

2 April 2009

Dear Stakeholder

Updated penalties statement

I wrote to you in October¹ seeking your views on some changes we were intending to make to our approach to financial penalties. We have reflected on your views and we have today published our updated economic enforcement policy, which includes the revised penalties statement in section 4².

As proposed, we have updated the penalties statement to:

- clarify that our main purpose is to change future behaviour and to incentivise compliance, both by the offender and other enterprises. Our approach is consistent with that recommended by Professor Richard Macrory in his report 'Regulatory justice: making sanctions effective'.³ And we have introduced the penalty principles set out in this report as a factor we will take into account when deciding if a penalty is appropriate;
- emphasise how we use the concept of seriousness, and to widen this to reflect both culpability and the actual and/or potential harm caused. This has enabled us to simplify the statement, to remove multiple references to key issues throughout our process, and to allay any concern that we might examine the same issue more than once. We have set out the various categories of seriousness we have found useful; and
- add to the list of mitigating factors we will consider actions that make worthwhile restoration to those harmed, where they indicate a sincere admission of guilt or remorse, are unconditional, and where any extra expenditure is verifiably additional. We also make clear our approach is to apply an overall adjustment reflecting the net effect of all the relevant aggravating and mitigating factors in a case.

We have made other changes to make our policy clearer and more readable.

¹ ORR's consultation, October 2008 - http://www.rail-reg.gov.uk/upload/pdf/cons-Penalties_letter_200108.pdf

² ORR Economic Enforcement Policy, April 2009 - <http://www.rail-reg.gov.uk/upload/pdf/395.pdf>

³ <http://www.berr.gov.uk/files/file44593.pdf>

We received ten responses to our consultation⁴. Overall, respondents supported our proposals. DfT, FirstGroup and TfL all supported our approach. OFT and Rail Freight Group had no comments. We received comments from Network Rail, Passenger Focus, Transport Scotland, National Express and Severn Trent Water.

Network Rail broadly welcomed our commitment to a graduated response to penalties. It considered our categorisation of the seriousness of a breach into five levels, with corresponding indicative levels of penalty, to be helpful. It also welcomed our approach in applying proportionality to the non-specific licence obligations, but thought this should be reflected more clearly in our economic enforcement policy. We have discussed our approach with Network Rail and will consider changes to the wider policy when we next review it.

Network Rail was concerned that we had implied that its directors and senior managers would always need to be involved in remedying a breach to a high level. We have made a change to clarify that we expect senior staff to be involved only to an appropriate degree. This change is in paragraph 19 of our statement.

On reparations as a mitigating factor, Network Rail thought we should not limit ourselves by saying it was “unlikely” that any potential penalty would be reduced to zero on a “£ for £” basis. It was also concerned this statement was inconsistent with our later statement that the net effect of mitigating factors could be to reduce a penalty to zero.

We have not changed the text on reparations, which reflects our view that a penalty would normally have an important reputational effect. We have however amended the statement to make it clearer that it is the net effect of all mitigating and aggravating factors taken together that could reduce a penalty to zero (or indeed to increase a penalty).

Network Rail suggested it should have the opportunity to make its case directly to the relevant ORR decision making body before any decision on a breach and/or penalty was taken. We do not consider this is necessary as we already give the licence holder several opportunities to make oral and written representations during any investigation, which my Board will consider.

Passenger Focus was disappointed that our draft statement did not make explicit references to passengers. In the light of this, we have added a specific reference to passengers and other railway users in our statement.

Transport Scotland thought penalties needed to be linked to Network Rail's Management Incentive Plan, to ensure visibility on how performance and accountability are impacting bonuses. We agree that the decisions taken by Network Rail's remuneration committee

⁴ Consultation responses - <http://www.rail-reg.gov.uk/server/show/ConWebDoc.9440>

should be more transparent and have dealt with this concern in our recent review of Network Rail's network licence.

National Express was concerned that a financial penalty imposed on a franchised TOC could have the unintended consequence of causing the TOC to default on its franchise contracts. It suggested we should consider these financial aspects as potential mitigation. We agree that this is an important issue. We are bound by our duties in section 4 of the Railways Act 1993 to consider a number of factors in all our decisions and this is clear in the penalties statement.

Severn Trent Water (STW) thought that all the regulators should have a standardised penalties policy. We think that there are too many disparate factors across the various sectors to make this possible at this time. However, we do discuss issues of best practice with other regulators. STW also suggested there should be clear separation between the team investigating a problem and the decision makers. We are content that our current processes are appropriate. STW supported the reference to the harm caused when considering our starting point for a penalty.

Thank you to everyone who gave us their views.

Yours sincerely

A handwritten signature in blue ink that reads "Bill Emery". The signature is written in a cursive, slightly slanted style.

Bill Emery