



## ORR's updated enforcement policy and penalty statement for Railway licences

The Office of Rail and Road recently updated its enforcement policy for railway licence holders during December 2015. The policy sets out the ORR's approach to economic regulation of compliance with all railway licences including those issued to train and freight operators as well as Network Rail. In addition, it includes ORR's penalty statement describing how ORR will calculate and impose fines (including 'reasonable' amounts to be paid in parallel to orders given to comply with a licence).

ORR has enforcement powers in four main areas:

- **Health and Safety**, including Her Majesty's Railway Inspectorate (HMRI) transferred from HSE to provide a more specialist railway focussed approach to safety compliance and to bring economic and safety regulation together
- **Competition abuses**, in connection with services relating to railways, under the Competition Act alongside the Competition and Market's Authority
- **Licence compliance in Railways**, largely under the Railways Act. This role is dominated by ORR's obligation to grant and regulate compliance by Network Rail with its network licence, however extends to anyone operating (regulated) light maintenance depots, stations, trains or railway infrastructure in Great Britain (ORR is also becoming the regulator in NI) for which an operator will require a licence
- **Highways**, following the recent incorporation (out of DfT) of Highways England as Highways Authority (in England) and the appointment (and renaming) of ORR as its economic monitoring body, with some (but not all) of the role and powers granted to it in respect of railways.

For each of these areas ORR has published an enforcement policy to provide clarity on the approach it will take to breaches. This article relates only to its Railway licence enforcement policy which has just been updated.

The ORR must exercise its functions as economic regulator of the railways according to the list of objectives at s4 of the Railways Act 1993. Essentially these are aimed at producing a long term, efficient and proportionate operation of the railway taking into account the needs of all stakeholders (including the need for predictability).

ORR is also expressly obliged by s68 of the Act to investigate "*any alleged or apprehended contravention of a condition of*

*a licence*" (however minor). ORR also seeks to comply with the principles of good regulation which include transparency, consistency and accountability. The policy confirms this extends to proportionality and targeting of aspects of compliance which customers care about or would cause customers most harm.

The enforcement policy states that ORR will prioritise its (discretionary) enforcement activities by assessing:

- the strategic significance of intervention – presumably this will be linked to the matters which ORR considers travellers most care about
- whether ORR is best placed to act. Where other regulators or bodies are better placed to act, ORR will consider whether to focus any resource on the issue or leave it to others e.g. competition matters to the CMA or DfT led matters
- likely impact of intervention. ORR will consider the level of harm, whether the issue is systematic or causing market distortion and whether intervention will have a future deterrent effect
- the cost of the intervention and whether it is proportionate
- risk of failure of intervention or of damage to ORR's reputation.

Essentially this should lead ORR to focusing its efforts on:

- fulfilling its duty to investigate any allegation of breach of a licence
- focusing resources on systemic issues or materially significant one-off issues. Of particular focus will be systemic issues which are not dealt with effectively through contractual relationships.

The enforcement policy also describes the escalation process ORR will follow in monitoring and reviewing issues, formal investigations and raising a case to answer and proposals for mitigation/reparations/recovery before seeking board decisions on the basis of evidenced reports on formal enforcement in the form of notices or enforcement orders.

Where ORR is looking at current issues and predicted future licence breaches it may consider enforcement orders are appropriate. Ultimately, particularly for publicly funded bodies such as Network Rail, these may be preferable to fines. Fines

however remain available and relevant to current and past breaches of licences. Fines will not be imposed in relation to anticipated future breach.

Where breaches are found, any proposed reparations (such as those recently approved for Network Rail in relation to failure to delivery its performance strategy targets in 2014-15 in relation to Southern Railways and Govia Thameslink Railway) will be assessed on whether the proposals are:

- genuinely additional
- appropriately targeted on the harm done and proportionate
- deliverable (convincing)
- value for money.

Failure to deliver agreed reparations may well be a licence breach in itself and ORR will take it extremely seriously in setting fines.

The enforcement policy also includes a Penalty Statement. This is ORR's description of how it will decide the amount of any fine and whether to impose it. It states that the ORR will set the amount of any fine by:

- starting with a figure from its table based upon seriousness – this divides licence breaches into:
  - Technical or de minimis – usually no penalty
  - Less Serious – up to **£2 million**
  - Moderately Serious – up to **£10 million**
  - Serious – up to **£25 million**.
- adjusting the base number for:
  - proportionality
  - mitigating and aggravating factors
  - financing duty. i.e. ORR's need to consider how the investment and operation of the railway is financed and whether a fine might adversely affect that (e.g. by preventing Network Rail spending funds on advantageous upgrades).

Where a licence holder has benefitted from the breach the fine should not be less than the overall benefit gained.

Overall, this marks a development in ORR's enforcement strategy in some areas and will fit with an overall picture of developments in ORR's role which are being considered as part of an overview of general industry structure. DfT is consulting on the strategic role of regulation on the railways at the same time as ORR's ambit is expanding into Highways where the needs of regulation are likely to be different. ORR's enforcement of the Network Licence held by Network Rail will also need to be seen in light of potential proposals around Network Rail's future structure expected in the Shaw Review.

**For further information, please contact Chris Jackson or Ian Tucker from our Rail team.**

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