing of Railway Undertakings) Regulations (Northern Ireland) 2016<sup>3</sup>**. Where appropriate, throughout this document we refer to both the GB and NI Regulations as the 'A&M Regulations'.

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<sup>1</sup> To comply with EU Directive 2012/34/EU, from 23 January 2017 ORR has a limited regulatory role in Northern Ireland to comply with the obligation that there is one independent regulator in each member state.

<sup>2</sup> The Railways (Access, Management and Licensing of Railway Undertakings) Regulations 2016: <http://www.legislation.gov.uk/uksi/2016/645/contents/made>

<sup>3</sup> The Railways Infrastructure (Access Management and Licensing of Railway Undertakings) Regulations (Northern Ireland) 2016: [http://www.legislation.gov.uk/nisr/2016/420/pdfs/nisr\\_20160420\\_en.pdf](http://www.legislation.gov.uk/nisr/2016/420/pdfs/nisr_20160420_en.pdf)

6. This policy is specific to our enforcement functions under the licensing of the railways and the A&M Regulations. Enforcement policies are available separately in relation to our functions under Health and Safety<sup>4</sup>, Competition<sup>5</sup> and Roads<sup>6</sup>.

## Parties in scope of this policy

7. Previously our enforcement powers were limited to licence holders. On 29 July 2016 Directive 2012/34/EU, recasting the First Railway Package, came into force through *The Railway (Access, Management and Licensing of Railway Undertakings) Regulations 2016*. On 23 January 2017 similar legislation came into force in NI through *The Railways Infrastructure (Access, Management and Licensing of Railway Undertakings) Regulations (NI) 2016* (as above we refer to these throughout as “the A&M Regulations”).
8. The legislative changes have provided additional powers to enforce against non-compliance by a ‘relevant operator’ in GB and NI with a decision, direction or notice issued by us under the A&M Regulations. Annex B provides an overview of the circumstances where we can take enforcement action under the A&M Regulations.
9. To take account of these changes we have amended the scope of this policy to include relevant operators as well as licence holders.
10. The sections below aim to provide clarity of the parties that are in scope of this policy.

## Licence holders

11. One of our core statutory functions in GB is to grant licences for railway businesses. A licence (or in some instances a licence exemption) is required to operate a train, station, network or light maintenance depot.
12. We monitor the industry's delivery of its key regulatory obligations. We also investigate complaints about the behavior of industry parties. In some cases, our monitoring or investigation of complaints can lead to consideration of whether there has been, is, or likely to be, a breach of a licence obligation.

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<sup>4</sup>ORR's Health and Safety enforcement policy: [http://orr.gov.uk/\\_data/assets/pdf\\_file/0016/5650/hswa-enforcement-policy-statement.pdf](http://orr.gov.uk/_data/assets/pdf_file/0016/5650/hswa-enforcement-policy-statement.pdf)

<sup>5</sup> ORR's Competition enforcement policy: [http://orr.gov.uk/\\_data/assets/pdf\\_file/0019/21367/competition-act-guidance.pdf](http://orr.gov.uk/_data/assets/pdf_file/0019/21367/competition-act-guidance.pdf)

<sup>6</sup> ORR's Highways enforcement policy [http://www.orr.gov.uk/\\_data/assets/pdf\\_file/0005/20003/enforcement-policy-for-highways-england.pdf](http://www.orr.gov.uk/_data/assets/pdf_file/0005/20003/enforcement-policy-for-highways-england.pdf)

13. If we establish that there has been, is, or likely to be, a breach of a licence obligation then Section 55 of the Act provides us with the power to make a final order to require the licensee to secure compliance and section 57A enables us to impose a penalty.
14. For the purposes of this policy a licence holder is any person who has been granted a licence in accordance with Section 8 of the Act.
15. **Chapters 1 to 5 of this policy are applicable to GB licence holders.**

## Relevant Operators

16. Another of our core statutory functions is to ensure applicants and railway undertakings in GB and NI are treated fairly as provided for by the A&M Regulations.
17. The A&M Regulations provide us with the power to fine a ‘relevant operator’ who has breached or is breaching a decision, direction or notice issued by us under the A&M Regulations.
18. The definition of a relevant operator differs slightly in the GB A&M Regulations and NI A&M Regulations, this is explained further below.
19. The GB A&M Regulations (see Regulation 38) define a relevant operator as:
  - i. a person issued with a decision or direction under Regulation 31, 32, 33 or 34 of the GB A&M Regulations;
  - ii. a person who has been given a direction under section 17 or 22A of the Act, where the direction relates to a matter referred to in regulation 32(c) to (g) and has been applied for as a result of Regulation 32(3); or
  - iii. a person who has been served with a notice under section 80 of the Act.
20. The Department for Transport has produced guidance on scope<sup>7</sup>. This should be the starting point for an assessment of whether the GB A&M Regulations affect you.
21. The NI A&M Regulations (see Regulation 38) define a relevant operator as:
  - i. a person issued with a decision or direction under regulations 31, 32, 33, or 34, or
  - ii. a person on whom a notice is served under regulation 36.
21. We provide an overview of each of the above GB & NI A&M Regulations in Annex B and set out below key definitions of the parties that are deemed to be a relevant operator in GB and NI.

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<sup>7</sup> <https://www.gov.uk/government/publications/recast-first-railway-package-guidance-on-scope-of-2016-transposition-regulations>

22. **Note that only chapters 1, 3, 4 and 5 of this policy are applicable to relevant operators.**

### **Relevant Operators GB**

23. For the purposes of this policy the parties deemed to be a relevant operator in GB include:

- An infrastructure manager;
- A service provider;
- A railway undertaking;
- An applicant;
- An allocation body;
- A charging body; or
- A facility owner.

These definitions are defined in the GB A&M Regulations as follows:

24. **‘infrastructure manager’** is<sup>8</sup>:

*any body or undertaking that is responsible in particular for:*

- (a) the establishment, management and maintenance of railway infrastructure, including traffic management and control-command and signalling; and*
- (b) the provision with respect to that infrastructure of network services as defined in section 82 of the Act,....*

25. In practice, this means the following bodies fall within the definition-

- Network Rail Infrastructure Limited;
- HS1 Limited in respect of High Speed 1;
- Heathrow Airport Ltd in respect of the Heathrow Spur;
- Rail for London (Infrastructure) Ltd in respect of Crossrail’s Central Operating Section (also known as ‘the Tunnel’); and
- The Channel Tunnel Group Limited and France-Manche S.A. (jointly “Eurotunnel”) in respect of the Channel Tunnel.

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<sup>8</sup> See regulation 3 ‘interpretation’ of the GB A&M Regulations for the full definition.

26. Our view is that owners of heritage railways are not infrastructure managers for the purposes of the 2016 Regulations. Similarly, owners of private stations are not infrastructure managers if they do not provide network services.

27. **'service provider'** is a body or undertaking that supplies any of the services:

*(a) to which access is granted by virtue of regulation 6; or*

*(b) listed in paragraphs 2, 3 or 4 of Schedule 2,*

*or which manages a service facility used for this supply, whether or not that body or undertaking is also an infrastructure manager.*

28. It is possible for an infrastructure manager to also be a service provider for the purposes of the 2016 Regulations where that infrastructure manager also supplies services. However, it is not possible for a service provider that only supplies services to be regarded as an infrastructure manager.

29. **'railway undertaking'** is:

*any public or private undertaking licensed according to [Directive 2012/34/EU], the principal business of which is to provide services for the transport of goods and/or passengers by rail with a requirement that the undertaking ensure traction; this also includes undertakings which provide traction only.*

30. In practice railway undertakings will be the licensed freight and passenger train operators.

31. **'applicant'** is defined in the 2016 Regulations as:

*a railway undertaking or an international grouping of railway undertakings or other persons or legal entities, such as competent authorities under Regulation No 1370/200, shippers, freight forwarders and combined transport operators, with a public service or commercial interest in procuring infrastructure capacity.*

32. While certain provisions in the 2016 Regulations only confer entitlements and obligations on railway undertakings, some provisions apply more widely to bodies such as shippers and freight forwarders. Where the 2016 Regulations are intended to apply more broadly, the term 'applicant' is used.



33. Where a party that is not a railway undertaking is considering whether the 2016 Regulations confer any entitlements or obligations on it, it will need to look at whether the relevant provision applies to ‘applicants’ and whether it falls within that definition.

34. **‘allocation body’** means a body other than the infrastructure manager, which is responsible for the functions and obligations of the infrastructure manager under Part 5 and Schedule 4 of the A&M Regulations because the infrastructure manager is not independent of any railway undertaking.

35. **‘charging body’** means the body, other than the infrastructure manager, which is responsible for the functions and obligations of the infrastructure manager under Part 4 and Schedule 3 of the A&M Regulations because the infrastructure manager is not independent of any railway undertaking.

36. **‘facility owner’** means any person—

(a) who has an estate or interest in, or right over, a railway facility; and

(b) whose permission to use that railway facility is needed by another before that other may use it.

*If parties to connection contracts satisfy the definition of a facility owner they are deemed to be in scope of the A&M Regulations.*

## **Relevant Operators NI**

37. For the purposes of this policy the parties deemed to be a relevant operator in NI include:

- An infrastructure manager;
- A service provider;
- A railway undertaking;
- An applicant;
- An allocation body; or
- A charging body.

These definitions are defined in the NI A&M Regulations as follows<sup>9</sup>:

**38. 'infrastructure manager':**

*Means any body or undertaking that is responsible in particular for establishing and maintaining railway infrastructure.*

39. In practice, this means that NIR Networks Ltd falls within the definition.

40. Our view is that owners of heritage railways are not infrastructure managers for the purposes of the NI A&M Regulations. Similarly, owners of private stations are not infrastructure managers if they do not provide network services.

**41. 'service provider'** means a body or undertaking that supplies any of the services:

- a. to which access is granted by virtue of regulation 5; or
  - b. listed in paragraphs 2, 3 or 4 of Schedule 1,
- or which manages a service facility used for this supply, whether or not that body or undertaking is also an infrastructure manager.

42. In practice, this means that NIR Networks Ltd falls within the definition.

43. It is possible for an infrastructure manager to also be a service provider for the purposes of the NI A&M Regulations where that infrastructure manager also supplies services. However, it is not possible for a service provider that only supplies services to be regarded as an infrastructure manager.

**44. 'railway undertaking'** is:

*any public or private undertaking licensed according to [Directive 2012/34/EU].*

45. In practice, this means that Northern Ireland Railways (NIR) or Enterprise Northern Ireland Railways Operations Limited falls within the definition.

**46. 'applicant'** is defined in the NI A&M Regulations as:

*a railway undertaking or an international grouping of railway undertakings or other persons or legal entities, such as competent authorities under Regulation No*

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<sup>9</sup> See Regulation 2 of the NI A&M Regulations.

*1370/2007(a), and shippers, freight forwarders and combined transport operators, with a public service or commercial interest in procuring infrastructure capacity.*

47. While certain provisions in the NI A&M Regulations only confer entitlements and obligations on railway undertakings, some provisions apply more widely to bodies such as shippers and freight forwarders. Where the NI A&M Regulations are intended to apply more broadly, the term 'applicant' is used.

48. In practice, as there is currently no freight operating on the NI network, only NIR or Enterprise Northern Ireland Railways Operations Limited would fall within the definition.

49. Where a party that is not a railway undertaking is considering whether the NI A&M Regulations confer any entitlements or obligations on it, it will need to look at whether the relevant provision applies to 'applicants' and whether it falls within that definition.

50. '**allocation body**' means a body or undertaking, other than the infrastructure manager, which is responsible, by virtue of Regulation 19(3), for the functions and obligations of the infrastructure manager under Part 5 and Schedule 3 of the NI A&M Regulations.

51. In practice, this means that NIR Networks Ltd falls within the definition.

52. '**charging body**' means a body or undertaking, other than the infrastructure manager, which is responsible, by virtue of regulation 14(6), for the functions and obligations of the infrastructure manager under Part 4 and Schedule 2 of the NI A&M Regulations.

## Purpose of enforcement

22. The railway is a public service operated in both the public and private sectors. ORR, as the independent regulator, approves the terms on which access to track, stations and light maintenance depots is provided. In performing our functions, we act in accordance with our duties which are designed to protect the interests of users of the network<sup>10</sup>.

23. ORR's general approach to economic regulation of the rail industry is to:

- ensure that the right incentives are in place for the whole industry to work together and improve performance and standards of service across the railway network, for passengers and freight and in the public interest;

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<sup>10</sup> Pursuant to Section 4 of the Act and Regulation 31 of the NI A&M Regulations.

- facilitate and encourage the industry to deliver safe and efficient services which meet the reasonable requirements of funders and passenger and freight customers; and
- to use our enforcement powers, where appropriate, to ensure that railway operators comply with their licences and relevant operators comply with the decisions, directions and notices issued by ORR under the A&M Regulations and so work in the public interest.

24. A penalties statement is required by section 57B of the Act **and regulation 39 of the NI A&M Regulations** and we choose to publish both our policy and the penalties statement as a single document. This document explains our policy for enforcing all licence and Statement of National Regulatory Provisions (SNRP) obligations, and compliance with decisions, directions and notices issued by us under the A&M Regulations and sets out in detail what powers we have to enforce compliance and our policies on when (and why) ORR would do so.

## Competition and economic licence enforcement

25. The Competition Act 1998 (CA98) is enforced by the Competition Markets Authority (CMA) and the concurrent regulators<sup>11</sup> including ORR (in respect of services relating to railways).
26. 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 CA98<sup>12</sup>. We will therefore consider at an early stage of the process (but depending on the facts of each case), whether we are satisfied that it would be more appropriate to proceed under the CA98 before taking any licence enforcement action. Where we are satisfied that it would be more appropriate to proceed under the CA98, we must do so, rather than proceeding with licence enforcement under sector-specific regulation.

## Principles of Prioritisation

27. We apply prioritisation principles to help us focus our resource in a way that will deliver most value out of our interventions. These prioritisation criteria apply across most of our discretionary enforcement activities.
28. The criteria are not ordered by priority or significance. The weight attached to each of the criteria will be influenced by our strategic priorities.

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<sup>11</sup> The Competition and Markets Authority has competition law powers which apply across the whole economy. Sectoral regulators such as the ORR may exercise the competition law powers to enforce the prohibitions on anti-competitive agreements and on abuse of a dominant position, and to make market investigation references, concurrently with the CMA in those sectors for which they have responsibility. Concurrent regulators include; ORR, CAA, Ofcom, Ofgem, Ofwat.

<sup>12</sup> Section 55(5A), Railways Act 1993. **For the purposes of this policy this is not applicable to relevant operators in NI.**

29. Our prioritisation criteria are as follows:

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### Prioritisation Criteria

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#### **Strategic significance**

We will consider how our intervention will deliver outcomes which are in line with our strategic objectives; for example to promote services and value for money for the benefit of passengers and taxpayers.

#### **Is ORR best placed to act?**

In some cases, it may be more appropriate for a body other than ORR to investigate or take action (e.g. a passenger body, the franchising authority or an industry association). We will consider, on a case-by-case basis, whether or not there are other organisations best placed to take the matter forward.

#### **Impact**

An important consideration for us will be the likely impact of our intervention. Factors which we will take into consideration in measuring that impact include:

- the actual or potential level of harm (which depending on the circumstances could be harm to passengers, taxpayers or other users of the railways);
- evidence to suggest a systemic rather than an isolated incident;
- circumstances that suggest conduct that is recurrent rather than occasional and/or whether the conduct is ongoing or in the past;
- whether the conduct in question is leading or could lead to inefficiencies in the market either in terms of costs or end prices to consumers; or
- any forecast deterrent effect or any other beneficial effects such as raised awareness amongst consumers. This impact can be in the market in question or in related markets.

#### **Costs**

For efficiency reasons we will also estimate the internal and external costs attached to our intervention. The internal costs will include any opportunity costs (e.g. knock-on effects on ORR's current and future portfolio of strategic work). It is important that the costs of our intervention are proportionate to the impact that we are seeking.

#### **Risks**

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ORR will adopt a risk-based approach when assessing whether or not a matter constitutes a priority. The risks that we will consider include:

- the probability of a successful outcome particularly in terms of better outcomes for taxpayers, passengers or other users of the railways; the legal risks, notably the strength of the evidence available or likely to become available during the investigation; and
- the impact of our decisions on ORR's reputation since credibility plays an important role in the overall effectiveness of the regulatory regime.

30. The list of criteria set out above is not exhaustive and we may consider other factors where appropriate.

31. We will keep our prioritisation assessment of any particular case under review<sup>13</sup>.

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<sup>13</sup> It may be that we need to close an investigation once it has been opened, if our assessment of priority changes. Conversely, it may be that we need to open an investigation after it has been decided not to open it, if our prioritisation assessment changes.

# Chapter 1 Enforcement approach and principles

## Summary

This chapter sets out our enforcement approach and principles in relation to railways.

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### Enforcement approach

45. The purpose of enforcement is to ensure delivery and secure compliance with public interest obligations.
46. Our enforcement approach is informed by best regulatory practice and the following principles:
  - proportionality in applying the law and securing compliance;
  - targeting of enforcement action;
  - consistency of approach;
  - transparency about how we operate and what the industry may expect; and
  - accountability for our actions in line with best practice in regulation.
47. These principles apply both to enforcement in particular cases and to management of monitoring and enforcement activities as a whole.
48. Our enforcement objectives are to:
  - ensure that the right incentives are in place for the industry to meet public interest objectives;
  - facilitate and encourage the industry to deliver safe and efficient services which meet the expectations of passengers, freight customers and funders; and
  - use our enforcement powers, where appropriate, to ensure that the industry works in the public interest.
49. In summary, our enforcement approach will be to:
  - focus our resources and priorities on systemic issues or one-off events of material significance and those aspects of compliance which are most important to passengers, freight customers, funders and where non-compliance would cause most harm;
  - fulfil our duty under section 68 of the Act to investigate any complaint about an alleged or apprehended contravention of a licence condition, unless we deem it to be frivolous or vexatious;

- adopt a staged process of review, investigation and escalation, within reasonable timescales according to the urgency of the case, leading ultimately to consideration of enforcement action; and
  - consider the range of regulatory tools we have available before choosing the most appropriate.
50. In GB we have powers under the Act to enforce licences granted to Network Rail and other infrastructure operators, train operators (including the SNRP), station operators and light maintenance depot operators, which contain a number of conditions reflecting public interest requirements.
51. We also have powers to enforce compliance with decisions, directions and notices issued by us under the A&M Regulations to relevant operators.
52. We shall use our powers firmly but fairly and in a timely manner.

## One-off failures

### GB Licence Enforcement

53. We shall generally focus our resources and priorities on sustained failure to deliver outputs<sup>14</sup> or on individual events of material significance, rather than on one-off minor failures. This is because, in some cases, outputs may fluctuate over a short period of time. For example, train delays fluctuate from day to day and have to be considered over a reasonable period of time. In other cases, the significance of a licence holder missing a deadline or target will depend on the overall effect on passengers, freight customers, funders and other relevant stakeholders.
54. We shall, however, investigate complaints about one-off failures and consider enforcement action where it is in the public interest and in accordance with the requirements of section 55 of the Act. We will also monitor the occurrence of related one-off failures. A decision on when a series of one-off failures is deemed to be a sustained or systemic breach will depend on the nature and seriousness of the failures and on the progress of the licence holder to rectify the situation proactively.
55. We will take a staged approach to decisions, engaging with the licence holder at an early stage to discuss our concerns. We provide further guidance on our staged approach and prioritising in chapter 2.

## Enforcement under the A&M Regulations

56. We have powers to enforce compliance with decisions, directions and notices issued by ORR under the A&M Regulations. We shall investigate complaints about one-off

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<sup>14</sup> Such as in the case of Network Rail's regulated outputs and obligations under its Network Licence and periodic review final determination.



failures and consider enforcement action where it is in the public interest and in accordance with the relevant legislation. As such we will apply our staged approach and principles to intervention, investigation and enforcement where there is a complaint or evidence to suggest a relevant operator has not, or is not, complying with a decision, direction and/or notice.

## Applying our principles of enforcement

57. In considering the enforcement of licences, we shall act in accordance with section 55 and section 4 of the Act, which requires us to balance a number of public interest duties. In considering enforcing decisions, directions and notices we shall act in accordance with the GB A&M Regulations, which require us to act in accordance with section 4 of the Act and balance a number of public interest duties. **In considering enforcement of decisions, directions and notices issued in NI, we shall act in accordance with Regulation 31 of the NI A&M Regulations.** Our approach in all cases is informed by best regulatory practice and the following principles set out below.

### Proportionality

58. ORR oversees the compliance of all licence holders in GB with the conditions of their licences and has a duty under section 68 of the Act to investigate complaints about alleged or potential breaches.
59. Some licence obligations are specific and absolute; others require judgement, or an assessment of the adequacy of the licence holder's performance. Obligations to comply with decisions, directions and notices under the A&M Regulations are absolute. We shall apply the principle of proportionality to enforcing all types of obligation. For example, where ORR is monitoring compliance with licence conditions the level of monitoring undertaken by ORR varies from condition to condition, and will depend on the nature of the obligation, the consequences of the licence holder breaching the condition for other industry parties, passengers, freight customers, funders and other stakeholders, and how we balance our public interest duties.
60. Methods of monitoring include the use of independent regulatory reporters<sup>15</sup>, analysis of regular reports and industry information, feedback from industry stakeholders, and regular discussions with licence holders and other stakeholders. Where there has been a particular problem in compliance, we may monitor more closely. Where there are potential areas for concern, we shall consider what action is being taken by the licence holder or relevant operator to resolve them and whether any action by ORR is required.

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<sup>15</sup> The role of independent reporters is to provide us with professional advice on the quality of Network Rail's provision, as specified in their licence.

61. We shall consider carefully the circumstances of individual cases when determining whether to take enforcement action. We are likely to take account of the following factors:
- the significance of the failure, including whether it is a one-off failure or part of a systemic or sustained failure;
  - the extent to which the licence holder or relevant operator has a robust, adequately resourced plan to achieve compliance within a reasonable period of time;
  - whether enforcement action would encourage greater effort on the part of the licence holder or relevant operator to remedy the potential breach;
  - any persistent non-compliance; and
  - the effect of the failure on third parties and their potential right to compensation.

## Targeting

62. We shall focus our monitoring and investigation of potential breaches on those aspects of compliance which are most important for passengers, freight customers, and funders and where non-compliance would cause most harm. We shall ensure that our approach recognises the urgency of the case.
63. ORR's policy is to focus on using its regulatory powers to resolve systemic issues that are not dealt with effectively in contractual relationships. Such relationships include access contracts, the Network Code, the Stations Code and Depots Code, as well as industry wide arrangements on ticketing. We do not monitor compliance with contractual obligations and the ordinary rules of contract law apply to them. We expect the industry to manage its contractual relationships effectively and to explore the mechanisms in those contracts to secure compliance.
64. ORR will give priority to enforcing obligations where there is a detrimental effect on passengers, freight customers, funders and other stakeholders.
65. Subject to the specific requirements of individual licence conditions or the determination, direction or notice at issue, we shall normally adopt the above approach in considering whether to take enforcement action.

## Consistency

66. Consistency of approach does not mean uniformity. It means taking a similar approach in similar circumstances to achieve similar ends. We shall normally explain the reasons for any apparent differences in approach. Through the adoption of common principles, including those set out in this document, through consideration of the approach taken by other authorities, and by being transparent in our actions, we shall aim to ensure consistency in our approach to regulation of the industry.

## Transparency

67. Transparency means helping the industry to understand what is expected of it and what it should expect from ORR. When taking or proposing enforcement action, we shall give our reasons. We will also publish our decisions and the reasons for them to ensure that we are open about the action we are taking.
68. We recognise that the industry we regulate, its funders, and passengers and freight customers must be able to understand why we are concerned about a particular issue, the options open to us, and any rights of appeal or complaint. Therefore:
- we shall always explain why we are concerned, whether we are taking formal action, and the next steps; and
  - where we require an undertaking to take steps to remedy the position, we shall seek industry views before including any steps in formal action.

## Accountability

69. Regulators are accountable to the public for their actions through Parliament, **the NI Assembly** and through the courts. We have an obligation to give written and oral evidence to the Committees of Parliament and to make an annual report to the Secretary of State for Transport and lay it before Parliament. We are subject to scrutiny by the National Audit Office and are answerable to the Parliamentary Commissioner for Administration in cases of alleged maladministration.
70. We also have an obligation to comply with the rules of administrative law and good public administration. We consult on and publish our policies and keep them under review to ensure that they remain fit for purpose. We also consult on our corporate strategy. As a matter of policy and good practice, we shall consider any representations made to us about our approach to monitoring, enforcement or the levying of penalties and we shall respond to them. Ultimately our decisions may be subject to judicial review and scrutiny by the courts. A licence holder aggrieved by an enforcement order we have made or by a penalty we have imposed also has a specific right of appeal to the court under section 57 of the Act. **If a relevant operator is aggrieved by a penalty imposed under the A&M Regulations it can also appeal to the court<sup>16</sup>.**

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<sup>16</sup> Pursuant to Section 57F of the Act and Regulation 42 of the NI A&M Regulations.

# Chapter 2 Monitoring and Investigation

## Summary

This chapter is only applicable to **GB** licence holders and sets out our staged approach to monitoring, investigation and enforcement in exercising our powers and duties.

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71. The purpose of enforcement is to ensure delivery and secure compliance with public interest obligations which underpins our approach at every stage.
72. The following diagram illustrates the range of activities undertaken from monitoring, intervention through to formal enforcement action.



## Monitoring and investigation

73. Regulatory intervention at early stages of an issue can be very effective in resolving concerns so that formal action is not required. We monitor licence compliance and use a range of information, data and regulatory influence to hold licence holders to account and bring parties together to find appropriate remedies to issues.
74. Early intervention as part of a staged approach is a key aspect of ORR's regulatory toolkit. Effective and timely intervention could avoid the need for formal enforcement.
75. Our monitoring takes a forward looking, risk-based, proportionate and targeted approach. It anticipates and highlights issues as early as possible, to ensure licence holders manage risks effectively before they become problems that could adversely affect passengers and freight users. ORR also has a duty to investigate any complaint about an alleged or apprehended contravention of a licence condition, unless it believes it to be frivolous or vexatious
76. We have a range of regulatory tools to hold licence holders to account as part of our monitoring role. Depending on the issue, monitoring takes several forms. We apply our influence, intervening to highlight and address issues before formal action is necessary, for example through:
  - informal and formal review meetings;
  - investigation of complaints;
  - letters to licence holders;
  - public statements;
  - data analysis; and
  - industry and government engagement.
77. We also publish regular reports on the industry's performance, including, data publications, the Network Rail Monitor and our Annual Efficiency and Finance Assessment of Network Rail<sup>17</sup>.
78. As part of our monitoring approach, we use an escalation process. This process includes discussing escalated issues as part of monitoring meetings with licence holders to identify and implement remedies to the issues raised and, where necessary, escalation to formal investigations and ultimately formal enforcement action.

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<sup>17</sup> The Network Rail Monitor and our Annual Efficiency and Finance Assessment of Network Rail can be found on our website: <http://orr.gov.uk/what-and-how-we-regulate/regulation-of-network-rail/monitoring-performance>

79. Issues which require early intervention may arise from regular monitoring, routine engagement and/or intelligence gathering and we will consider them in relation to:
- whether an issue is a matter for ORR or some other body;
  - which levers are available and which are most appropriate (for example, exerting influence, greater transparency, strengthened incentives or the use of more formal licensing and contractual powers);
  - whether to raise the issue as part of a wider industry issue and if so, to identify the best way to do this (for example, whether bilaterally or through a wider industry forum such as the Rail Delivery Group);
  - whether an investigation should be initiated and if so, how and by whom; and
  - whether and how an issue should be escalated with the licence holder or within other functions of ORR.
80. Where there is cause for concern, we shall adopt a staged approach of review, investigation and escalation, within reasonable timescales according to the urgency of the case, leading ultimately to consideration of enforcement action.
81. This staged approach is likely to include one or more of the following:
- where there is a dispute between two industry parties, encouraging those parties to try to resolve the problem between themselves, where this is possible within a reasonable timescale, before seeking regulatory redress;
  - researching and analysing specific areas of potential failings;
  - considering the findings of independent regulatory reporters;
  - carrying out investigations, including formal investigations under competition law – considering whether competition is more appropriate;
  - requiring an explanation from the industry party responsible;
  - highlighting the issue publicly;
  - considering whether there has been a breach of a licence condition, or competition law;
  - requiring a recovery plan;
  - considering whether to issue a provisional or final enforcement order, or to take no enforcement action; and
  - considering whether to impose a penalty.
82. ORR will consider each case on its merits and the statements in this document must be considered in that context.

83. When considering whether to take action under competition law or under the Act, we shall make it clear to interested parties which route we propose to adopt and shall notify them of any subsequent change in approach.
84. To illustrate our process the following diagram shows the stages we follow and the types of documents we are likely to publish at each stage.

Stage 1	Stage 2	Stage 3
<ul style="list-style-type: none"> <li>Monitoring and escalation.</li> <li>Issue(s) identified / complaint received.</li> <li>Discussions take place at internal ORR monitoring review meetings to establish whether further escalation is required – such as an issue being placed on the regulatory escalator<sup>18</sup>.</li> <li>Discussions take place at working level with licence holder to seek clarification on concerns and to establish whether these can be resolved.</li> </ul>	<ul style="list-style-type: none"> <li>Formal investigation and Case-To-Answer.</li> <li>Issues are presented to ORR executive with recommendation to launch formal investigation.</li> <li>Write formally to licence holder concerned, initiating the investigation process.</li> <li>Engage with relevant stakeholders and gather evidence.</li> <li>Analysis and assessment.</li> <li>Findings and consideration of whether there is evidence of a case to answer; if not a case to answer, consider further monitoring arrangements.</li> </ul>	<ul style="list-style-type: none"> <li>Board decision on any breach and appropriate enforcement action.</li> <li>Board decides on appropriate actions based on evidence.</li> </ul>

#### Types of information we would normally expect to publish as part of the process

<ul style="list-style-type: none"> <li>Monitor publications and data.</li> </ul>	<ul style="list-style-type: none"> <li>Case to answer letter.</li> </ul>	<ul style="list-style-type: none"> <li>Evidence report.</li> <li>Decision letter.</li> <li>Notice (if required).</li> <li>Order (if required).</li> </ul>
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<sup>18</sup> The Regulatory Escalator is an internal prioritised register of current issues with Network Rail's (and the industry's) delivery.

# Chapter 3 Enforcement Action

## Summary

This Chapter explains the enforcement powers available to ORR.

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## The legal framework for licence enforcement

### Our duties

85. Our approach to enforcement is informed by best regulatory practice. We use our enforcement powers firmly but fairly in a timely manner and in accordance with our duties under **Section 4 of the Act and when considering enforcement of decisions, directions and notices issues in NI, we shall act in accordance with regulation 31 of the NI A&M Regulations.**

### Our enforcement process - when can we apply our enforcement powers?

86. The following table sets out the types of breaches and the instances where we can impose an enforcement measure for non-compliance. Previous examples of enforcement action we have taken can also be found on our website<sup>19</sup>:

### Summary of available enforcement measures for licensees

Type of Licence Breach	Enforcement Order (provisional & final)	Financial Penalty
Past		X
Current	X	X
Likely Future	X	

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<sup>19</sup> ORR's website: Enforcement action <http://orr.gov.uk/what-and-how-we-regulate/regulation-of-network-rail/enforcement/licence-enforcement-taken-by-us-to-date>



## Summary of available enforcement measures under the A&M Regulations

Type of A & M Regulatory breach	Enforcement Order (provisional & final)	Financial Penalty
Past		X
Current		X
Likely Future		

### Enforcement orders

87. As shown in the table above, we do not have the powers to make enforcement orders under the A&M Regulations; therefore enforcement orders are not applicable to relevant operators. However, under section 55 of the Act, where we are satisfied that a licence holder is contravening or is likely to contravene a licence condition, we **must** take enforcement action by making a final order, unless we consider it requisite that we should make a provisional order<sup>20</sup>.
88. A final or provisional order:
- shall require the relevant operator to whom it relates (according to the circumstances of the case) to do, or not to do, such things as are specified in the order or are of a description so specified;
  - shall take effect at such time, being the earliest practicable time, as is determined by or under the order; and
  - may be revoked at any time by the appropriate authority.
89. We are further precluded from making a final or provisional order if:
- Our section 4 duties preclude us from making the order<sup>21</sup>. A list of our section 4 duties is set out fully in Annex A ;

<sup>20</sup> See Section 55(2) of the Act.

<sup>21</sup> See Section 55(5)(a) of the Act.

- We are satisfied that the most appropriate way of proceeding is under the CA98<sup>22</sup>; or
- Under section 55 (5B) of the Act if we are satisfied that:
  - the licence holder has agreed to take, and is taking, all such steps as ORR considers appropriate to take for the purpose of securing or facilitating compliance with a licence condition; or
  - the contravention or apprehended contravention will not adversely affect the interests of users of railway services or lead to any increase in public expenditure, we can only make the enforcement order if we consider it appropriate to do so<sup>23</sup>.

90. If we decide not to make a final order, or not to make or confirm a provisional order in respect of a licence breach because we consider that one of the statutory exceptions applies, we must, under section 55(6) of the Act, serve notice of that fact on the licence holder and publish the notice, in which we will explain the reasons for our decision.

## Provisional orders

91. A provisional order is, in effect, an interim measure and may last for no more than three months unless it is confirmed. We must make a provisional order, without going through the procedural steps required for a final order, where it appears to us that it is requisite that a provisional order be made. In considering what is requisite we must have regard, in particular, to the extent to which any person is likely to sustain loss or damage from the breach before a final order may be made.

92. The requirements for confirming a provisional order are substantially the same as for making a final order<sup>24</sup>.

## Content of enforcement orders

93. Final or provisional orders must contain requirements for the licence holder to whom it relates (according to the circumstances of the case) to do or not to do, such things as are specified in the order. An order will take effect at a time determined under the order. ORR has the power to revoke an order.

94. An enforcement order may include provisions requiring:

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<sup>22</sup> See Section 55(5A) of the Act.

<sup>23</sup> See Section 55(5B) of the Act.

<sup>24</sup> See Section 55(4) of the Act.

- production and implementation of a plan to address any weaknesses identified during an investigation;
- establishment of a recovery board comprising relevant industry representation to agree the steps to take to remedy the breach, within a specified timescale; or
- payment of a reasonable sum in the event of a specified contravention of the order, such amount not to exceed 10% of the licence holder's turnover (*section 55(7A) of the Act*).

## Reasonable sum

95. A reasonable sum is an amount which can be imposed as part of an order and which needs to be paid where the licence holder fails to deliver the requirements set out under the order. Such a sum, of a level deemed appropriate in the circumstances of the case, would therefore provide a further incentive to the licence holder to deliver the requirements of the order.

## Timing and notice for orders

96. Once ORR's Board has decided to make a final order or confirm a provisional order, we must give notice stating that we propose to make or confirm such an order and setting out details of the licence breach. The notice must set out the period for representations to be made, which the Act states cannot be less than 21 days.

## Reparations

97. Our policy is to encourage licence holders or relevant operators to offer reparations to be considered as part of our enforcement process, if a licence holder or a relevant operator has acknowledged its failings. We prefer licence holders and relevant operators to offer reparations as early as possible, including, where appropriate, ahead of a formal investigation. Alternatively, reparations could be offered at a later stage in the enforcement process.
98. An offer of reparations will not necessarily be accepted by ORR. We expect the licence holder or relevant operator to submit a detailed plan of proposed reparations or account of reparations made already so that we are clear what is being offered or has already been done.
99. When considering reparations, either when determining what appropriate enforcement action to take or as a mitigating factor in determining a penalty amount, ORR expects the licence holder or relevant operator to ensure the offer complies with the following:
- **Genuinely additional** (for example, to the franchise agreement or all the commitments already made to us, funders, operators etc.). In order to confirm that reparations are not already part of an existing franchise commitment ORR

will consult the relevant franchising authority, for example the Department for Transport (DfT), Transport Scotland, Transport for London (TfL) or London Underground Ltd. (LUL). We will also check to ensure that the offer is additional to existing commitments made through periodic reviews or other obligations;

- **Appropriately targeted and proportionate** to the harm done. That is, the reparations being offered are sufficient to compensate for the harm done to a meaningful degree and are targeted at those that suffered, as far as is practicable. We will consult with the appropriate passenger organisations when considering this;
- **Deliverable** that is, the licence holder or relevant operator needs to set out clearly how it proposes to deliver the reparations proposed; and
- **Provides value for money.** The licence holder or relevant operator needs to show that offer is value for money and has regard to ORR's section 4 **and regulation 31** duties. Value for money in this context means the benefits of the reparations exceeds the costs using a standard cost/benefit methodology.

100. Reparations will normally constitute public commitments with a reputational incentive to deliver what is promised. Depending on the facts of each case, acceptance of an offer of reparations might result in the ORR deciding that a financial penalty is not appropriate, or that a proposed financial penalty should be reduced because of the mitigating effect of the reparations.
101. We will need to consider the impact of the non-delivery of reparations on the industry and passengers and how we can mitigate these risks.
102. We will also need to monitor closely the delivery of reparations and look to take remedial action for non-compliance. We may agree that a franchising authority or another body is best placed to monitor this. Monitoring arrangements and repercussions of non-compliance will be set out to the licence holder or relevant operator where an offer of reparations is accepted. A failure to deliver reparations will be treated very seriously by ORR and may constitute a breach.
103. A licence holder or relevant operator may offer or decide to take action that does not meet the criteria for reparations, but which is nonetheless a mitigating factor that could serve to reduce a penalty.
104. In respect of breaches of decisions, directions or notices issued under the A&M Regulations, penalties can only be imposed when the relevant operator has not, or is not complying with decisions, directions or notices imposed by the ORR i.e. after the relevant operator's conduct has already been considered in detail. Therefore a financial penalty as a sanction and an incentive for the relevant operator to return to compliance is likely to be considered more appropriate than a reparatory offer in most cases.

## Other enforcement powers

105. We also have powers to amend licence conditions with the consent of the licence holder or can make a reference to the Competition and Markets Authority, requesting a modification in the public interest.

## Application of ORR's enforcement policy

106. Different breaches will require different approaches to ensuring compliance, depending on the nature of the condition and of the alleged or potential breach. We can provide further details to interested parties of our likely approach to specific issues on a case-by-case basis. That said, we set out briefly below some guidance in respect of Network Rail's licence and of franchisees awarded by the Department for Transport or Transport Scotland.

## Condition 1 of Network Rail's licence contains the following general duty:

### General duty

107. The licence holder shall achieve the purpose in condition 1.1 to the greatest extent reasonably practicable having regard to all relevant circumstances including the ability of the licence holder to finance its licensed activities.

108. The purpose in condition 1.1, referred to in the general duty, is to secure:

- a) (a) the operation and maintenance of the network;
- b) (b) the renewal and replacement of the network; and
- c) (c) the improvement, enhancement and development of the network,
- d) in accordance with best practice and in a timely, efficient and economical manner so as to satisfy the reasonable requirements of persons providing services relating to railways and funders, including potential providers or potential funders, in respect of:
  - i) the quality and capability of the network; and
  - ii) the facilitation of railway service performance in respect of services for the carriage of passengers and goods by railway operating on the network.

109. ORR considers that Condition 1 applies to Network Rail's management of both the network as a whole and to individual parts of it. So if Network Rail is meeting outputs at a network-wide level, but is failing on a significant part of the network, we would be able to investigate the reasons for this and shall consider enforcement action.

110. In monitoring and enforcing compliance with Network Rail's network licence, we shall examine Network Rail's efficient operation, maintenance, renewal and development

of the network, and review whether Network Rail is meeting the reasonable requirements of its customers and funders.

111. We consider that reasonable requirements include (but are not limited to):

- outputs established in a periodic review;
- disaggregated outputs established as a result of the transfer of responsibility for funding infrastructure in Scotland to Scottish Ministers;
- firm commitments (as opposed to aspirations) included in Network Rail's delivery plan (including route plans); and
- effective communication with customers and funders about the delivery of these outputs and commitments.

112. If Network Rail is failing to deliver an output which ORR determines is a reasonable requirement, ORR will go on to consider whether, in the circumstances of the case, Network Rail is fulfilling the general duty.

## Other operators

113. ORR's routine monitoring will focus on those conditions in GB operator licences (or in the SNRP) not being monitored by the DfT. This will include, for example, monitoring to ensure that passenger train operators play their part in providing passenger information, advance timetable information and that all operators hold appropriate insurance cover against third party liabilities. Under European legislation, we also need to be satisfied that train operators are of good repute, comply with safety requirements and have the necessary financial resources to satisfy European licensing rules, without this becoming an undue barrier to enter the market.

114. DfT has various approval roles under the terms of conditions dealing with through ticketing, impartial retailing, the National Rail Enquiry Service and general liaison with Transport Focus. This reflects the synergies between those issues and franchising, fares policy and DfT's other statutory responsibilities. DfT is also responsible for routine monitoring of compliance with the arrangements it approves, many of which also appear in franchise agreements.

115. For these matters, consideration by ORR of enforcement action may take account of advice from the DfT. In addition, we have a duty under section 68 of the Act to investigate any complaints about alleged or potential licence breaches, and we shall also take action on our own initiative where it is appropriate to protect the interests of passengers, freight customers, and funders.

## The A&M Regulations

116. The enforcement powers associated with the A&M Regulations relate to action which can be taken when the relevant operator has not, or is not complying with decisions, directions or notices imposed by the ORR. Further detail of when this might apply can be found in Annex B.

# Chapter 4 Penalties Statement

## Summary

This Chapter sets out our penalties statement as required under the Act and the A&M Regulations. It provides detail of how we decide whether to impose penalties and determine their amount.

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117. In **GB** section 57B of the Act, and in **NI**, regulation 39 of the **NI A&M Regulations**, requires ORR to “prepare and publish a statement of policy with respect to the imposition of penalties and the determination of their amount”. We are also obliged to undertake appropriate consultation in preparing the statement. We include the penalties statement in our published economic enforcement policy document.
118. This penalties statement relates to enforcement under the Act and the A&M Regulations. It covers both the levying of a penalty and the inclusion of a reasonable sum (under section 55(7A)) in an individual enforcement order<sup>25</sup>. References to a penalty should be understood to apply equally to a reasonable sum, where the context permits.
119. We must have regard to the statement when deciding whether to impose penalties and in determining their amount. Penalties in relation to licence breaches and the A&M Regulations are paid to the Secretary of State.

## The framework for imposing a penalty

120. If we are satisfied that a **GB** licence holder or relevant operator is breaching, or has breached a licence condition, SNRP, enforcement order or a decision, direction or notice issued by us under the A&M Regulations, then we have legal powers to impose a penalty. This means that we can impose a penalty for a past or current breach, irrespective of whether or not we have made an enforcement order (in the case of a licence breach). The maximum penalty ORR may impose is 10% of the licensee’s or relevant operator’s turnover<sup>26</sup>.
121. Our primary objective in setting a penalty is to change the future behaviour of an offender and to deter non-compliance with its obligations (both specifically and in general). We also aim to incentivise others subject to similar obligations to comply with them.

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<sup>25</sup> Reasonable sums are not applicable to decisions, directions or notices issued under the A&M Regulations.

<sup>26</sup> In **NI** such fines are payable to the **Department for Infrastructure**.



## Is a penalty appropriate?

122. In deciding whether a penalty is appropriate we shall take full account of the particular facts and circumstances of the contravention, including any representations and objections made to us, and shall act in a manner best calculated to fulfil the duties placed upon us by **our duties**. We shall take account of the six penalty principles<sup>27</sup>. An offer of reparations might suggest that a penalty is not appropriate.
123. We regard penalties as an important element in our regulatory toolkit; acting as a reputational incentive to the licence holder or relevant operator. Whilst imposing a penalty is likely to be a ‘last resort’, our primary objective in setting a penalty is to change the future behaviour of an offender so as to deter non-compliance with its obligations (both specifically and in general). We also aim to incentivise others subject to similar obligations to comply with them.
124. The legal status of the licence holder or relevant operator (for example, if it is a publicly listed company, an unlisted company or a company limited by guarantee) and any dependency on public funds is a factor we may take into account when considering whether to impose a financial penalty having regard to our Section 4 duties **and when considering enforcement of decisions, directions and notices issues in NI, we shall act in accordance with Regulation 31 of the NI A&M Regulations**.
125. While recognising that the use of enforcement tools such as reparations and orders can often be highly effective, the particular circumstances of a case might nonetheless mean that a financial penalty is the most suitable sanction.

## Calculating the amount of a penalty

126. When assessing the amount of a penalty ORR is likely to consider a number of factors falling into three categories:
- proportionality;
  - adjustments for mitigating and aggravating factors; and
  - financing duty.

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<sup>27</sup> See the Macrory report - ‘Regulatory Justice: Making Sanctions Effective’ and the related five principles of good regulation- 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, which can include punishment and the public stigma that should be associated with a criminal conviction; (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.

## Proportionality

127. A penalty should be proportionate to the seriousness of the breach. In some cases, this may lead to no penalty being required. In other cases the penalty may be substantial.
128. We will take into account that levying a financial penalty has both a financial effect and a reputational effect, and that both of these are capable of being powerful.
129. In setting a penalty, our starting point will normally be the seriousness of the breach. In considering seriousness, we will look at:
- The actual and potential harm caused to third parties including passengers, freight customers and to the public interest purpose of the obligation (including to the effectiveness of the regulatory regime). In some instances we may calculate the likely financial value of the harm caused to enable us to inform a better view of the scale. For example, in considering previous performance related breaches by Network Rail we estimated total passenger/customer delay caused, and multiplied by a value of time for those impacted to produce a financial value. We may adopt a similar approach in future cases if we believe this will be helpful to our decision making;
  - The culpability of the offender, including whether the licence holder or relevant operator has intentionally acted either negligently or recklessly; and
  - The extent to which the licence holder or relevant operator has cooperated with ORR during the investigation.

## Levels of Seriousness

130. We distinguish five levels of seriousness of breaches. These are: technical or de minimis, less serious, moderately serious, serious and very serious. The aim of this is to help us determine the starting amount for a penalty to which the other factors in this statement might then lead us to make adjustments.
131. If a penalty is to be proposed the levels and financial ranges for a breach are given below. These are based on previous actions taken and judgements of seriousness.
132. As we consider the particular facts and circumstances of each individual case we may consider it appropriate to deviate from this. In the chart below, column three sets out ranges for the level of penalty. Column two gives examples of the sorts of breaches that might fall into each level.
133. The highest range given is limited only by the legal maximum of 10% of turnover. We recognise licence holders or relevant operators will have different levels of turnover. The table below provides examples of penalty levels under each seriousness

category. This helps ensure that any such penalty is proportionate to each licence holder or relevant operator and reflective of the seriousness of the breach in each case.

1. Seriousness of breach	2. Examples	3. Scale of penalty
<b>Technical or de minimis</b>	A breach falling into this category would probably involve no, or very little, culpability on the licence holder's or relevant operator's part, or cause no harm or potential harm to third parties. No penalty would normally be levied for a breach of this type.	Usually no penalty
<b>Less serious</b>	<p>This type of breach would be less serious because it may relate to a relatively small amount of harm or isolated to a small geographical area. It would not be technical or de minimis because it has more serious implications for third parties.</p> <p>A financial penalty in this range would normally be at the low end of the scale.</p>	Up to £2 million
<b>Moderately serious</b>	This type of breach would be moderately serious because it may result in more serious implications; actual or potential harm for third parties.	Up to £10 million
<b>Serious</b>	There is evidence of systemic failings and results in serious harm or potential harm to third parties.	Up to £25 million
<b>Very Serious</b>	A breach falling into this category might involve significant harm, or the risk of significant harm, being caused to a wide range of third parties and/or greater culpability on the part of the licence holder, for example, where it was deliberately misleading.	Up to 10% of a licence holders turnover

134. We will take account of the principle that where the licence holder or relevant operator has received any benefit from the breach (which may not always be the case). The starting penalty should be not less than that benefit.

## The A&M Regulations

135. While the table above provides some general guidance on the relationship between seriousness of a breach and level of penalty, this guidance is likely to be less relevant to a breach of a decision, direction or notice made under the A&M Regulations, so we may depart from it if we feel it is not appropriate in a particular case.

## Adjustments for mitigating or aggravating factors

136. We will adjust the starting penalty up or down to take account of relevant mitigating and aggravating factors, according to the particular facts and circumstances of each case. The appropriate adjustment will be a matter of judgement, taking previous cases into account for consistency. We will apply an overall adjustment reflecting the net effect of all the relevant mitigating and aggravating factors.

137. ORR may consider the following factors as mitigating or aggravating factors as appropriate:

- any steps which have been taken to rectify the breach, including whether these were initiated proactively by the licence holder or relevant operator or in response to ORR's actions;
- any steps which have been taken to minimise the risk of the breach recurring or the absence of internal procedures intended to prevent infringements occurring and the extent to which organisational weakness may result in repeated infringements of the same type by the same licence holder or relevant operator;
- any reparations offered in accordance with our criteria for reparations and not already taken into account as a means of determining whether or not a penalty is appropriate and/or any other actions that do not meet the criteria for reparations but which have been or will be taken by the licence holder or relevant operator in order to make worthwhile restoration to those who have suffered the consequences of the contravention;
- the extent of involvement of directors or senior management in the action or inaction which caused the breach or their lack of appropriate involvement in action to remedy the breach;
- repeated or continuing infringement of this or other obligations, particularly if subsequent breaches occur after the licence holder or relevant operator becomes aware of, or is made aware of, the initial infringement; and
- co-operation with ORR's investigation or evidence that the licence holder or relevant operator attempted to conceal the infringement from ORR.

138. Other mitigating or aggravating factors may arise depending on the particular facts and circumstances of a specific case.
139. The net effect of all mitigating and aggravating factors may be significant. Potentially, taken together these adjustments could reduce a penalty to zero, or increase it several fold, in appropriate cases. A penalty on a licence holder or relevant operator may therefore be adjusted to be outside the range which determined our starting point.

## Financing duty

140. When setting a penalty we will consider all our duties under section 4 of the Act **and Regulation 31 of the NI A&M Regulations**. In most cases, the duty to promote improvements in railway service performance and the duty to promote efficiency and economy on the part of persons providing railway services are particularly relevant. Other duties may be relevant in particular cases.
141. For holders of network licences (e.g. Network Rail), ORR has a duty to act in a manner which we consider will not render it unduly difficult to finance those activities relevant to our functions. There is also a duty to have regard to the funds available to **both** the Secretary of State **and the Department in NI<sup>28</sup>**, which although applicable to any licence holder in theory, has particular relevance to Network Rail since its reclassification. Consideration of these duties does not mean that ORR will not impose a penalty – the duties have to be balanced against each other and where they point in different directions, ORR will decide on the weight to be afforded to each one. Other duties may also be relevant.

## Reaching a conclusion

142. Having considered, the factors listed above, ORR will determine an appropriate amount for a penalty. In doing so, we shall ensure that the amount determined does not exceed 10% of the turnover of the licence holder or relevant operator (as calculated in accordance with the turnover regulations) and that it is consistent with our duties in section 4 of the Act **and regulation 31 of the NI A&M Regulations**.
143. The imposition of a penalty is also subject to the procedural requirements set out in Annex C. These require us to consult on a proposed penalty and to take into account any representations that are made. Such representations may include offers of reparations.

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<sup>28</sup> Pursuant to Section 4 of the Act and Regulation 31 of the NI A&M Regulations.

## **Statutory enforcement action and senior management remuneration**

144. Taking enforcement action against any licence holder or relevant operator implies a serious failure of the organisation to comply with licence obligations or decisions, directions or notices issued under the A&M Regulations particularly when a penalty is involved (and/or an offer of reparations) is accepted. We would therefore expect that any enforcement action and/or any reparations we agree, to be taken into account by the offending licence holder or relevant operator when determining the performance of its senior management and therefore their remuneration.

# Chapter 5 Publication

## Summary

This Chapter sets out our approach to reviewing and publishing our enforcement policy and penalties statement.

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## Publication

145. We are required under the Act and under the A&M Regulations to publish a penalties statement.

## Revision of policy

146. We may, from time to time, revise this enforcement policy following appropriate consultation.

147. We **will carry out a review of this enforcement policy no later than two years after the date of publication** to ensure it remains fit for purpose for industry control period cycles.

## Annex A – ORR’s Statutory Duties

The Office of Rail and Road must discharge the statutory duties placed upon it by section 4 of the Railways Act 1993 (as amended by the Transport Act 2000 and the Railways Act 2005)<sup>29</sup> and Regulation 31(1) of the NI A&M Regulations. The relevant sections are provided below.

### Section 4 of the Railways Act 1993

(1) The Office of Rail Regulation shall have a duty to exercise the functions assigned or transferred to it under or by virtue of this Part or the Railways Act 2005 that are not safety functions in the manner which it considers best calculated —

(zb) to promote improvements in railway service performance;

(a) otherwise to protect the interests of users of railway services;

(b) to promote the use of the railway network in Great Britain for the carriage of passengers and goods, and the development of that railway network, to the greatest extent that [it] considers economically practicable;

(ba) to contribute to the development of an integrated system of transport of passengers and goods;

(bb) to contribute to the achievement of sustainable development;

(c) to promote efficiency and economy on the part of persons providing railway services;

(d) to promote competition in the provision of railway services for the benefit of users of railway services;

(e) to promote measures designed to facilitate the making by passengers of journeys which involve use of the services of more than one passenger service operator;

(f) to impose on the operators of railway services the minimum restrictions which are consistent with the performance of its functions under this Part or the Railways Act 2005;

(g) to enable persons providing railway services to plan the future of their businesses with a reasonable degree of assurance;

(2) Without prejudice to the generality of subsection (1)(a) above, the Office of Rail Regulation shall have a duty, in particular, to exercise the functions assigned or transferred to it under or by virtue of this Part or the Railways Act 2005 that are not safety functions in the manner which it considers is best calculated to protect -

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<sup>29</sup> ORR also has an overriding duty in section 21 of the Channel Tunnel Rail Link Act 1996 to exercise its regulatory functions in such a manner as not to impede the performance of any development agreement.



(a) the interests of users and potential users of services for the carriage of passengers by railway provided by a private sector operator otherwise than under a franchise agreement, in respect of -

- (i) the prices charged for travel by means of those services, and
- (ii) the quality of the service provided, and

(b) the interests of persons providing services for the carriage of passengers or goods by railway in their use of any railway facilities which are for the time being vested in a private sector operator, in respect of—

- (i) the prices charged for such use; and
- (ii) the quality of the service provided.

(3) The Office of Rail Regulation shall be under a duty in exercising the functions assigned or transferred to it under or by virtue of this Part or the Railways Act 2005 that are not safety functions—

(a) to take into account the need to protect all persons from dangers arising from the operation of railways; and

(b) to have regard to the effect on the environment of activities connected with the provision of railway services.

(4) [... ]

[ Sections 3A, 3B and 4 relate to the Secretary of State and the Scottish Ministers ]

(5) The Office of Rail Regulation shall also be under a duty in exercising the functions assigned or transferred to it under this Part or the Railways Act 2005 that are not safety functions—

(a) to have regard to any general guidance given to it by the Secretary of State about railway services or other matters relating to railways;

(aa) to have regard to any general guidance given to it by the Scottish Ministers about railway services wholly or partly in Scotland or about other matters in or as regards Scotland that relate to railways;

(ab) in having regard to any guidance falling within paragraph (aa), to give what appears to it to be appropriate weight to the extent (if any) to which the guidance relates to matters in respect of which expenditure is to be or has been incurred by the Scottish Ministers;

(b) to act in a manner which it considers will not render it unduly difficult for persons who are holders of network licences to finance any activities or proposed activities of theirs in relation to which the Office of Rail Regulation has functions under or by virtue of this Part or that Act

(whether or not the activities in question are, or are to be, carried on by those persons in their capacity as holders of such licences);

(c) to have regard to the funds available to the Secretary of State for the purposes of his functions in relation to railways and railway services;

(ca) to have regard to any notified strategies and policies of the National Assembly for Wales, so far as they relate to Welsh services or to any other matter in or as regards Wales that concerns railways or railway services;

(cb) to have regard to the ability of the National Assembly for Wales to carry out the functions conferred or imposed on it by or under any enactment.

(d) to have regard to the ability of the Mayor of London<sup>30</sup>, and Transport for London to carry out the functions conferred or imposed on them by or under any enactment.

(5A) Before giving any guidance for the purposes of subsection (5)(a) above the Secretary of State must consult the National Assembly for Wales.

(5B) In exercising its safety functions, other than its functions as an enforcing authority for the purposes of the Health and Safety at Work etc Act 1974, the Office of Rail Regulation shall be under a duty to have regard to any general guidance given to it the Secretary of State.

(6) In performing its duty under subsection (1)(a) above so far as relating to services for the carriage of passengers by railway or to station services, the Office of Rail Regulation shall have regard, in particular, to the interests of persons who are disabled.

(7) Without prejudice to the generality of paragraph (e) of subsection (1) above, any arrangements for the issue and use of through tickets shall be regarded as a measure falling within that paragraph.

(7ZA) Where any general guidance is given to the Office of Rail Regulation for the purposes of subsection (5)(a) or (aa) or (5B)—

(a) it may be varied or revoked by the person giving it at any time; and

(b) the guidance, and any variation or revocation of the guidance, must be published by that person in such manner as he considers appropriate.

(7A) Subsections (1) to (6) above do not apply in relation to anything done by the Office of Rail Regulation in the exercise of functions assigned to it by section 67(3) below (“Competition Act functions”).

(7B) The Office of Rail Regulation may nevertheless, when exercising any Competition Act function, have regard to any matter in respect of which a duty is imposed by any of subsections (1) to (6) above, if it is a matter to which the Office of Fair Trading could have regard when exercising that function.

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<sup>30</sup> Deleted pursuant to section 59(6) – para 18(4) of Schedule 13 which provided for the deletion of LRT on the basis that it is no longer operational.

(8) [. . .]

(9) In this section—

“the environment” means all, or any, of the following media, namely, the air, water and land (and the medium of air includes the air within buildings and the air within other natural or man-made structures above or below ground);

“notified strategies and policies”, in relation to the National Assembly for Wales, means the strategies and policies of that Assembly that have been notified by that Assembly for the purpose of this section to the Office of Rail Regulation;

“the passenger transport market” means the market for the supply of services for the carriage of passengers, whether by railway or any other means of transport;

“railway service performance” includes, in particular, performance in securing each of the following in relation to railway services –

- (a) reliability (including punctuality);
- (b) the avoidance or mitigation of passenger overcrowding; and
- (c) that journey times are as short as possible;

“safety functions” means functions assigned or transferred to the Office of Rail Regulation-

- (a) under this Part;
- (b) under or by virtue of the Railways Act 2005; or
- (c) under or by virtue of the Health and Safety at Work etc Act 1974;

so far as they are being exercised for the railway safety purposes (within the meaning of Schedule 3 of the Railways Act 2005) or for purposes connected with those purposes.

## Regulation 31(1) of the NI A&M Regulations

31.— (1) The Office of Rail and Road is designated as the regulatory body for the purposes of these regulations and when carrying out its functions under these Regulations shall have a duty to act in a manner which is best calculated —

- (a) to promote improvements in railway service performance;
- (b) to protect the interests of users of railway services;
- (c) to promote the use of the railway network for the carriage of passengers and goods, and the development of that network, to the extent that it considers economically practicable;
- (d) to contribute to the development of an integrated system of transport of passengers and goods;
- (e) to promote efficiency and economy on the part of persons providing railway services;
- (f) to promote measures designed to facilitate the making, by passengers, of journeys which involve use of the services of more than one passenger service operator;
- (g) to take account of the need to protect all persons from dangers arising from the operation of railways;
- (h) to have regard to the effect on the environment of activities connected with the provision of railway services;
- (i) to have regard to any general guidance given to it, by the Department, about railway services or other matters relating to railways;
- (j) to have regard to the funds available to the Department for the purposes of its functions in relation to railways and railway services;
- (k) to have regard to the interests of persons who are disabled when performing its duties relating to the services for the carriage of passengers by railway or to station services; and
- (l) where any general guidance is given to the Office of Rail and Road for the purposes of subparagraph (i) above—
  - (i) it may be varied or revoked by the Department at any time; and
  - (ii) the guidance, and any variation or revocation of the guidance, must be published by the Department in such manner as it considers appropriate.

## Annex B – Overview of GB A&M Regulation 38 and NI A&M Regulation 38

Relevant legislation	What this requires	ORR's powers	Who may be affected
<b><u>A&amp;M Regulation 31</u></b> <b>'Regulatory Body'</b>	If negotiations between an applicant and infrastructure manager about infrastructure charges are likely to contravene the requirements of these Regulations, the ORR may issue a direction to the applicant or the infrastructure manager to ensure that no contravention arises or, to the extent that a contravention has arisen, that it ceases.	If the ORR is satisfied that the applicant or infrastructure manager has contravened, or is contravening the direction then the ORR may impose a penalty of such amount as is reasonable.	<ul style="list-style-type: none"> <li>• Applicants</li> <li>• Infrastructure managers</li> </ul>
<b><u>A&amp;M Regulation 32</u></b> <b>'Appeals to the Regulatory Body'</b>	An applicant has the right to appeal to the ORR if it believes that it has been unfairly treated, discriminated against or is in any other way aggrieved <sup>31</sup> .	If the ORR is satisfied that the decision made has been contravened, or is being contravened then the ORR may impose a penalty of such amount as is reasonable.	<ul style="list-style-type: none"> <li>• Applicants</li> <li>• Infrastructure managers</li> <li>• Allocation bodies</li> <li>• Charging bodies</li> <li>• Service providers</li> <li>• Railway undertakings</li> </ul>
<b><u>A&amp;M Regulation 33</u></b> <b>'Regulatory decisions concerning international passenger services'</b>	The ORR must determine on request whether the principle purpose of a service is to carry passengers between stations located in different member states.	If the ORR is satisfied that the determination made has been contravened, or is being contravened then the ORR may impose a penalty of such amount as is reasonable.	<ul style="list-style-type: none"> <li>• Infrastructure managers</li> <li>• Allocation bodies</li> <li>• Charging bodies</li> <li>• Service providers</li> <li>• A railway undertaking</li> </ul>

<sup>31</sup> Unless, in GB section 17 or 22A of the Act applies.

<p><b><u>A&amp;M Regulation 34</u></b> <b>‘Monitoring the rail services market’</b></p>	<p>The ORR must monitor the competitive situation in the rail services market. Where appropriate the ORR must provide a direction to correct discrimination against applicants; market distortion or undesirable developments in relation to the competitive situation in the rail services market.</p>	<p>If the ORR is satisfied that the direction issued has been contravened, or is being contravened then the ORR may impose a penalty of such amount as is reasonable.</p>	<ul style="list-style-type: none"> <li>• Infrastructure managers</li> <li>• Allocation bodies</li> <li>• Charging bodies</li> <li>• Service providers</li> <li>• A railway undertaking</li> </ul>
<p><b><u>Section 17 of the Act</u></b> <b>(Not applicable to relevant operators in NI)</b></p> <p><b>‘Access agreements: direction requiring facility owners to enter into contracts for the use of their railway facilities’</b></p>	<p>The ORR may issue a direction to a facility owner requiring him to enter into an access contract with an applicant.</p>	<p>If the ORR is satisfied that the direction issued has been contravened, or is being contravened then the ORR may impose a penalty of such amount as is reasonable.</p>	<ul style="list-style-type: none"> <li>• Facility owners</li> <li>• Applicants</li> </ul>
<p><b><u>Section 22A of the Act</u></b> <b>(Not applicable to relevant operators in NI)</b></p> <p><b>‘Directions to require amendments permitting more extensive use’</b></p>	<p>The ORR may issue a direction requiring parties to an access agreement to make amendments to allow more extensive use of the railway facility or network installation.</p>	<p>If the ORR is satisfied that the direction issued has been contravened, or is being contravened then the ORR may impose a penalty of such amount as is reasonable.</p>	<ul style="list-style-type: none"> <li>• Facility owners</li> <li>• Applicants</li> </ul>

**Section 80 of the Act**

**‘Duty of certain persons to furnish information to the Secretary of State, the Scottish Minister or the ORR on request’**

**&**

**Regulation 36 of the NI A&M Regulations**

**‘Duty of certain persons to furnish information to the Department or the ORR’**

The ORR can request information from infrastructure managers, allocation bodies, charging bodies, applicants, service providers and any other party.

Responses to the above requests for information must be received no less than 28 days. If the ORR does not receive information within this timeframe then it can issue a notice requiring the information to be provided.

If the ORR is satisfied that the notice issued has been contravened, or is being contravened then the ORR may impose a penalty of such amount as is reasonable.

- Infrastructure managers
- Allocation bodies
- Charging bodies
- Applicants
- Service providers
- Any other party

## Annex C – Procedural requirements for penalties

There are a number of procedural requirements that must be followed by ORR prior to the imposition of a penalty on a licence holder or relevant operator. These are set out in section 57C of the Act and in the A&M Regulations respectively.

In particular, before imposing a penalty on a relevant operator, ORR must give notice that it proposes to impose a penalty setting out, amongst other things, the amount and the grounds on which the penalty is being imposed. ORR is obliged to consider any representations or objections made to it. ORR may not modify a proposal to impose a penalty without the relevant operator'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 (specifically the giving of further notice and the consideration of any further representations or objections made).

ORR must then give a final notice stating that it has imposed the penalty on the relevant operator and its amount. In addition, it must set out the grounds on which the penalty is imposed and must specify the manner, the place and the date on which the penalty is to be paid.

A penalty must be imposed within the prescribed time limit. In GB a copy of the notice relating to the penalty must be served on the relevant operator within two years of the time of the breach.





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