

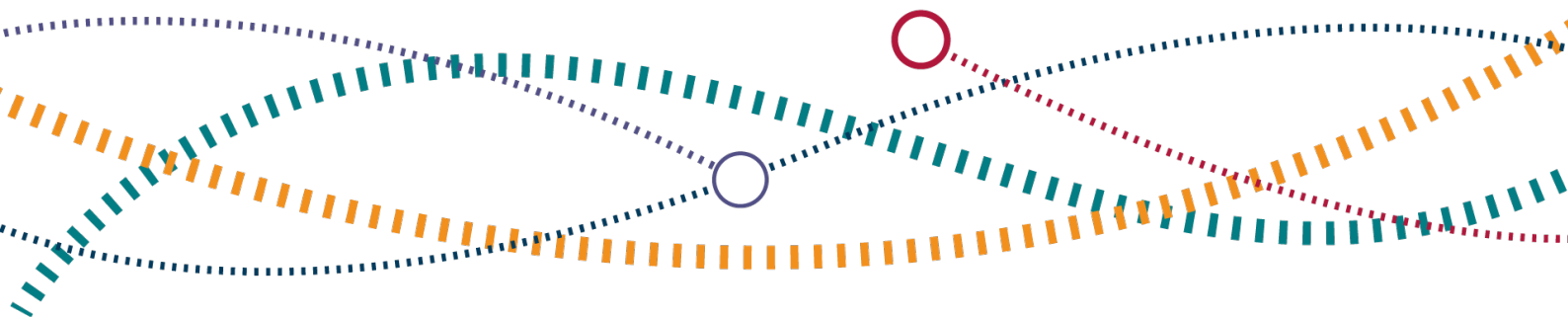


# PR23 final determination:

## Policy position - holding to account

31 October 2023

Version	Date	Notes
1.0	31 October 2023	Published following the PR23 final determination



# About this document

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This holding to account policy document is one of five policy positions documents of our final determination for the 2023 periodic review (PR23).

PR23 determines what the infrastructure manager for the national rail network, Network Rail, is expected to deliver with respect to its operation, support, maintenance and renewal (OSMR) of the network during control period 7 (CP7), which will run from 1 April 2024 to 31 March 2029, and how the available funding should be best used to support this.

This strongly influences:

- the service that passengers and freight customers receive and, together with taxpayers, ultimately pay for; and
- the charges that Network Rail’s passenger, freight and charter train operator customers pay to access its track and stations during CP7.

Our final determination sets out:

- our decisions on Network Rail’s outcome delivery and its planned expenditure to secure the condition and reliability of the network;
- changes to access charges and the incentives framework; and
- relevant policies on the financial framework, managing change and holding to account.

In addition to **this document**, we have also published as part of our final determination:

Document type	Details
<b>Summary of conclusions and overviews</b>	<p>Our decisions on what Network Rail will need to deliver and how funding should be allocated:</p> <ul style="list-style-type: none"><li>• Summary of conclusions and overview for England &amp; Wales</li><li>• Summary of conclusions and settlement for Scotland</li></ul>

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Document type	Details
<b>Consolidated decisions</b>	A summary of our final decisions across Great Britain
<b>Introduction</b>	An overview of PR23 and background to our final determination
<b>Settlement documents</b>	<p>Detailed final decisions for the System Operator and each of Network Rail’s regions in England &amp; Wales:</p> <ul style="list-style-type: none"><li>• Eastern region</li><li>• North West &amp; Central region</li><li>• Southern region</li><li>• Wales &amp; Western region</li></ul> <p>See our summary of conclusions and settlement document for detailed information for Scotland.</p>
<b>Supporting documents</b>	<p>Technical assessments of:</p> <ul style="list-style-type: none"><li>• Health and safety</li><li>• Outcomes</li><li>• Sustainable and efficient costs</li><li>• National Functions</li><li>• Other income</li></ul>
<b>Policy positions</b>	<p>How we intend to regulate Network Rail during CP7 in relation to:</p> <ul style="list-style-type: none"><li>• Financial framework</li><li>• Access charges</li><li>• Schedules 4 and 8 incentives regimes</li><li>• Managing change</li><li>• <b><u>Holding to account</u></b></li></ul> <p>With the exceptions of managing change and holding to account, our policy position documents include our assessment of stakeholder views on our proposals. Stakeholder views for managing change and holding to account are published in a separate document.</p>

Document type	Details
Impact assessments	A consolidated set of assessments of the impact of our final policies on access charges and contractual incentives on affected parties

## Next steps

We will now implement our final determination. Implementation is the process through which we amend operators' track and station access contracts to give effect to new access charges and incentives (such as Schedule 8 benchmarks and payment rates) determined through the periodic review. We expect to issue our review notices in December 2023 and, subject to Network Rail's acceptance, issue notices of agreement and review implementation notices in time for CP7 to commence from of 1 April 2024.

We expect Network Rail to publish a delivery plan for CP7 that is consistent with our final determination. We have published [a notice](#) alongside our final determination which sets out expectations for the scope and timing of the delivery plan.

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# 1. Introduction

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- 1.1 The purpose of this policy is to set out how we hold Network Rail to account against the [network licence](#) and the final determination of our 2023 Periodic Review (PR23). The policy outlines our approach to the monitoring and enforcement of these licence obligations.
- 1.2 This includes how we monitor performance to identify if we need to take action, and the actions we may take to secure improvement; early intervention, investigation and/or enforcement using our powers under the licence. This policy also contains a statement of the penalties we may impose as a result of enforcement action.
- 1.3 We take a proportionate approach to intervention and enforcement, which considers the nature, severity and urgency of the issue; the ability of customers and other stakeholders to influence and challenge Network Rail; and Network Rail's response to the issue.
- 1.4 We regulate the infrastructure manager, Network Rail, as one company with a single Board and Executive, regions, the System Operator (SO) and other relevant business units such as its National Functions.
- 1.5 Network Rail has other obligations that it must comply with, such as ensuring the network operates safely, passenger and freight train operating companies have fair access to the rail network and that the market is competitive and fair. Our approach to enforcing those obligations is set out in our [economic enforcement](#), [health and safety enforcement](#) and [competition enforcement](#) policies.

## 2. Our aim and approach

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### Our aim

2.1 Network Rail operates under its [network licence](#), which underpins our approach to holding Network Rail to account and to monitoring and assessing compliance. Network Rail has three core duties:

- **Network Management Duty:** securing the operation, maintenance, renewal and enhancement of the network in order to satisfy the reasonable requirements of its customers and funders in a timely, efficient and economical manner;
- **Passenger Information Duty:** providing appropriate, accurate and timely information to enable train operators to meet their obligations to passengers, so that passengers can plan and make their journeys with a reasonable degree of assurance; and
- **Stakeholder Engagement Duty:** engaging with all stakeholders in ways appropriate to their reasonable requirements ensuring views are taken into account in a timely manner that is inclusive, well-governed and transparent.

2.2 In holding Network Rail to account against its licence, we consider what the relevant licence conditions require. Some licence requirements, such as the overarching network management duty (Condition 1) require Network Rail to achieve their purpose 'to the greatest extent reasonably practicable, having regards to all relevant circumstances'. In practice, we have high expectations of Network Rail but we also consider the constraints Network Rail is operating under when holding it to account.

2.3 Our aim when monitoring and assessing Network Rail's compliance with its licence is to have a balanced set of incentives which reflect its structure and public sector status, whilst providing benefits for good performance and effective sanctions for underperformance.

2.4 Our approach to monitoring, escalation and enforcement aims to:

- **take prompt, direct action to address any poor performance where needed:** aiming to resolve concerns at the earliest stage possible and minimise the impact of poor performance on passengers and freight customers, or on Network Rail's wider efficiency and effectiveness. We have

a range of enforcement powers, which include the imposition of financial penalties which can be used if the issue is not addressed;

- **encourage competition between regions (and where applicable, the SO)** to be high-performing and deliver for passengers and freight customers, highlighting both good and poor performance at corporate and business unit level, as well as to incentivise innovation and sharing of best practice across the company; and
- **promote good stakeholder engagement by Network Rail** and encourage collaborative working with the wider industry.

## Our approach to holding Network Rail to account

2.5 Our approach is informed by principles of regulatory best practice, and is:

- **risk-based:** we focus our resources on the greatest risks;
- **targeted:** at specific concerns and the part(s) of Network Rail's business that we consider responsible – to ensure accountability and strong performance incentives at all levels within Network Rail;
- **proportionate:** our actions reflect the scale and nature of the problems and the likely costs and benefits to different parties of taking action; and
- **transparent:** we publish our view of Network Rail's performance; whether we have concerns and any action we might take.

2.6 Network Rail's network licence reflects the broad structure of its business along with the governance arrangements needed to support clear accountability. The network licence refers to routes, but reflecting [changes in Network Rail's organisational structure made in 2019](#), we focus our regulatory activity at the regional level. Network Rail's licence, and this policy, applies to Network Rail as a whole and covers all parts of its business – including regions, the SO and National Functions. Our holding to account activity may focus on specific parts of Network Rail but always within the context of Network Rail as one organisation with one licence.

2.7 In many cases Network Rail's customers and stakeholders (including its funders) are best placed to influence its priorities and challenge performance across its organisation. We expect Network Rail to ensure that there are effective conditions in place at both a national and local level to enable customers and stakeholders to

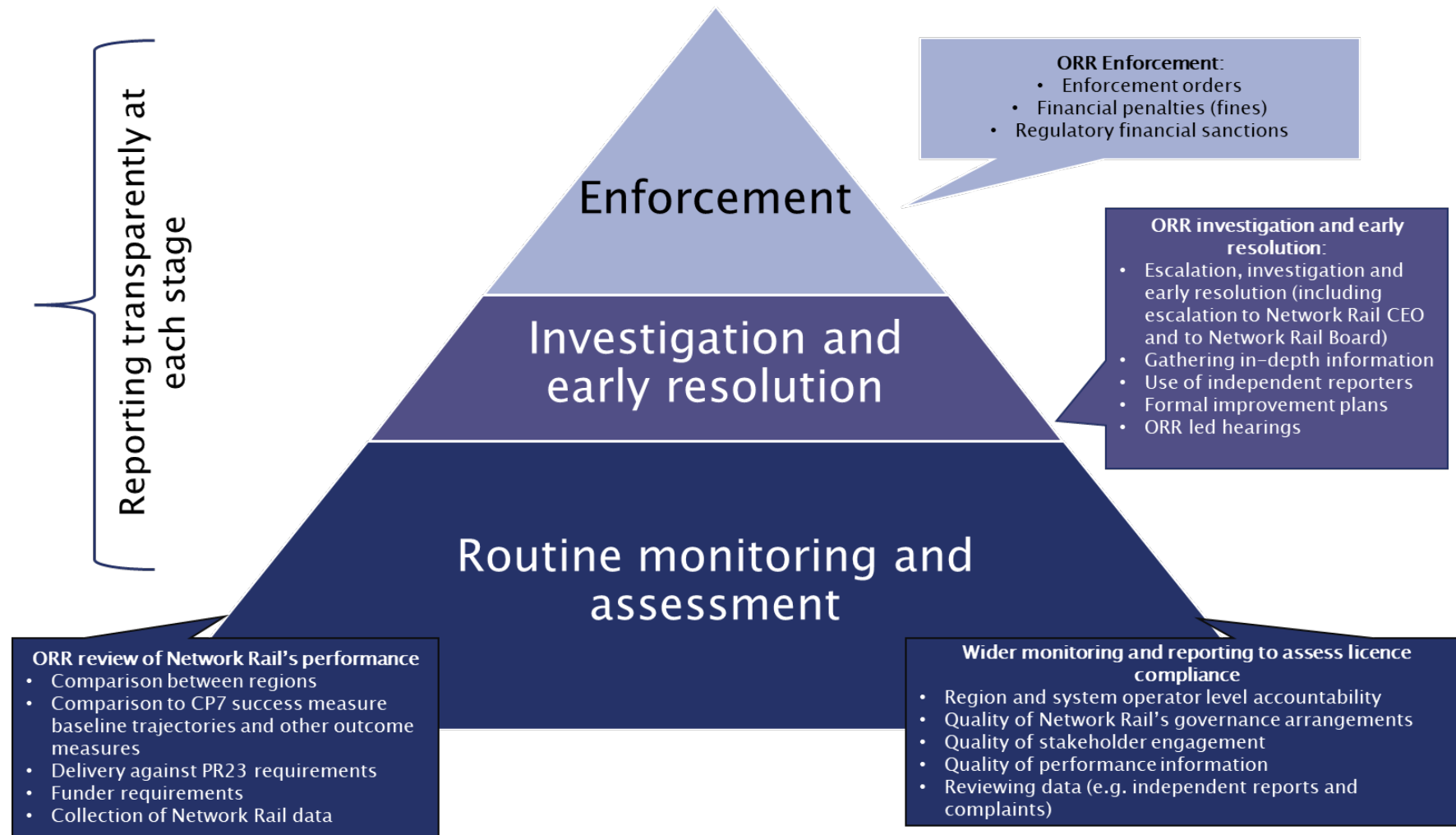


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engage on these matters effectively. This will form part of our judgements on how to prioritise our monitoring, assessment and interventions in areas of poor performance.

- 2.8 We have a tiered approach to holding Network Rail to account (illustrated in Figure 2.1 below). As part of our monitoring approach, we use a process to escalate our concerns. Should we identify an area of potential cause for concern via our routine monitoring and assessment, we adopt a risk-based, staged approach of review, investigation and escalating in a timely manner according to the urgency of the case.
- 2.9 We may choose to carry out investigations to analyse specific issues, such as reviewing the findings of independent regulatory reporters to secure early intervention and agreement with Network Rail to resolve an issue. Where necessary, we may launch more formal investigations to consider whether there has been a breach of a licence condition, which could ultimately lead to consideration of enforcement action.
- 2.10 While the stages are tiered in the diagram, we do not necessarily move through each stage in turn. For example, we may move immediately to a formal investigation without further monitoring or seeking early resolution first.
- 2.11 Our holding to account activity and governance works in tandem with our Managing Change policy. This policy requires Network Rail to report and potentially consult us in relation to changes which may reasonably be expected to impact what Network Rail should deliver in respect of its role in operating, maintaining and renewing the network, and to reflect any changes in Network Rail's organisational and accountability structure.

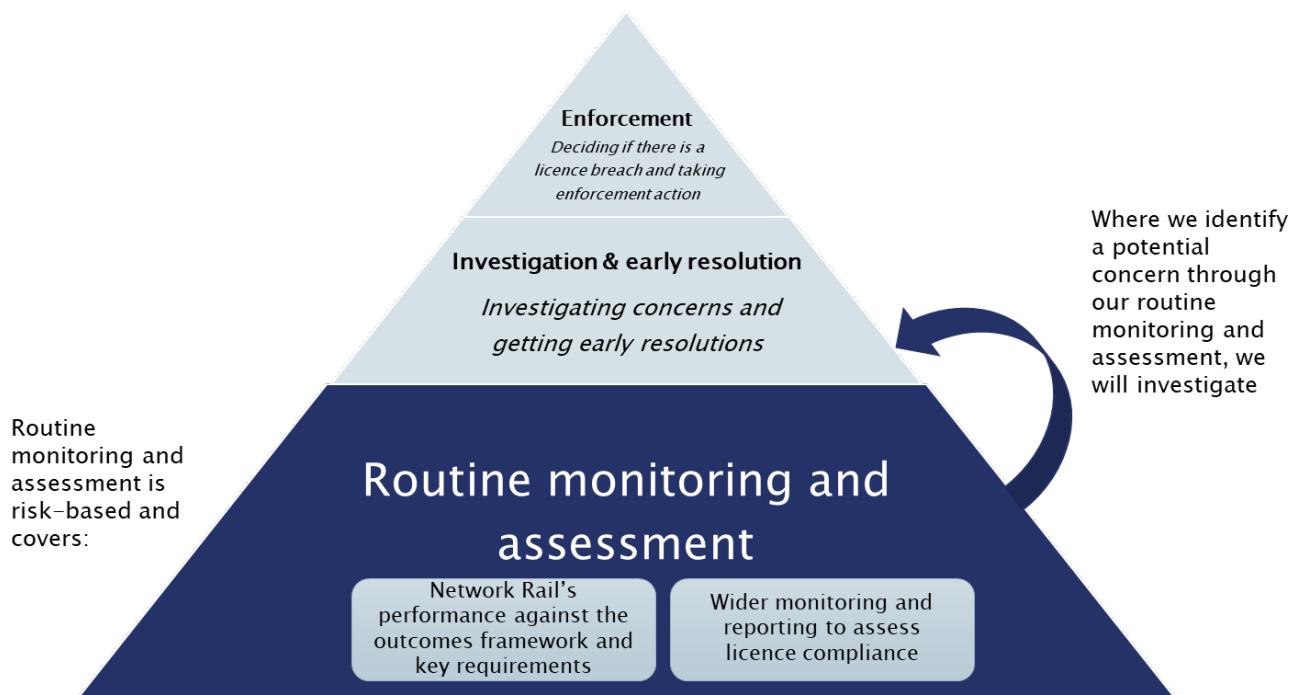
Figure 2.1 The three tiers of our holding to account approach



### 3. Routine monitoring and assessment

3.1 We routinely monitor how Network Rail performs, and is likely to perform, against its obligations and whether we need to take any action.

Figure 3.1 The routine monitoring and assessment phase



3.2 In control period 7 (CP7), which will run from 1 April 2024 to 31 March 2029, we will assess Network Rail’s performance against the delivery of the obligations set in the PR23 final determination, including the expectations specified in the outcomes framework, and other commitments Network Rail has made to its funders, stakeholders and customers.

#### Risk-based, targeted, monitoring and assessment

3.3 The scope and extent of our routine monitoring and assessment will vary over time and across different issues and/or parts of Network Rail’s business. In some areas we may adopt a more focused approach, and in others it may be more appropriate to monitor activity at a high level.

3.4 When deciding how we prioritise our monitoring of Network Rail, we consider factors such as:

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- **absolute performance** – against commitments to customers and funders;
- **relative performance** – against other business units or issues;
- **performance trends and trajectories** (including historical performance);
- **leading indicators** measuring likely future performance;
- **our confidence in the ability of customers and other stakeholders to influence and challenge** Network Rail regions and SO to address concerns; and
- **the strength of Network Rail’s governance and assurance** arrangements to help manage risk and ensure clear accountability.

## How we monitor and assess Network Rail’s performance

3.5 Figure 3.2 summarises what we routinely monitor and assess Network Rail’s performance against. We provide more detail on each in turn.

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

Performance against the outcomes framework	Wider monitoring and reporting to assess licence compliance
<ul style="list-style-type: none"><li>• Performance against CP7 success measure baseline trajectories</li><li>• Performance against supporting measure forecasts in Network Rail's delivery plan and performance of any other measures reasonably required by ORR</li></ul>	<ul style="list-style-type: none"><li>• Funder requirements (e.g. Scotland HLOS tracker)</li><li>• Qualitative information and compliance with other requirements</li><li>• Annual targets agreed with customers (e.g. joint performance plans)</li><li>• Quality of stakeholder engagement</li><li>• Other data from Network Rail (e.g. scorecards)</li><li>• Independent reporter and other reviews</li></ul>

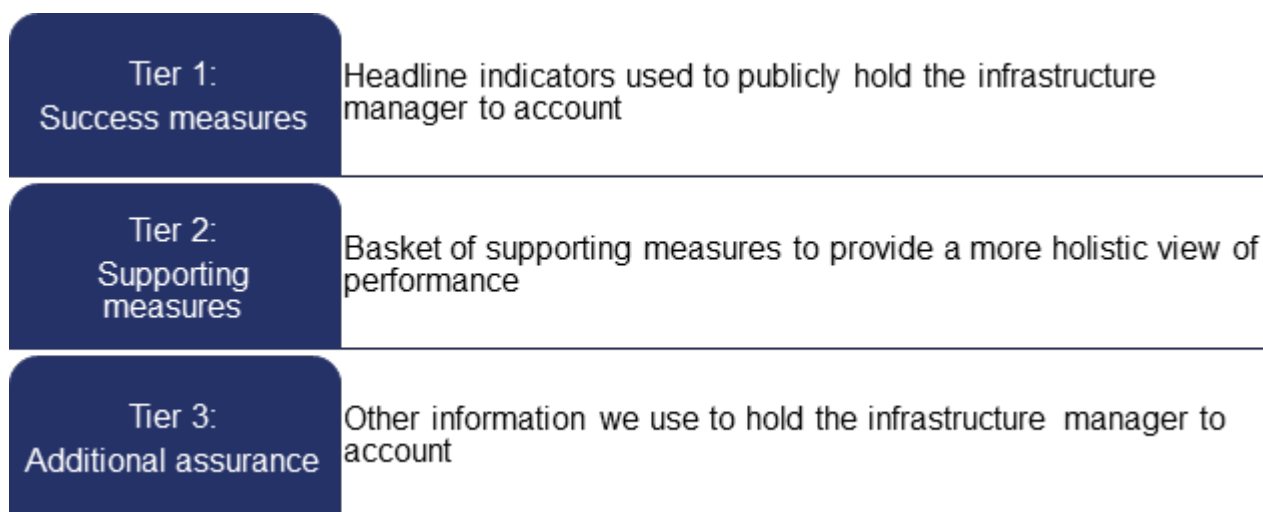
## Performance against the outcomes framework

3.6 As part of its compliance with its network licence, Network Rail must deliver the requirements we set out in the PR23 final determination and within individual settlements for each region and the SO. For CP7, this includes a tiered outcomes framework, shown in Figure 3.3.

3.7 The outcomes framework:

- (a) sets the key requirements that Network Rail must deliver for the funding it receives in CP7;
- (b) sets the measures and baseline trajectories that we use to publicly report Network Rail’s performance; and
- (c) defines a consistent set of measures to allow us to report comparisons between regions and other business functions.

Figure 3.3 The CP7 outcomes framework



- 3.8 The framework includes a small number of top-tier ‘success measures’ that are the headline indicators we use to publicly hold Network Rail to account. Our final determination sets out baseline trajectories for each success measure (typically by region for each year of CP7). These are quantified expectations of performance that Network Rail is required to deliver in line with the UK Government (for England & Wales) and the Scottish Government (for Scotland) High-Level Output Specifications (HLOSs) and the funding provided for CP7. When referring to performance, we mean overall performance in the wider sense of delivery across all outcome areas, not only train performance.
- 3.9 Our Managing Change policy details the process for making any changes to success measure baseline trajectories during the control period.
- 3.10 To provide a more holistic view of performance, we have specified a wider range of ‘supporting measures’ as the second tier of the framework, which Network Rail publicly reports against in CP7.
- 3.11 The third tier is ‘additional assurance’. This is any other information that we use to monitor Network Rail during the control period. We agree, and are able to update these requirements with Network Rail during the control period as appropriate to emerging issues.
- 3.12 We monitor Network Rail’s performance regularly against our outcomes framework for each region and SO (where appropriate) and report on them in our annual assessments. Our monitoring and reporting focus is on delivery against the baseline trajectories set for each success measure. We also monitor supporting

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measures against Network Rail's own delivery plan forecasts and the performance of other measures. We may choose to publicly report on the performance of supporting measures and other measures in our annual assessments.

- 3.13 Our use of the headline indicators does not preclude us from taking action for non-compliance in other areas of Network Rail's performance, such as whether it is operating in accordance with Condition 1 of its network licence.
- 3.14 In CP6, Network Rail and its operator customers used scorecards as a tool to report on performance, which we used to monitor and report on. Network Rail and operators may choose to continue to use scorecards as a management tool to report performance against the success measures and customer requirements in CP7. Whilst our focus is on the new outcomes framework, we continue to monitor scorecard performance as part of our wider monitoring.

### Agreed objectives and priorities

- 3.15 We expect Network Rail to work closely with train operators during CP7. This could include using mechanisms such as joint performance strategies. We expect Network Rail to agree and maintain these strategies in a timely manner, and to share them with ORR to support our monitoring.
- 3.16 Where regions or the SO have agreed and documented targets with their customers, we will consider this an important indicator of strong regional or SO accountability. In the event of poor performance, we expect to see evidence of an improvement plan agreed with Network Rail's customers.

### Non-exhaustive indicative criteria we may use when considering investigation

- 3.17 When assessing performance against success measure baseline trajectories, supporting measure forecasts and any other measures of performance/expectations, we need to make judgements as to when it is appropriate to conduct further investigation. Our non-exhaustive indicative criteria seek to provide transparency around the type of factors we take into account.
- 3.18 We expect fluctuations in performance around the baseline trajectories and will not automatically assess instances of performance worse than the trajectory as poor performance. We will take a range of information into account, including Network Rail's response to concerns we raise.
- 3.19 Should a decline be substantial or persist over a prolonged period, we will consider whether we need to increase or escalate our monitoring of an issue. The



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non-exhaustive indicative criteria help provide transparency around the types of factors we place weight on when considering whether to launch an investigation into whether Network Rail has breached its licence.

- 3.20 When deciding whether to investigate further, ORR will balance a range of factors, including known issues and what actions Network Rail has already put in place to address them. The criteria are therefore designed to be indicative and non-exhaustive and provide an indication of the types of factors that we may initially take into consideration. They are not intended to restrict or prevent us from using other sources of information in our monitoring and investigative phase, such as intelligence from stakeholders, information on significant incidents affecting passengers or freight customers and the quality of performance plans and strategies in place.
- 3.21 The criteria are also used when assessing performance of supporting measures in the outcomes framework or when monitoring Network Rail’s delivery to operators. We will make decisions on any regulatory action by taking a consistent approach using the below criteria.

### Non-exhaustive indicative criteria:

- **sustained decline in performance over time;**
- **an outlier in performance** (e.g. performance in one region is particularly poor relative to other regions);
- **exceptionally poor performance** (even if only for a short period of time); and/or
- **performance consistently below expectations** (e.g. below a success measure baseline trajectory).

### Wider reporting and monitoring to assess licence compliance

- 3.22 In addition to our outcomes framework, our monitoring of Network Rail’s performance takes account of a range of other information. This may include the areas explained below.



## Funder requirements

- 3.23 The respective UK and Scottish Government's HLOS set out what the governments expect to be delivered for the funding provided throughout the control period. Network Rail must do everything reasonably practicable to deliver the outcomes within the funding available and its plans and our determination for CP7 reflects these requirements.
- 3.24 We monitor and assess Network Rail's performance, ensuring that plans and performance are consistent with the requirements funders have set out in their HLOSs.
- 3.25 We also track Network Rail's performance in delivering the Scottish HLOS requirements through the **Scotland** HLOS tracker. Each of these requirements is individually enforceable under the network licence via the 'reasonable practicability' test. DfT and Network Rail have developed a consolidated view of Network Rail's delivery of the England & Wales requirements, which we expect to use to support our holding to account activity.

## Qualitative information

- 3.26 Qualitative information is vital to filling in the gaps that data cannot explain and can be an important factor in influencing our decision whether to escalate an issue. Our engagement with specialist and regional regulation teams will be key to gathering qualitative information to identify best practice, and where under-performance is identified, to ascertain what plans an operator and the region/SO have in place to address under-performance, and whether there is a need for additional steps to support improved performance. There is a range of qualitative information that we use to support our monitoring of Network Rail's performance, including but not limited to:
- certain aspects of the **SO's performance** not captured through its settlement or supporting measures, such as quality of advice to funders, franchising authorities and operators;
  - **Network Rail's delivery against its plans for maintaining the network** and the reports in relation to addressing issues associated with reactionary delay, cancellations and network availability;
  - **the capability of the network** in a number of key areas (e.g. asset management). Such assessments provide indicators of performance and can support comparison of best practice across regions; and

- **change controls to Network Rail's Enhancement Delivery Plans**, where we ensure affected stakeholders have been consulted on changes and that the published Enhancement Delivery Plans are showing accurate information.

## Quality of stakeholder engagement

- 3.27 The network licence contains specific requirements in relation to the quality of Network Rail's engagement with its stakeholders including a set of principles as part of the Stakeholder Engagement Duty. We also expect customers and stakeholders to engage constructively with Network Rail and where necessary, escalate concerns with Network Rail to resolve disputes.
- 3.28 We monitor and assess the quality of Network Rail's stakeholder engagement and publish annual reports comparing performance between the business units. We may revise our assessment process of Network Rail during CP7 in response to its performance and any significant issues we identify.

## Strength of governance arrangements

- 3.29 Any part of Network Rail's business or activity may be subject to regulatory focus at any time and Network Rail's Board and Executive must ensure it has appropriate governance to deliver all the requirements placed on it. The balance of ORR's monitoring between the regions/SO and Network Rail's National Functions will vary. For example, where the National Functions are viewed to not be sufficiently responsive to the region and SO's needs, we could increase our monitoring or carry out further investigation.

## Independent reporters

- 3.30 Network Rail's licence requires it to engage a reporter to conduct a review into (and report on) any such matter as ORR reasonably requires for the purpose of carrying out any of its functions. ORR approves the terms of reference, and the reporter's contract includes a duty of care to ORR. ORR always discusses the scope and content of a review with Network Rail beforehand.
- 3.31 Independent reporters are an important tool. We may use them in the monitoring phase to ascertain the scale or extent of an issue before it reaches the point of investigation, or to support an investigation.

## How we collect information from Network Rail

- 3.32 Network Rail must provide any information that we require for the purpose of carrying out our monitoring function, as per the network licence. We also use its published data for our monitoring.
- 3.33 Network Rail submits routine data and reports that are agreed with ORR according to a data protocol between the two organisations. We can also make ad-hoc requests for data, such as for specific investigations.
- 3.34 We expect Network Rail to produce high-quality data, underpinned by reliable data systems ensuring there is consistent measurement and targeting across regions/SO over time. This data should be clear, readily available, up to date and in a format that ORR and stakeholders can easily interpret. Timely information and data allows performance problems to be identified and resolved early.
- 3.35 We expect Network Rail to assure its data quality and notify ORR of any weaknesses or inconsistency in data sets. We may carry out our own assurance and may use independent reporters to do this.
- 3.36 We expect the accountable business unit(s) to respond to our information requests within the timescales we specify. In the event of non-compliance within a reasonable timescale, we will escalate to Network Rail's Executive and may apply our information gathering powers. Failure to provide us with this information could constitute a licence breach. We have powers under the Act to request information from Network Rail, but expect Network Rail to continue to cooperate with requests for further information without us having to invoke these powers.

## What we publish

- 3.37 The choice of what we report is distinct from what we monitor. Our public reporting aims to:
- **provide transparency on Network Rail's performance**, to meet the needs of funders, parliaments, wider industry, and the public;
  - **support Network Rail's customers and stakeholders in holding the company to account**, including by reporting on factors affecting the strength of region/SO accountability;
  - **leverage reputational incentives for Network Rail's management** to reinforce positive performance and tackle poor performance;

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- **encourage and facilitate the spread of best practice** across Network Rail regions; and
- **fulfil statutory obligations** to publish certain information.

3.38 The scope of our reporting will vary depending on the coverage, quality, accessibility and timeliness of Network Rail’s reporting. We may evolve the style, content and frequency of our reporting over time to reflect changing circumstances, or reduce the scope of our reporting if Network Rail’s own performance reporting is sufficient, and vice versa.

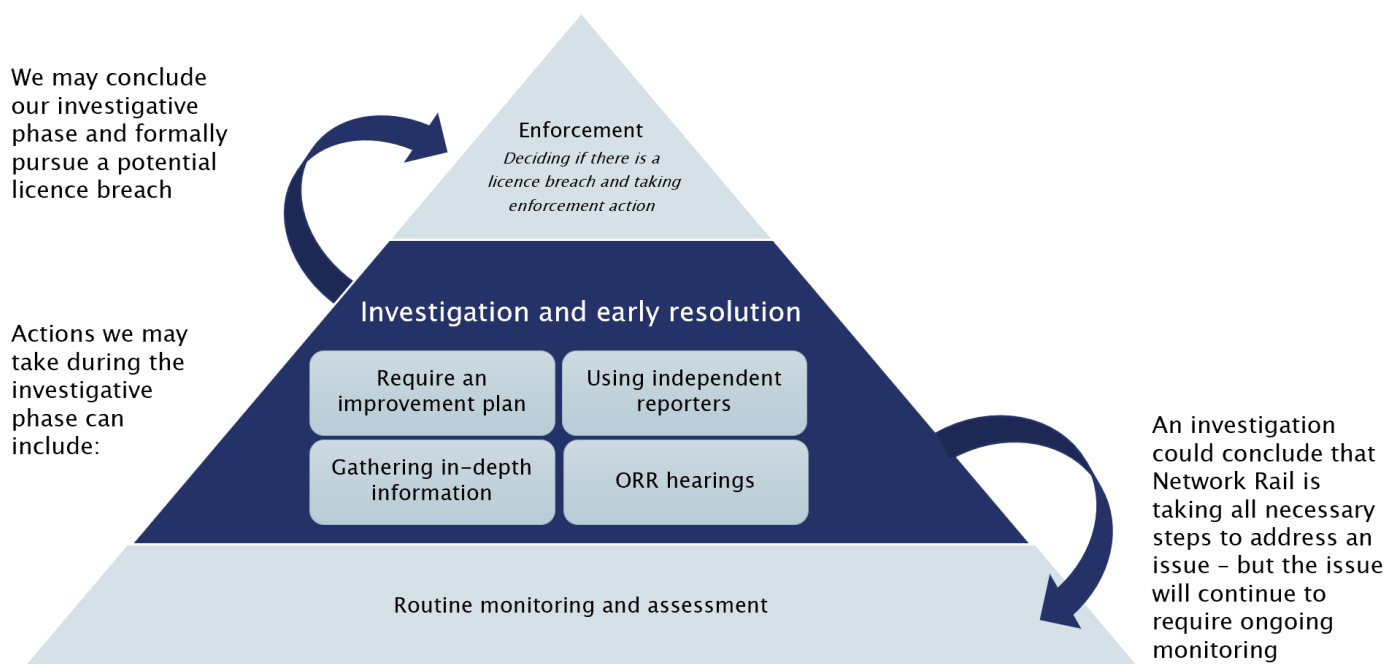
3.39 We publish a range of material reflecting our economic monitoring activity and the conclusions we are drawing. These can be found on [our website](#). Key publications include:

- our [annual assessment of Network Rail](#), which reports on most aspects of Network Rail’s performance over the previous financial year. Our annual assessment focuses on the economic regulation of Network Rail, providing an overview and a comparison of regions’, SO’s and National Functions’ performance.
- our [Annual Efficiency and Finance Assessment](#), which is designed to give assurance to rail users and funders that Network Rail is delivering what is expected and, at the same time, provide a strong reputational incentive on Network Rail to become more efficient; and
- our [annual assessments on the quality of Network Rail's stakeholder engagement](#), which focus on the extent to which Network Rail meets the four overarching principles of good stakeholder engagement (i.e. inclusive, transparent, well-governed and effective).

## 4. Investigation and early resolution

4.1 This chapter explains how we investigate concerns, the actions we may take, and the potential outcomes of an investigation. As shown in Figure 4.1 below, as a result of our investigation we could decide to move into enforcement action or decide that no further action is necessary and resume our routine monitoring and assessment.

**Figure 4.1** The investigation and early resolution phase



### How we assess concerns

4.2 Our investigative phase covers stages from initial investigation of an issue, through to formal licence compliance investigations. When we investigate, we consider whether or not Network Rail is doing everything reasonably practicable to deliver the reasonable requirements of its customers and funders, having regard to all relevant circumstances, including its ability to fund its licensed activities.

4.3 While our routine monitoring and assessment may prompt us to investigate an issue, an investigation may also be prompted by a stakeholder complaint or information. ORR has a duty under section 68 of the Railways Act to investigate

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any complaint of licence non-compliance made to us (unless we deem it to be frivolous or vexatious).

4.4 Where we identify a potential concern, we will consider a number of factors to determine whether we need to take action, as set out in Figure 4.2 below.

**Figure 4.2 What we consider when assessing concerns**

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

4.5 We will prioritise taking action on those issues where:

- there is significant harm or risk of harm to passengers, freight customers, funders' interests, or other stakeholders;
- where concerns could be systemic, suggesting a more widespread problem;
- customers and other stakeholders are not well placed to hold Network Rail to account to resolve the issue, or there is no agreement by customers to the steps Network Rail proposes to take; and
- Network Rail's response does not demonstrate senior management commitment, clear responsibility within the business unit and clear and timely actions that are proportionate to the concern.

4.6 In establishing the nature of the concern, we will consider what the relevant licence conditions require of Network Rail (e.g. the 'reasonably practicable' test under Condition 1). Our regulatory duties mean we must also consider if we are

best placed to act and whether or not it would be more appropriate to proceed under the Competition Act 1998 (CA98). We are not permitted to make or confirm a provisional order or make a final order if we are satisfied that the most appropriate way of proceeding is under the CA98.

## **Actions we may take**

4.7 If we decide that it is appropriate to investigate an issue, we will consider a range of actions depending on the nature of the concern, as detailed in Figure 4.1. Each action is described in more detail below.

### **Gathering in-depth information**

4.8 The first step of our investigative phase will typically be to engage with and potentially request further information from Network Rail.

4.9 We may gather evidence from affected parties where necessary. For example, if the issue involves failure to meet success measures and targets agreed by customers, then we could approach the affected passenger or freight operators for their views.

### **Use of independent reporters**

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

### **ORR hearings**

4.11 We may hold a hearing between the relevant business units and affected parties to gather evidence, explore the issue, and enable swift resolution where possible. Hearings provide an opportunity for different parties to present their positions, for ORR to collect evidence, and for stakeholders to question Network Rail on the issue under investigation.

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



## Improvement plans

- 4.13 We may, during or in conclusion to an investigation, ask Network Rail to create an improvement plan. We may also ask it to set up an improvement board to oversee progress in addressing the issue, especially where we want stakeholders to be involved. Network Rail may offer these itself as part of our engagement with it, prior to us requesting it.
- 4.14 We would then monitor progress against the improvement plan or findings from the improvement board to ensure that all aspects are being delivered, taking further action as necessary.

## Possible outcomes from the investigative phase

There are three possible outcomes from the investigative phase:

- **Close down:** Our investigation concludes that no further action is needed and our routine monitoring and engagement resumes.
- **Secure early action and monitor progress:** Our investigation concludes that there is evidence that Network Rail is doing everything reasonably practicable to address the issue. We may require Network Rail to create a plan of how it will resolve the problem and may ask it to establish a Board to oversee the improvement plan. We assess the plans to ensure they are robust, monitoring progress against any such plan as part of our risk-based monitoring. We would also share any lessons with any relevant parts of Network Rail. Further investigation could be initiated if further concerns are raised as part of our monitoring, and/or new complaints are raised.
- **Potential licence breach – issue ‘case to answer letter’:** Where we think that we may formally pursue a potential licence breach, we will write to Network Rail to confirm this. This is known as a ‘case to answer letter’. This sets out the evidence that we have found and next steps in the enforcement process. The purpose of the letter is to provide Network Rail the opportunity to respond formally with its views on our findings, prior to ORR’s Board considering the matter.



## Potential licence breach

### Initiating a formal investigation

- 4.15 A formal investigation may follow attempts at early resolution. However, depending on the scale or nature of the concern, we may move immediately to a formal investigation phase.
- 4.16 While Network Rail is a single licensee, we may choose to target an investigation at a specific part of the business. If we decide to initiate a formal investigation, we will identify (if relevant) which part(s) of Network Rail have primary responsibility or alternatively engage with its Executive. Considering the individual circumstances of the case, we will engage with Network Rail on the issues and stages of our investigations. Our actions may include the following:
- **writing an ‘initiation letter’**, which would formally set out our concerns and scope of the investigation. This would include any requests for further information and data. We would escalate any non-compliance as failure to provide information, which could ultimately result in an information notice being served and/or a breach of licence;
  - **discussing the scope of any reviews by independent reporters** that we wish to commission;
  - **keeping Network Rail informed of progress** and timescales of our investigations (there is no set timescale for an investigation, as it depends on the nature of the issues); and/or
  - **confirming in writing the outcome of the investigation** notifying Network Rail's Executive and Board and any relevant business units. In the event that we consider there is a likely breach of licence, we will address the ‘case to answer letter’ to the responsible business units.
- 4.17 As investigations progress and more evidence becomes available on the causes of the issue being investigated, we may identify different business units that are responsible and will confirm this in writing to them. If it is unclear which parts of Network Rail are responsible, we will direct our communications and requests to Network Rail's Executive and Board, highlighting gaps in accountability where necessary.

## Publishing information on investigations

- 4.18 We will publish details of the investigation on the [Holding to Account](#) section of our website:
- (a) the initiation letter, summarising details of the scope of our investigation and the relevant business units;
  - (b) records of ORR hearings;
  - (c) final reports from independent reporters; and
  - (d) the outcome of the investigation, including any ‘case to answer’ letters and any responses received.
- 4.19 Where appropriate, we may also publish correspondence from Network Rail and other stakeholders, as well as providing periodic updates on progress with investigations, such as expected timescales.

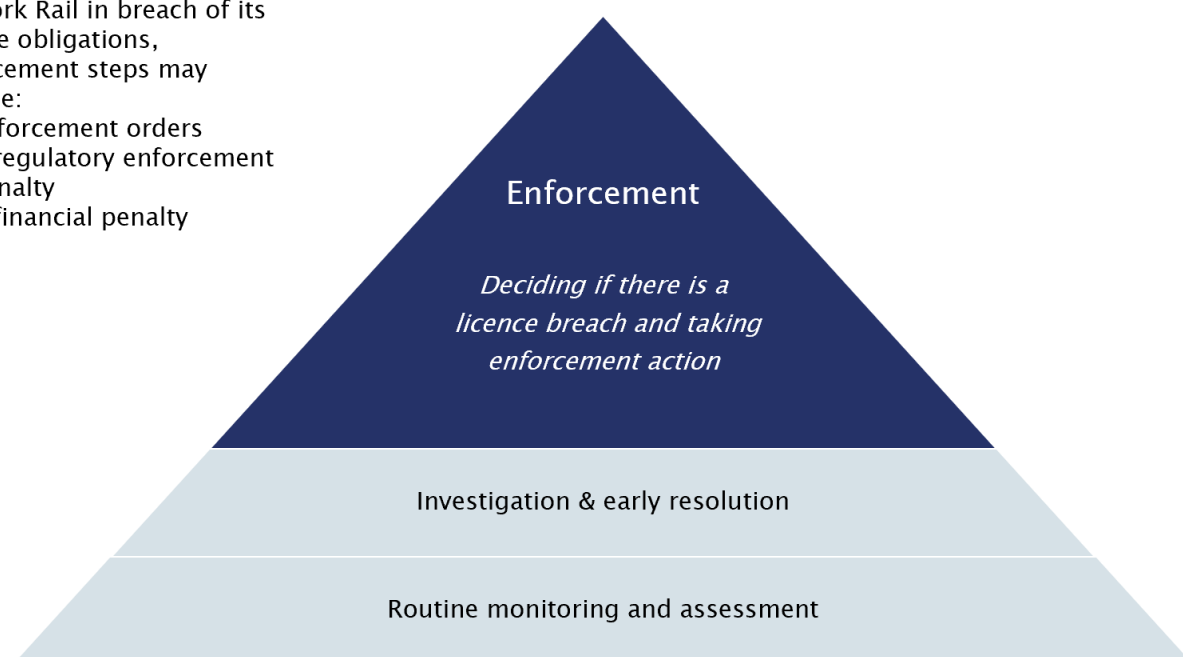
## 5. Enforcement

- 5.1 Following a ‘case to answer’ letter, and any response from Network Rail, ORR’s Board will make the final decision on whether there is, or has been, a licence breach, and what action to take based on the evidence. This chapter describes the regulatory actions ORR can consider, and how we take those decisions.
- 5.2 We are accountable to the public for our actions through Parliament and through the courts. We have an obligation to comply with the rules of administrative law and good public administration. Ultimately our decisions may be subject to judicial review and scrutiny by the courts. Network Rail has a specific right of appeal to enforcement orders or financial penalties under [section 57 and 57F of the Act](#).
- 5.3 Figure 5.1 below sets out the possible outcomes at this stage of the process. ORR’s Board may decide to take enforcement action that requires Network Rail to do, or stop doing, something which then becomes subject to routine monitoring.

**Figure 5.1 The Enforcement phase**

If the ORR Board finds Network Rail in breach of its licence obligations, enforcement steps may include:

- Enforcement orders
- A regulatory enforcement penalty
- A financial penalty



- 5.4 If ORR’s Board is satisfied there is a licence breach, it can take a range of potential regulatory actions as set out in Figure 5.2. The actions we may take

depend on whether the licence breach is past, current or likely in the future. Some of these actions are subject to certain legal requirements, explained further below.

**Figure 5.2 Potential regulatory enforcement actions**

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

5.5 In deciding the appropriate steps to take, we may consider holding a hearing to allow affected parties and Network Rail an opportunity to state their views on what would be the most appropriate action following a licence breach.

## Enforcement orders

5.6 If ORR's Board finds Network Rail is contravening, or is likely to contravene a licence condition(s), section 55 of the Railways Act requires us to issue an enforcement order requiring Network Rail to take action to bring the company into compliance.

5.7 We will first give notice of the planned enforcement order providing a copy of the order and stating the period for representations to be made (which the Act states

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cannot be less than 21 days). The Board will have regard to these representations in its considerations of finalising the order.

- 5.8 An enforcement order sets out our findings on the reasons for the licence breach and the parts of Network Rail's business we consider responsible and can include:
- (a) instructions to stop doing something;
  - (b) instructions to start doing something (e.g. include a requirement to set up an improvement board); and/or
  - (c) Conditions, including specifying a reasonable sum (a financial penalty) that is payable if the order is not complied with.
- 5.9 Failure to comply with an enforcement order constitutes a licence breach and may expose Network Rail to legal action by third parties.
- 5.10 In order to take action quickly, we may, where appropriate, make a provisional enforcement order where there appears to be a licence breach. In deciding if it is appropriate, we will take into consideration our Section 4 duties, the circumstances of the breach and, in particular, judge the extent to which any person is likely to sustain loss or damage during the time it takes to make an enforcement order.
- 5.11 A provisional order cannot last longer than three months (it must then be confirmed as a final order, or it ceases). The only exceptions to the legal requirement to make an enforcement order are if:
- to do so would be in conflict with ORR's duties under section 4 of the Railways Act 1993;
  - Network Rail has agreed to take, and is taking, all steps that we consider can secure or facilitate compliance with a licence condition and we consider that it is not appropriate to make an enforcement order;
  - the licence breach will not adversely affect the interests of users of railway services or lead to an increase in public expenditure and we consider it is not appropriate to make an enforcement order; or
  - it is more appropriate to take action under the Competition Act 1998.
- 5.12 If we find there is a current or future licence breach, but judge that one of the exemptions apply, we will not issue an enforcement order but will issue a notice to set out the reasons for our decision.

- 5.13 Once ORR’s Board has decided to make an enforcement order (or confirm a provisional order), we will give notice, setting out details of the licence breach and proposed order.

## Financial penalties and financial sanctions

- 5.14 There are two types of financial remedies which could be used in different circumstances:
- (a) ORR has legal powers to impose a **financial penalty** of up to 10 percent of Network Rail’s turnover under [section 57A of the Railways Act 1993](#).
  - (b) We can issue a non-statutory penalty, imposing a **financial sanction** (reduction) to the Financial Performance Measure (FPM) of the relevant business unit.

### Financial penalties

- 5.15 The Railways Act 1993 enables ORR to issue a financial penalty and as such ORR’s Board must consider whether it is appropriate to issue one where it takes any enforcement action.
- 5.16 We might consider imposing a financial penalty where we are satisfied that a penalty is necessary to change Network Rail’s future behaviour or deter future non-compliance. Network Rail is a public sector body funded by taxpayers and railway users. As such a financial penalty which reduced funds available for maintaining and operating the railway would always be a last resort.
- 5.17 Such a decision would reflect our confidence in Network Rail’s management at Board, Executive, regional and SO-level to take the appropriate action now and in the future. We will take into account that levying a financial penalty has both a financial and reputational effect. A *de minimis* penalty could still have a significant reputational effect.
- 5.18 In considering the scale of a financial penalty, our starting point will always be:
- (a) the extent of actual and potential harm caused to third parties, particularly to passengers and freight operators; and
  - (b) the culpability of Network Rail, including whether it has acted intentionally, negligently or recklessly. We will pay particular attention to the actions and behaviour of senior management, the Executive and the Board.

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- 5.19 We will consider any mitigating, proactive steps taken by Network Rail to remedy the harm caused by the breach and/or aggravating factors (e.g. repeated non-compliance or attempts to conceal non-compliance). We would then consider the impact levying a penalty might have on changing Network Rail’s behaviour and the impact of the size of the penalty on railway users and funders.
- 5.20 We may choose to scale any financial penalty so that it is capable of being funded by management bonuses (of the responsible business units). While it is for Network Rail to decide how to fund any penalty, this would have the effect of enabling Network Rail to protect the funding available for the operation, maintenance and renewal of the network.
- 5.21 The Railways Act 1993 requires ORR to prepare and publish a statement of policy with respect to the imposition of penalties and the determination of their amount. This statement is set out in Annex A.
- 5.22 We will issue a notice and consult with Network Rail and stakeholders when we intend to impose a penalty. If Network Rail proposes mitigations (such as reparation offers) during, or at any stage prior to consultation, we will consider whether the actions proposed are:
- targeted and proportionate to the harm; and
  - additional to existing commitments and deliverables, not simply reducing resources for other valuable activities. Where a mitigation involves redistributing Network Rail’s resources, it needs to demonstrate this would result in improved value for money and would not harm the interests of other parties.
- 5.23 Following consultation with Network Rail and stakeholders, if ORR’s Board considers it appropriate to impose a penalty, we will publish a final notice. The final notice will confirm that ORR’s Board has decided to impose a financial penalty on Network Rail and confirm the penalty amount.

### Financial sanctions

- 5.24 As an alternative to a financial penalty, ORR’s Board may decide to issue a financial sanction. In doing so, we will apply the principles and procedures set out in our penalty statement.
- 5.25 A financial sanction would require Network Rail to record a deduction to the Financial Performance Measure (FPM), at ORR’s direction as set out in ORR’s [regulatory accounting guidelines](#). Network Rail currently uses the FPM as a key



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input in calculating performance-related pay (i.e. management bonuses), so in addition to acting as a strong reputational incentive, financial sanctions have the potential to provide a direct financial incentive for the responsible business unit. If Network Rail subsequently removes the link between FPM and management bonuses, we will review our usage of these sanctions accordingly.

- 5.26 Financial sanctions would need to be included in the reporting of financial performance in the regulatory financial statements (and therefore reporting on success measures) of the relevant Network Rail business unit. Unlike a financial penalty, this is not a statutory power but is covered under [the regulatory accounting guidelines](#) that we set. The financial performance reported in Network Rail's regulatory financial statements would include the financial sanction with the amount of the deduction. The business units to which it applies will be directed by ORR.
- 5.27 To the extent that financial sanctions provide an effective incentive, they could reduce the need to resort to financial penalties. However, issuing a financial sanction does not preclude ORR subsequently issuing a financial penalty. The size of any sanction will depend on the specific circumstances of a licence breach. In setting the size of a financial sanction, ORR will consider:
- the severity of the impact of the licence breach and in particular, the harm to railway users and funders;
  - the responsiveness of Network Rail management;
  - which parts of Network Rail may, as a consequence of the sanction, be affected and whether this is justified; and
  - the impact of staff incentives and behaviours now and in the future.

### Communicating our decisions

- 5.28 More information about our enforcement powers can be found on our [enforcement webpage](#). Information on [licence enforcement taken to date](#) can be found on our website.
- 5.29 We will be transparent about decisions made by ORR's Board, publicly setting out decisions on licence breaches and enforcement actions, including the reasons for the decisions and what ORR expects of Network Rail.



## 6. Annex A: Penalties statement

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- 6.1 The Act requires ORR to “prepare and publish a statement of policy with respect to the imposition of penalties and the determination of their amount”. We must have regard to this statement when deciding whether or not to impose financial penalties and in determining their amount.
- 6.2 The Act refers to both the levying of a penalty and the inclusion of a reasonable sum (under section 55(7A)) in an individual enforcement order. In this statement references to a penalty should be understood to apply equally to a reasonable sum, where the context permits.
- 6.3 Penalties are paid to the Secretary of State for Transport, which are then returned to His Majesty’s Treasury (HMT) under managing public money.
- 6.4 As a last resort, ORR may impose a financial penalty or financial (or other) sanction. We treat financial sanctions in the same way as financial penalties and apply the same principles and procedures set out in this penalty statement.
- 6.5 In all decisions to impose a penalty or sanction and set the size of a penalty or sanction we will have regard to:
- our duties under Section 4 of the Railways Act 1993. These include ORR’s duties to act in a manner which we consider will not result in Network Rail having difficulty financing its activities and the duty to have regard to the funds available to the Secretary of State; and
  - the penalty principles set out in the [Macrory Report](#) that include:
    - (i) aim to change the behaviour of the offender;
    - (ii) aim to eliminate any financial gain or benefit from non-compliance;
    - (iii) be responsive and consider what is appropriate for the particular offender and regulatory issue;
    - (iv) be proportionate to the nature of the offence and the harm caused;
    - (v) aim to restore the harm caused by regulatory non-compliance, where appropriate; and
    - (vi) aim to deter future non-compliance.

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6.6 Additional factors specific to the decision to impose a penalty or sanction and the decision on the size of a penalty or sanction are set out below.

### Deciding whether to impose a financial penalty or sanction

6.7 We may impose a penalty or sanction where we are satisfied that it is necessary to:

- change Network Rail's future behaviour; or
- deter future non-compliance.

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

### Calculating the amount of a penalty or sanction

6.9 Under section 55(7B), ORR may impose a penalty of up to 10 percent of turnover as defined in [the Railways Act 1993 \(Determination of Turnover\) Order 2005](#).

6.10 In assessing the appropriate size of any penalty or sanction, we will consider the seriousness of the breach by judging:

- (a) the actual and potential harm caused to third parties, particularly to passengers and freight customers and to the effectiveness of the regulatory regime; and
- (b) the culpability of Network Rail, including whether it has intentionally acted either negligently or recklessly, and in particular, the behaviour of senior managers and the Board.

6.11 We will then consider any mitigating or aggravating factors. Mitigating factors could include proactive steps to remedy the harm caused by the breach and prevent it recurring. Aggravating factors might include repeated non-compliance, or attempts to conceal non-compliance. We will also consider the extent to which Network Rail has cooperated with ORR during the investigation (in particular, senior managers of the relevant business units and the Executive) and is acting to remedy the breach.

6.12 The net effect of all mitigating and aggravating factors may be significant. Potentially, taken together these adjustments could reduce a penalty or sanction to zero. Once we have judged the seriousness of the breach, we will then consider:

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- the likely impact of the size of a penalty or sanction on Network Rail’s future behaviour (including the impact on staff incentives and behaviours now and in the future); and
- the likely impact of the size of any penalty or sanction on railway users and funders (now and in the future).

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

6.14 Having considered the factors listed above, the ORR Board will determine an appropriate amount for a penalty or sanction.

6.15 Given Network Rail’s public sector status, we will consider whether it is more appropriate to scale the size of a penalty so that it is capable of being funded by resources that would otherwise be used for management bonuses (recognising that decisions on how to fund penalties are for Network Rail). This, however, does not remove ORR’s discretion to impose larger penalties up to the limits established under the Act.

### Consultation

6.16 ORR will issue a notice and consult with Network Rail and stakeholders to inform them when we propose a penalty. If we were to impose both a financial penalty and a final enforcement order (permissible for a current breach only) we would process these notice periods for representations in parallel. We are required to consult for a minimum of 21 days. Our consultation will set out the proposed amount and the grounds on which the penalty is being imposed. We will consider any representations or objections made in response to the consultation.

6.17 ORR cannot modify a proposal to impose a penalty without Network Rail’s consent, unless the modifications consist of a reduction of the amount of the penalty or a deferral of the date by which it is to be paid, or ORR has complied with certain additional requirements, set out in section 57C of the Act.

6.18 Although ORR is not legally required to consult on imposing a sanction, we will follow the same principle as for financial penalties, including consulting for a minimum of 21 days.

**Confirmation of penalties or sanction**

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



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