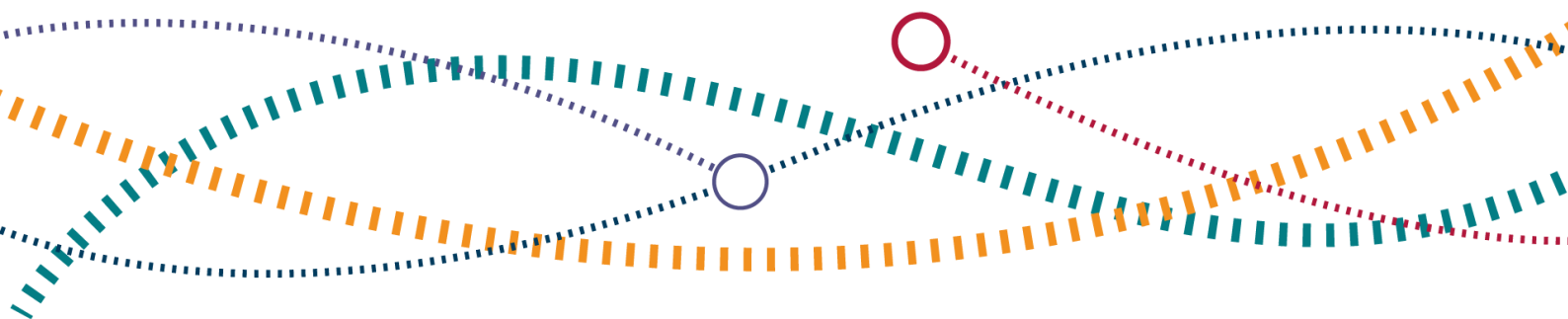




# ORR Enforcement Policy

The Health Protection (Coronavirus, Pre-Departure Testing and Operator Liability) (England) (Amendment) Regulations 2021

17 March 2021



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# Key principles

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1. The Health Protection (Coronavirus, Pre-Departure Testing and Operator Liability) (England) (Amendment) Regulations 2021 (“HPR”) introduced new requirements for passengers arriving in England to have a valid negative Covid test (PDT) and a passenger locator form (PLF.) It also introduced new liability requirements on operators providing international travel services, making them liable for any passenger who appears at the UK border without a PDT or PLF.
2. The HPR gives ORR the power to issue a Fixed Penalty Notice (FPN) or prosecute operators - Eurostar / Eurotunnel - where a passenger either arrives in the UK or at immigration control at the Channel Tunnel shuttle terminal (i.e. at Coquelles) without a PDT or PLF.
3. This policy sets out ORR’s general approach to enforcement of the HPR. We believe in firm but fair enforcement of legislation. This is informed by the regulatory principles as set out in the Legislative and Regulatory Reform Act 2006: proportionality in applying the law and securing compliance; consistency of approach; targeting of enforcement action; transparency about how the regulator operates and what those regulated may expect; and accountability for the regulator’s actions. These principles apply both to enforcement in particular cases and to management of enforcement activities as a whole.

## Proportionality

4. Proportionality means relating enforcement action to the level of harm or risk of harm arising from a breach and /or the seriousness of a failure to comply with a legal obligation.
5. The HPR is aimed at ensuring that further Covid cases and variants are not brought into England, therefore any non-compliance could potentially cause risks to national health. Any action taken by ORR to achieve compliance will be proportionate to these risks.

## Targeting

6. Targeting means making sure that actions are targeted on those operators whose activities are the focus of the HPR. For ORR there are only two operators that are subject to the HPR and therefore any enforcement will be targeted at Eurostar and Eurotunnel.

## Consistency

7. Consistency of approach does not necessarily mean uniformity. It means taking a similar approach in similar circumstances to achieve similar ends.

## Transparency

8. Transparency means helping operators to understand what is expected of them and what they should expect from ORR. We note that DfT has issued detailed operational guidance for the international rail and maritime industry to implement Covid border measures. The guidance covers requirements relating to PDT and the PLF and is consistent with guidance being provided to the aviation sector. ORR will look to this guidance when taking enforcement decisions in this area.

## Accountability

9. Regulators are accountable to the public for their actions. This means that ORR has policies and standards (such as the four enforcement principles above) against which it can be judged, and an effective and easily accessible mechanism for dealing with comments and handling complaints.

# Compliance and enforcement approach

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## Fixed Penalty Notices

10. ORR may issue a FPN if it reasonably believes that an operator has committed an offence under the HPR. In deciding whether to issue a FPN, we will take into account all of the circumstances of the case, including any potential defence, and the principles of enforcement set out above.
11. In reviewing the circumstances of the case, ORR may exercise its discretion not to issue a FPN.
12. In general, we expect enforcement of the HPR will be by FPN to encourage compliance with the regulations. However, a FPN is not an automatic outcome and ORR may take the view that a breach is too serious for an FPN (see next section).

## Prosecution

13. The decision to prosecute a case is an objective exercise and made by an Approval Officer who is independent from the investigation and who has had no prior dealings with the prospective defendant in respect of the matter.
14. Prosecutors will always act in the interests of justice and will not let any personal views about the prospective defendant, victim or witness influence their decisions.
15. The decision whether to prosecute is carried out in accordance with the Code for Crown Prosecutors<sup>1</sup> and takes into account the evidential stage and relevant public interest factors. A prosecution will not go ahead unless the Approval Officer finds that there is sufficient evidence to provide a realistic prospect of conviction and where a prosecution would be in the public interest.
16. The decision to prosecute is kept under continuous review, so that any new facts or circumstances which may support or undermine the prosecution's case are taken into account in the decision to continue or terminate the proceedings.

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<sup>1</sup> <https://www.cps.gov.uk/publication/code-crown-prosecutors#:~:text=The%20Code%20for%20Crown%20Prosecutors%20is%20a%20public%20document%2C%20issued,they%20make%20decisions%20on%20cases.>

17. Given that the offences in the HPR are related to measures introduced to prevent the spread of infection throughout the UK, and potentially high incidences of serious illness and death, they will be considered as serious. Therefore, there will be a high public interest in prosecution in the majority of cases.
18. We will be more likely to prosecute where either of the following circumstances apply:
  - A FPN has been issued but the operator has failed to pay the penalty within the required 28 days;
  - Where there is evidence of systemic failures to comply with the HPR.
19. In deciding our response to a breach of the law, we will also consider any potential mitigating features of a case. Relevant mitigating factors will be kept under constant review as cases are required to be considered on an individual basis. We may update this enforcement policy to include examples of mitigating factors that we may take into account as our experience of reviewing cases develops over time.

## Process

20. There is no appeals mechanism inherent in the FPN regime but, similar to other regulators, we consider it reasonable to allow operators 14 days to respond to us with any additional relevant information upon receipt of a FPN. We will consider any evidence provided at this stage before making a final decision. We will communicate our decision to the operator within 7 days of receipt of any additional relevant information. Where there are no grounds to withdraw the FPN the operator will have 7 days to make payment i.e. within 28 days of receipt of the FPN.
21. Where no payment is received we have the discretion to pursue a prosecution (see above).
22. Offences under the HPR are summary only however they are not governed by the 6 month time limit (from the offence date) set out in section 127(1) of the Magistrates' Courts Act 1980. The HPR is made under the Public Health (Control of Disease) Act 1984 and section 64A of this Act states that the time limit for proceedings is:
  - before the end of the period of 6 months beginning with the date on which evidence which the prosecutor thinks is sufficient to justify the proceedings comes to the prosecutor's knowledge; and
  - within 3 years of the date of the commission of the offence.

23. Where an offence is charged 6 months or more after the date of the breach we will produce a certificate to state the date on which evidence which we consider is sufficient to justify the proceedings came to our knowledge. In cases where a FPN is issued, this will be after the expiry of the 28 day period for paying when an evidential review for charging purposes is completed.



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