



## **ORR's economic enforcement policy and penalties statement – Northern Ireland**

December 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 railway services in Northern Ireland.

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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 economic regulator for railway services in Northern Ireland.
2. The ORR's role in Northern Ireland was established through European Directive 2012/34/EU - the recast of the first Railway Package (the Recast). The Recast contains provisions on a number of areas of rail market regulation; these include charging, access, licensing, enforcement and network statements. The Recast also requires each member state to have a single regulatory body for the railway sector.
3. The Recast has been implemented in Northern Ireland through the Railways Infrastructure (Access, Management and Licensing of Railway Undertakings) (Northern Ireland) 2016 (the NI Regulations). The NI Regulations came into force on 23 January 2017<sup>1</sup>, from which date ORR has assumed a number of economic regulatory functions, including enforcement of certain regulations, for rail in Northern Ireland. We have produced a separate guidance document to help explain the meaning and implications of the provisions of the NI Regulations<sup>2</sup>.
4. Our role in Northern Ireland includes:
  - ensuring that the charges imposed by the infrastructure manager in Northern Ireland for the use of its railway infrastructure comply with the requirements of the NI Regulations;
  - monitoring the rail services markets, which we will do through reviewing the Northern Ireland infrastructure manager's annual network statement and ensuring it addresses any deficiencies we may identify;

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<sup>1</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)

<sup>2</sup> ORR's guidance on The Railways Infrastructure (Access Management and Licensing of Railway Undertakings) Regulations (Northern Ireland) 2016: [http://orr.gov.uk/\\_data/assets/pdf\\_file/0004/25933/northern-ireland-access-and-management-2016-regulations-guidance.pdf](http://orr.gov.uk/_data/assets/pdf_file/0004/25933/northern-ireland-access-and-management-2016-regulations-guidance.pdf)

- ensuring that there is accounting separation between the infrastructure manager and the railway undertaking, which is in accordance with the NI Regulations; and
  - acting as the appeal body for applicants who believe they have been unfairly treated, discriminated against, or are in any other way aggrieved or against a decision made by an infrastructure manager, service provider or railway undertaking, in relation to certain matters.
5. The ORR is not the safety regulator in Northern Ireland. Nor does the Recast give ORR a role in Northern Ireland in licensing, setting access charges, holding periodic reviews of access charges, setting outputs in respect of funding levels, monitoring the delivery of outputs or holding to account.

## Purpose of this policy

6. The purpose of this policy is to set out the ORR's enforcement policy as economic regulator for the railway in Northern Ireland. A statement of policy with respect to the imposition of penalties and determination of their amount is required by regulation 39 of the NI Regulations.
7. We recognise that the industry, its funders and wider stakeholders wish to understand how we shall use our powers, and our approach is therefore set out in the following chapters.
8. This policy is specific to our enforcement functions under the NI Regulations. We have a separate economic enforcement policy, which is applicable to licence holders and relevant operators in Great Britain<sup>3</sup>. There are also separate enforcement policies to help explain our functions under Health and Safety<sup>4</sup>, Competition<sup>5</sup> and Roads<sup>6</sup> in Great Britain.

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<sup>3</sup> ORR's economic enforcement policy and penalties statement (GB) - [http://orr.gov.uk/\\_data/assets/pdf\\_file/0018/4716/economic-enforcement-statement.pdf](http://orr.gov.uk/_data/assets/pdf_file/0018/4716/economic-enforcement-statement.pdf)

<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)

## Parties in scope of this policy

9. The NI Regulations came into force in January 2017. The legislative changes provide ORR with additional powers to enforce against non-compliance by a 'relevant operator' with a decision, direction or notice issued by us under the NI Regulations.
10. The section below aims to provide clarity of the parties that are in scope of this policy.

## Relevant Operators

11. One of our core statutory functions is to ensure applicants and railway undertakings are treated fairly as provided for by the NI Regulations.
12. The NI Regulations provide us with the power to impose a penalty on a 'relevant operator' who has breached or is breaching a decision, direction or notice issued by us under the NI Regulations.
13. The NI 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 NI Regulations; or
  - ii) a person who has been served with a notice under regulation 36.
14. To help put this into context we provide an overview of each of the above regulations in Annex A and set out below key definitions of the parties that are deemed to be a relevant operator.
15. 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.
16. These definitions are defined in the NI Regulations as follows<sup>7</sup>:

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<sup>7</sup> See regulation 2 of the NI Regulations.

17. **‘infrastructure manager’:**

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

18. In practice, this means that NIR Networks Limited falls within the definition.

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

20. **‘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
- c. or which manages a service facility used for this supply, whether or not that body or undertaking is also an infrastructure manager.

21. In practice, this means that NIR Networks Limited falls within the definition.

22. It is possible for an infrastructure manager to also be a service provider for the purposes of the NI 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.

23. **‘railway undertaking’** is:

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

24. In practice, this means that NIR Operations Limited and Iarnród Éireann could fall within the definition.

25. **‘applicant’** is defined in the NI 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 1370/2007(a), and shippers, freight forwarders and combined transport operators, with a public service or commercial interest in procuring infrastructure capacity.*

26. While certain provisions in the NI 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 Regulations are intended to apply more broadly, the term ‘applicant’ is used.

27. There is currently no freight operating on the Northern Irish rail network, therefore in practice only NIR Operations Limited and Iarnród Éireann could fall within this definition.
28. Where a party that is not a railway undertaking is considering whether the NI 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.
29. ‘**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 Regulations.
30. ‘**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 Regulations.
31. There are currently no allocation or charging bodies in Northern Ireland.

## Purpose of enforcement

32. The railway is a public service operated in both the public and private sectors. In performing our functions under the NI Regulations, we act in accordance with our duties which are designed to protect the interests of users of the network.
33. ORR’s general approach to economic enforcement is to use our powers, where appropriate, to ensure that relevant operators comply with the decisions, directions and notices issued by ORR under the NI Regulations and so work in the public interest.
34. A statement of policy to confirm the imposition of penalties and the determination of their amount is required by regulation 39 of the NI Regulations. We choose to publish both our policy and a penalties statement as a single document. This document explains our policy for enforcing compliance with decisions, directions and notices issued by us under the NI Regulations.

# Chapter 1 Enforcement approach and principles

## Summary

This chapter sets out our enforcement approach and principles in relation to rail services in Northern Ireland.

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### Enforcement approach

35. The purpose of enforcement is to ensure delivery and secure compliance with public interest obligations.
36. 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.
37. Our enforcement objectives are to use our enforcement powers, where appropriate, to ensure that the industry works in the public interest.

### Enforcement under the NI Regulations

38. We have powers to enforce compliance with decisions, directions and notices issued by ORR under the NI Regulations. We shall use our powers firmly but fairly and in a timely manner.
39. 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. We will consider if appropriate enforcement action is required where it is in the public interest and in accordance with the relevant legislation.

### Applying our principles of enforcement

40. In considering enforcement of a decision, direction or a notice issued under the NI Regulations we shall act in accordance with those Regulations. The NI Regulations require us to act in accordance with regulation 31 (as set out in Annex B) and

balance a number of public interest duties. Our approach in all cases is informed by best regulatory practice and the following principles set out below.

## Proportionality

41. While obligations to comply with decisions, directions and notices issued under the NI Regulations are absolute; we shall apply the principle of proportionality to enforcement.
42. Methods of investigating potential breaches could include analysis of regular reports and industry information, feedback or complaints from industry stakeholders, and regular discussions with stakeholders. Where there are potential areas for concern, we shall consider what action is being taken by the relevant operator to resolve them and whether any action by ORR is required.
43. 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:
  - a. the significance of the failure, including whether it is a one-off failure or part of a systemic or sustained failure;
  - b. the extent to which the relevant operator has a robust, adequately resourced plan to achieve compliance within a reasonable period of time;
  - c. whether enforcement action would encourage greater effort on the part of relevant operator to remedy the potential breach; and
  - d. any persistent non-compliance.

## Targeting

44. We shall focus our investigation of potential breaches on those aspects of compliance which are most important for passengers and funders and where non-compliance would cause most harm. We shall ensure that our approach recognises the urgency of the case.
45. ORR's policy is to focus on using its regulatory powers to resolve systemic issues that are not dealt with effectively in contractual relationships. 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.
46. ORR will give priority to enforcing obligations where there is a detrimental effect on passengers, funders and other stakeholders.

47. Subject to the specific requirements of the determination, direction or notice at issue, we shall normally adopt the above approach in considering whether to take enforcement action.

## Consistency

48. 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.
49. 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

50. 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.
51. We recognise that the industry we regulate, its funders, and passengers 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:
- a. we shall always explain why we are concerned, whether we are taking formal action, and the next steps; and
  - b. 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

52. Regulators are accountable to the public for their actions through Parliament, Northern Irish 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.
53. 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 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 relevant operator aggrieved by a penalty imposed under the NI Regulations can also appeal to the court<sup>8</sup>.

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<sup>8</sup> Pursuant to regulation 42 of the NI Regulations.

# Chapter 2 Enforcement Action

## Summary

This Chapter explains the enforcement powers available to ORR under the NI Regulations.

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### Regulatory tools

54. We have a range of regulatory tools including reputational incentives to hold relevant operators to account; applying our influence, intervening to highlight and address issues before formal action is necessary, for example through activities such as informal and formal review meetings, investigation of complaints; data analysis and industry and government engagement.

### Regulation 31 duties

55. 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 regulation 31 of the NI Regulations.

### When can we apply our enforcement powers?

56. The enforcement powers associated with the NI 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 ORR.

### Penalties

57. In respect of breaches of decisions, directions or notices issued under the NI 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.
58. The maximum penalty ORR may impose is 10% of the relevant operator's turnover.

### Reparations

59. A financial penalty as a sanction and an incentive for the relevant operator to return to compliance is likely to be considered most appropriate, however there may be instances where a reparatory offer could be considered.
60. An offer of reparations could be considered as part of the enforcement process, if a relevant operator has acknowledged its failings. We prefer 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.

61. An offer of reparations will not necessarily be accepted by ORR. We expect the 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.
62. 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 relevant operator to ensure the offer complies with the following:
  - i. It is genuinely additional (for example, to the commitments already made to us, funders, operators etc.). In order to confirm that reparations are not already part of an existing commitment ORR will consult the relevant parties;
  - ii. It is 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;
  - iii. It is deliverable, the relevant operator needs to set out clearly how it proposes to deliver the reparations proposed; and
  - iv. It provides value for money. The relevant operator needs to show that the offer is value for money and has regard to ORR's regulation 31 duties. Value for money in this context means the benefits of the reparations exceeds the costs using a standard cost/benefit methodology.
63. 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.
64. We will need to consider the impact of the non-delivery of reparations on the industry and passengers and how we can mitigate that risk.
65. We would also closely monitor the delivery of reparations and look to take remedial action for non-compliance. Monitoring arrangements and repercussions of non-compliance will be set out to the relevant operator where an offer of reparations is accepted. Failure to deliver reparations will be treated very seriously by ORR.
66. A 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.

# Chapter 3 Penalties Statement

## Summary

This Chapter sets out our penalties statement. It provides detail of how we decide whether to impose penalties and determine their amount.

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67. In Northern Ireland regulation 39 of the NI 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.
68. We must have regard to this statement when deciding whether to impose penalties and in determining their amount. Penalties in relation to the NI Regulations are paid to the Department for Infrastructure in Northern Ireland.

## The framework for imposing a penalty

69. If we are satisfied that a relevant operator is breaching, or has breached a decision, direction or notice issued by us under the NI Regulations, then we have legal powers to impose a penalty. This means that we can impose a penalty for a past or current breach. The maximum penalty ORR may impose is 10% of the relevant operator's turnover.

## Deciding whether a penalty is appropriate

70. 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 regulation 31(1) of the NI Regulations. We shall also take account of the six penalty principles<sup>9</sup>.
71. We regard penalties as an important element in our regulatory toolkit; acting as a reputational incentive to the 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

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<sup>9</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.

specifically and in general). We also aim to incentivise others subject to similar obligations to comply with them.

72. The legal status of the 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 duties as set out in regulation 31(1) of the NI Regulations.

## Calculating the amount of a penalty

73. When assessing the amount of a penalty ORR is likely to consider a number of factors falling into two categories:
- a) proportionality; and
  - b) adjustments for mitigating and aggravating factors.

## Proportionality

74. 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.
75. 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.
76. In setting a penalty, our starting point will normally be the seriousness of the breach. In considering seriousness, we will look at:
- a) The actual and potential harm caused to third parties. 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;
  - b) The culpability of the offender, including whether the relevant operator has intentionally acted either negligently or recklessly; and
  - c) The extent to which the relevant operator has cooperated with ORR during the investigation.

## Levels of Seriousness

77. 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.

78. 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.
79. 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.
80. The highest range given is limited only by the legal maximum of 10% of turnover. We recognise that 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 relevant operator and reflective of the seriousness of the breach in each case.

Seriousness of breach	Examples	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 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>	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.  A financial penalty in this range would normally be at the low end of the scale.	Up to 0.4% of turnover
<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.	Between 0.4% and 2% of turnover
<b>Serious</b>	There is evidence of systemic failings and results in serious harm or potential harm to third parties.	Between 2% and 5% of turnover
<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 relevant operator, for example, where it was deliberately misleading.	5% up to 10% of turnover

81. We will take account of the principle that where the 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.
82. While the table above provides some general guidance on the relationship between seriousness of a breach and level of penalty, it provides a broad overview of the different levels of penalty up to the maximum, which is 10% of a relevant operator's turnover. This guidance table may be less relevant for certain breaches of a decision, direction or notice made under the NI regulations, we therefore reserve the right to depart from it if we feel it is not appropriate in a particular case.

## Adjustments for mitigating or aggravating factors

83. 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.
84. ORR may consider the following factors as mitigating or aggravating factors as appropriate:
  - a) any steps taken to rectify the breach, including whether these were initiated proactively by the relevant operator or in response to ORR's actions;
  - b) 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 relevant operator;
  - c) 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 relevant operator to make worthwhile restoration to those who have suffered the consequences of the contravention;
  - d) 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;
  - e) repeated or continuing infringement of this or other obligations, particularly if subsequent breaches occur after the relevant operator becomes aware of, or is made aware of, the initial infringement; and

- f) co-operation with ORR's investigation or evidence that the relevant operator attempted to conceal the infringement from ORR.

- 85. Other mitigating or aggravating factors may arise depending on the particular facts and circumstances of a specific case.
- 86. 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 levied on a relevant operator may therefore be adjusted to be outside the range which determined our starting point.

## Reaching a conclusion

- 87. When setting a penalty we must consider all our duties under regulation 31(1) of the NI 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.
- 88. 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 relevant operator (as calculated in accordance with a direction made by the Department of Infrastructure, Northern Ireland) and that it is consistent with our duties in regulation 31(1) of the NI Regulations.
- 89. 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.

## Statutory enforcement action and senior management remuneration

- 90. Taking enforcement action against any relevant operator implies a serious failure of the organisation to comply with a decision, direction or notice issued under the NI Regulations particularly when a penalty is involved and accepted. We would therefore expect that any enforcement action and/or any reparations we agree to be taken into account by the offending relevant operator when determining the performance of its senior management and therefore their remuneration.

# Chapter 4 Publication

## Summary

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

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## Publication

91. We are required under the NI Regulations to publish a statement of policy with respect to the imposition of penalties and the determination of their amount.

## Revision of policy

92. We may, from time to time, revise this enforcement policy following appropriate consultation.
93. 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.
94. Regulation 39 of the NI Regulations require ORR to consult with relevant parties whenever it alters or replaces the existing statement.

## Annex A – NI Regulation 38

Relevant legislation	What this requires	ORR's powers	Who may be affected
<b><u>NI 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>NI Regulation 32</u></b> <b>'Appeals to the Regulatory Body'</b>	Subject to paragraph 3 of regulation 32, 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. ORR is required to make a decision on any appeals it receives.	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>NI 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>
<b><u>NI Regulation 34</u></b> <b>'Monitoring the rail services market'</b>	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.	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.	<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>NI Regulation 36</u></b>  <b>‘Duty of certain persons to furnish information to the Department or the ORR on request’</b></p>	<p>The Department for Infrastructure, Northern Ireland and ORR can request information from infrastructure managers, allocation bodies, charging bodies, applicants, service providers and any other party.</p> <p>Any request for information must be complied within such time as may be specified on the request (being not less than 28 days from the making of the request).</p> <p>If a request for information is not complied with, the ORR may serve a notice on the person from whom the information was requested.</p>	<p>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.</p>	<ul style="list-style-type: none"> <li>• Infrastructure managers</li> <li>• Allocation bodies</li> <li>• Charging bodies</li> <li>• Applicants</li> <li>• Service providers</li> <li>• Any other party</li> </ul>
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## Annex B – ORR’s Statutory Duties

The Office of Rail and Road (ORR) must discharge the statutory duties placed upon it by regulation 31(1) of the NI Regulations.

### Regulation 31(1) of the NI 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<sup>10</sup>;
- (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;

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<sup>10</sup> The NI Regulations define “railway service performance” as 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.

(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 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 relevant operator. These are set out in regulation 40 of the NI Regulations.

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. The notice must also specify the period within which representation or objections to the proposed penalty may be made (regulation 40(e) states that this must not be less than 21 days from the date of the published notice).

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.



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