

Enforcement Policy: Rail Franchise Agreements and Closures

July 2008

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1. Executive Summary

1.1 The passenger railway is a public service, specified by the Government and delivered by the private sector. The Secretary of State has a duty to protect the public interest by securing compliance with the franchise agreements under which rail services are delivered. She also has a duty to ensure that the law in relation to the closure of railway services and infrastructure is complied with.

1.2 The purpose of this document is to explain how these duties are discharged. It details the Department for Transport's enforcement policy in relation to:

- contraventions of franchise agreements; and
- contraventions of closure legislation - relating to the discontinuance of passenger railway services and the closure of networks, stations and light maintenance depots.

1.3 The document details how the Department takes a stepped approach to ensure that any enforcement action is proportionate to the contravention and explains the enforcement tools available to the Department.

1.4 The document also sets out the Secretary of State's policy in relation to the imposition of penalties for such contraventions and the determination of the amounts of those penalties. The Secretary of State is required under the Railways Act 1993¹ to consult on and publish this policy: consultation took place between 15 October 2007 and 4 January 2008. This document has been updated in the light of consultees' responses.

1.5 This policy document covers all passenger rail franchises in England and Wales.

¹ Section 57B(1). In this document, references to legislation include any amendments as at the date of this document.

2. Introduction

2.1 The Railways Act 1993 (the “1993 Act”) gives the Secretary of State power to enter into franchise agreements for the provision of passenger rail services. Franchise agreements form the basis of the contractual relationship between the Secretary of State and the operators of those services, and set out the obligations that operators are required to fulfil.

2.2 The 1993 Act and the Railways Act 2005 (the “2005 Act”) set out the basis on which passenger rail services may be discontinued and passenger rail infrastructure may be closed. Collectively the discontinuance of services and the closure of infrastructure are referred to in this document as “closures”, and the relevant provisions of the 1993 and 2005 Acts in relation to closures are referred to in this document as “closure restrictions”.

2.3 Annex B to this document lists the sections of the 1993 Act which relate to the Secretary of State’s power to enforce compliance with franchise agreements and closure restrictions.

2.4 This document explains the Secretary of State’s legal powers to enforce compliance with the terms of passenger rail franchise agreements and closure restrictions, and sets out her policy in relation to the exercise of those powers.

2.5 The Department for Transport monitors the delivery of franchise agreements on behalf of the Secretary of State on an ongoing basis. It also receives information on contraventions of franchise agreements from sources such as Passenger Focus, passenger transport executives and members of the public. In addition, operators themselves are required to inform the Department on becoming aware of any contravention of their franchise agreements. The Department would become aware of any breach of closure restrictions in a similar way.

2.6 Where there is an area of concern, the Department will investigate and, if appropriate, take enforcement action. The Secretary of State has broad powers to require operators to submit information and documents for this purpose².

2.7 The Department adopts a stepped approach to enforcement in order to ensure that any action taken is proportionate to the contravention. The aims of the Secretary of State’s enforcement policy are to:

- ensure that franchise commitments are delivered and franchise agreements are complied with;
- maintain the effectiveness of competition for franchises by ensuring that bids are realistic and achievable;

² Section 58 of the 1993 Act.

- ensure that, if appropriate, the taxpayer is reimbursed if operators do not deliver the obligations in their franchise agreements; and
- ensure that closure restrictions are complied with.

2.8 There is a range of enforcement tools available in relation to contraventions of franchise agreements and closure restrictions. These include using the Secretary of State's powers under the 1993 Act to make an enforcement order or impose a financial penalty.

2.9 Where a franchise agreement has been contravened, the franchise agreement itself will, in most cases, provide the Secretary of State with additional means of enforcement. This might involve requiring the franchise operator to produce a plan to remedy the breach, requiring the operator to enter into an agreement giving such a plan contractual force or, in some cases, termination of the franchise.

2.10 The Department will seek to respond in a consistent manner where different train operators commit similar contraventions.

2.11 Sections 3 to 5 of this document describe the Secretary of State's enforcement powers and policy in more detail:

1. Section 3 ("Enforcement Orders") deals with the Secretary of State's power under the 1993 Act to make orders requiring operators to take specified steps in order to comply with the terms of their franchise agreements or with closure restrictions.
2. Section 4 ("Penalty Policy") relates to the Secretary of State's power under the 1993 Act to impose financial penalties for contraventions of franchise agreements or closure restrictions. It explains how the decision whether to impose a penalty will be made and how the amount of the penalty will be calculated.
3. Section 5 ("The Contractual Framework") outlines the contractual measures which the Secretary of State may take to enforce compliance with franchise agreements, and sets out her policy in relation to the use of those measures.

2.12 The 1993 Act gives the Office of Rail Regulation ("ORR") similar powers to enforce compliance with licences issued by it under that Act. The ORR has issued a consultation document (Enforcement Policy and Penalties Statement - November 2005) containing its policy in relation to those powers.

2.13 The legal information contained in this document is for general information only and should not be treated as legal advice. The policy contained in this document shall be kept under review and may be revised from time to time.

3. Enforcement Orders

3.1 Under section 55(1) of the 1993 Act, if the Secretary of State is satisfied that an operator is contravening, or is likely to contravene, its franchise agreement or any closure restriction, she must make an order to end or prevent the contravention. An order under section 55(1) is referred to in this document as an “enforcement order” or a “final order”.

3.2 An enforcement order will contain such provision as is required in order to secure compliance with the relevant franchise agreement obligation or closure restriction³.

3.3 The measures which the order requires the operator to take may be expressed as inputs, outputs, or a mixture of the two. The order must specify:

- what the operator is required to do, or not to do; and
- the time it takes effect, which must be the earliest practicable time.

3.4 The Secretary of State’s duty to make an enforcement order is subject to certain exceptions, which are described at paragraph 3.8.

3.5 An enforcement order may include provision that a reasonable sum be paid by the operator in the event of a specified contravention of the order. This is described in more detail at paragraphs 3.16 to 3.20.

Provisional Enforcement Orders

3.6 A provisional enforcement order (referred to in this document as a “provisional order”) is an interim measure for cases of urgency and may last for no more than three months. The Secretary of State may make a provisional order without going through all the procedural steps which would be required for a final order.

3.7 A provisional order will expire at the end of the period stated in the order unless the Secretary of State confirms the order. If confirmed, a provisional order becomes a final order.

Circumstances where an Enforcement Order is not Required to be Made

3.8 The Secretary of State is not required to make an enforcement order under section 55(1) of the 1993 Act in the following circumstances:

- a) where she is satisfied that her duties under section 4⁴ of the 1993 Act preclude her from making the order. In these circumstances, she cannot make an enforcement order⁵;

³ Section 55(1) of the 1993 Act.

⁴ Section 4 duties include promoting the use of the railway network and protecting the interests of users of railway services.

⁵ Section 55(5) of the 1993 Act.

- b) where the ORR has given notice that it considers that the most appropriate way of proceeding is under the Competition Act 1998⁶. Again, in these circumstances, the Secretary of State cannot make an enforcement order⁷;
- c) where the relevant operator has agreed to take, and is taking, appropriate steps to secure compliance with the relevant franchise agreement term or closure restriction. This will often be the case where action is being taken under a franchise agreement (see section 5 below). In these circumstances, the Secretary of State shall make an order only if she considers it appropriate to do so⁸;
- d) where the contravention will not adversely affect the interests of users of the railway or lead to any increase in public expenditure. In these circumstances, the Secretary of State shall make an order only if she considers it appropriate to do so⁹; or
- e) where the Secretary of State considers that the contravention is trivial and that it would be inappropriate, for that reason, to make an order. The Secretary of State cannot make an enforcement order in these circumstances.

3.9 The 1993 Act does not specify what constitutes a trivial contravention. However, a contravention may have aggravating features, which would prevent it from being considered trivial. These may include:

- a decision or omission by a director or member of senior management which leads to the contravention;
- attempts to keep details of the contravention from the Department;
- the operator, having previously certified its compliance with an obligation, being found to have contravened that obligation;
- steps not being taken to remedy the contravention after it has been identified; or
- repeated contraventions of the same or similar obligations by the operator or operators in the same owning group.

⁶ The Competition Act 1998 confers on the ORR the function of investigating and, where appropriate, taking enforcement action in respect of, suspected or actual breaches of competition law within the railway industry.

⁷ Section 55(5ZA) of the 1993 Act.

⁸ Section 55(5B)(a) of the 1993 Act.

⁹ Section 55(5B)(b) of the 1993 Act.

Procedure for Making Enforcement Orders

3.10 In certain circumstances¹⁰, the Secretary of State must, before making an enforcement order, or confirming a provisional order, give the ORR the opportunity to consider whether it would be more appropriate to proceed under the Competition Act 1998. If the ORR gives notice that it does consider it more appropriate to proceed under that Act, then the Secretary of State may not make the proposed enforcement order or provisional order¹¹.

3.11 Before making a final order, or confirming a provisional order, the Secretary of State must give notice to the operator to whom the order relates and publish that notice¹². The notice must state that the Secretary of State proposes to make or confirm the order and set out:

- the franchise agreement term or closure restriction to which the order relates;
- the acts or omissions which constitute the contravention; and
- any other facts which justify the making of the order.

3.12 The notice must specify a period of not less than 21 days during which representations about the imposition of the enforcement order may be made to the Secretary of State.

3.13 Once the Secretary of State is satisfied that the contravention has been rectified, she will formally advise the operator to that effect.

Decision not to Impose an Order

3.14 Where the Secretary of State decides not to impose an enforcement order in respect of a contravention of a franchise agreement or closure restriction, she will formally notify the relevant operator to that effect.

Enforcement Orders in relation to Closure Restrictions

3.15 The Secretary of State would, in making any enforcement order in relation to the contravention of a closure restriction, take into account any action taken by the ORR in relation to the same contravention.

Payments under Enforcement Orders

3.16 Under section 55(7A) of the 1993 Act, an enforcement order or a provisional order may require the operator to pay a reasonable sum in the event of a specified contravention of the order. The order may specify either

¹⁰ These circumstances arise where the operator to whom the proposed order relates is also (a) the holder of a licence issued under section 8 of the 1993 Act or (b) under closure restrictions (within the meaning of section 55(11) of the 1993 Act).

¹¹ Section 55(5ZA) of the 1993 Act.

¹² Section 56(1) of the 1993 Act.

the amount of the sum or the way in which the sum is to be calculated.

3.17 The payment required to be made under an enforcement order may not exceed 10% of the operator's turnover. This limit was introduced in the Transport Act 2000 to make the railway enforcement regime consistent with the regimes of other regulated utilities and with the regime under the Competition Act 1998. Turnover is determined in accordance with The Railways Act 1993 (Determination of Turnover) Order 2005, a copy of which is attached at annex A to this document.

3.18 If the whole or part of any payment required to be made under an enforcement order is not paid by the due date, the unpaid balance carries interest at the judgement rate, which is currently 8% per annum¹³.

3.19 Paragraphs 4.8 to 4.12 of this document set out the Secretary of State's policy in relation to the decision whether to impose a financial penalty under section 57A of the 1993 Act, and the determination of the amount of such penalties. That policy applies equally to any sum required to be paid in respect of a contravention of an enforcement order.

Performance-based Payments

3.20 There may be circumstances where it is appropriate to impose a requirement to make a payment under an enforcement order but it is not possible or appropriate to fix the amount of the payment at the time of making the order. For example, it may be appropriate to penalise an operator for the degree by which it has failed to meet a target contained in the order. In that event, performance might be assessed on a daily, weekly or other basis, with the sum to be paid dependant on the extent of any performance failure identified.

¹³ Section 55(7C) of the 1993 Act. The judgment rate is prescribed by Statutory Instrument 1993 No. 564 (L.2): The Judgment Debts (Rate of Interest) Order 1993.

4. Penalty Policy

4.1 Section 57B of the 1993 Act requires the Secretary of State to publish a statement of policy relating to the imposition of financial penalties under section 57A, as well as payments imposed under section 55(7A) and the determination of the amount of such penalties and payments. That statement is set out below.

The Legal Framework

4.2 The Secretary of State has power under section 57A of the 1993 Act to impose a financial penalty if she is satisfied that an operator has contravened or is contravening:

- a) a franchise agreement or a closure restriction, or
- b) an enforcement order or provisional order.

4.3 A financial penalty under section 57A is referred to in this document as a “penalty”.

4.4 The Secretary of State may impose a penalty in addition to, or as an alternative to, making an enforcement order. However, a penalty may not be imposed if provision for payment in respect of the same contravention is made in an enforcement order.

4.5 There is no power under section 57A to impose a requirement on an operator to do anything other than pay a penalty. For example, there is no power to require the operator to make investments in passenger services or infrastructure. However, it is open to the Secretary of State to agree with the operator that, rather than pay a penalty, it will make specified investments in passenger services. More information on this is provided at paragraph 5.15.

4.6 A penalty under section 57A may not exceed 10% of the operator’s turnover¹⁴. Turnover is determined in accordance with The Railways Act 1993 (Determination of Turnover) Order 2005, a copy of which is attached at annex A to this document.

4.7 If the whole or part of a penalty is not paid by the due date, the unpaid balance carries interest at the judgement rate, which is currently 8% per annum.¹⁵

¹⁴ Section 57A(3) of the 1993 Act.

¹⁵ Section 57(E)(1) of the 1993 Act.

The Decision to Impose a Penalty

4.8 ¹⁶The Secretary of State's overarching objective in imposing financial penalties is to incentivise compliance with franchise agreements and closure restrictions without introducing unwarranted risk to operators.

4.9 In deciding whether to impose a penalty, the Secretary of State will take into account all relevant facts and circumstances, and will consider whether other enforcement action would be more appropriate. The matters considered may include:

- The consequences of the contravention, including its effect on the interests of users of railway services and any resulting increase in public expenditure;
- The extent to which the operator has co-operated in complying with any enforcement order in relation to the contravention;
- The extent to which the operator has co-operated in developing and implementing plans to remedy the contravention;
- The desirability of creating an incentive for the operator to comply with the relevant franchise agreement term or closure restriction in the future;
- The desirability of deterring the operator from committing similar contraventions in the future;
- The desirability of deterring other operators from committing contraventions in the future;
- The extent to which the contravention was caused by circumstances beyond the operator's control (e.g. by acts or omissions of third parties);
- The extent to which the operator was at fault or negligent;
- The extent to which the contravention was allowed to continue after the operator became aware of it;
- The extent to which the contravention would have been apparent to a diligent operator; and
- The extent to which the contravention has resulted, or will result, in the operator losing any performance payments or suffering any other adverse consequence under the terms of its franchise agreement.

¹⁶ The policy contained in paragraphs 4.8 to 4.12 applies to any sum required to be paid under an enforcement order in respect of a contravention of the order in the same way that it applies to a penalty under section 57A of the 1993 Act in respect of a contravention of a franchise agreement or a closure restriction.

Determining the Amount of a Penalty

4.10 Determining the amount of a penalty is a two-step process. Firstly, the Secretary of State will seek to identify a figure proportionate to the seriousness of the contravention. The more serious the contravention, the higher that figure is likely to be. Secondly, the figure will be adjusted as described at paragraph 4.12 to produce the final amount of the penalty.

4.11 In assessing the seriousness of the contravention, the Secretary of State will take into account all relevant facts and circumstances. These are likely to include the matters listed in paragraph 4.9 and, in addition:

- whether the operator has previously contravened its franchise agreement, particularly in the same area;
- the duration of the contravention;
- the extent to which the operator gained, or tried to gain, an advantage (financial or otherwise) from the contravention; and
- the degree to which the operator has taken steps on its own initiative to report the contravention, to co-operate with any investigation and to remedy the contravention.

4.12 Once a figure proportionate to the seriousness of the contravention has been identified, that amount will be adjusted:

- to ensure that the operator does not profit from the contravention;
- to take account of any revenue support payable as a result of the contravention;
- to take account of any penalty or fine imposed by another body in respect of the same contravention;
- to take account of the financial consequences of any Remedial plan, remedial agreement or other arrangement under the operator's franchise agreement in respect of the contravention;
- to take account of the extent to which the contravention has resulted, or will result, in the operator losing any performance payments or suffering any other adverse consequence under the terms of its franchise agreement;
- to take account of the desirability of deterring future contraventions;
- to ensure that the penalty does not exceed 10% of the turnover of the operator; and

- to take account of any other relevant factors.

Procedure in relation to Penalties

4.13 Under section 57C of the 1993 Act, the Secretary of State must before imposing any penalty give the relevant operator notice of her intention to do so¹⁷. This notice must set out details of the contravention and the proposed penalty, and must be published in such manner as the Secretary of State considers appropriate. The notice may, for example, be published on the Department for Transport's website, or by means of a press release or notices at stations.

4.14 The notice must also specify the period (a minimum of 21 days) within which representations or objections may be made. The Secretary of State must consider any representations or objections made within that period.

4.15 In certain circumstances¹⁸, the Secretary of State must before imposing a penalty give the ORR the opportunity to consider whether it would be more appropriate to proceed under the Competition Act 1998. If the ORR gives notice that it does consider that it is more appropriate to proceed under that Act, then the Secretary of State may not impose the proposed penalty¹⁹.

4.16 If the Secretary of State wishes to modify a proposal to impose a penalty then, unless the modification involves either reducing the amount of the penalty or deferring the penalty date, she must either obtain the consent of the operator or notify the operator of her intention to make the modifications. Unless the modifications are trivial, the notice must specify a period of not less than seven days within which the relevant operator may make representations or objections. The Secretary of State must consider any representations or objections made within that period²⁰.

4.17 Within 21 days of receipt of the penalty notice (as described at paragraph 4.13), the operator may apply to the Secretary of State for the penalty to be made payable in instalments²¹.

4.18 Once she has imposed a penalty, the Secretary of State must publish a notice stating that she has done so, giving details of the contravention and the penalty. A copy of the notice must be served on the relevant operator²².

Right of Appeal

4.19 Operators have the right to appeal against the imposition of penalties. If an appeal is successful, the High Court may reduce, quash or defer the

¹⁷ Sections 57C(1) and (2) of the 1993 Act.

¹⁸ These circumstances arise where the operator on whom it is proposed to impose a penalty is also (a) the holder of a licence issued under section 8 of the 1993 Act or (b) subject to closure restrictions (within the meaning of section 55(11) of the 1993 Act).

¹⁹ Section 57A(5) of the 1993 Act.

²⁰ Sections 57C(4) and (5) of the 1993 Act.

²¹ Section 57C(8) of the 1993 Act.

²² Sections 57C(6) and (7) of the 1993 Act.

penalty. The court may also make an order that the operator may pay the penalty in instalments, if the Secretary of State has unreasonably refused an application to do so²³.

²³ Section 57F of the 1993 Act.

5. The Contractual Framework

5.1 In addition to the Secretary of State's powers under the 1993 Act, franchise agreements themselves provide the Secretary of State with means of enforcing their terms. Most franchise agreements contain the following three enforcement mechanisms²⁴:

- improvement plans;
- remedial plans and remedial agreements;
- termination.

5.2 These provisions are in addition to, and do not detract from, the Secretary of State's powers to take enforcement action under the 1993 Act. However, as referred to in paragraph 3.8(c) above, there may be circumstances where the Secretary of State considers it appropriate not to pursue action under the 1993 Act because the operator has agreed to take, and is taking, appropriate steps to secure compliance with the relevant franchise agreement provision. This may include circumstances where the operator is taking such steps under the terms of an improvement plan, remedial plan or remedial agreement.

Performance Benchmarks

5.3 Franchise agreements typically contain performance benchmarks in relation to capacity, cancellations and punctuality. There are four benchmarked levels for each area of performance:

- target level;
- improvement plan level;
- breach level;
- default level.

Performance at the target level is regarded as satisfactory performance. Performance at or below the improvement plan level entails contractual consequences, which are described below.

Improvement Plans

5.4 If a franchise operator's performance in relation to one of the performance benchmarks in its franchise agreement falls to the improvement plan level, the operator is required to submit an improvement plan to the Secretary of State. The improvement plan sets out the measures which the

²⁴ Some older agreements do not provide for improvement plans, or remedial plans or agreements. All franchise agreements provide for termination following an event of default.

operator will take to ensure that performance does not fall to that level again. The operator is required to implement the improvement plan and to keep the Secretary of State informed of its results. The content of an improvement plan does not require the Secretary of State's approval.

Remedial Plans and Remedial Agreements

5.5 If a franchise operator's performance in relation to one of the performance benchmarks in its franchise agreement falls to the breach level, that will constitute a contravention of the franchise agreement.

5.6 If the Secretary of State is satisfied that an operator is contravening, or is likely to contravene, its franchise agreement she may serve the operator with a 'remedial plan notice'. The contravention may relate to one or more of the performance benchmarks, or to any other provision of the franchise agreement. The remedial plan notice will detail the contravention and require the operator to put forward a plan (a remedial plan) to secure compliance with its franchise agreement.

5.7 If the Secretary of State is satisfied that the remedial plan proposed by an operator is appropriate to secure compliance with its franchise agreement, she will in most cases require the operator to enter into a remedial agreement giving contractual force to the remedial plan.

5.8 If dissatisfied with the remedial plan, the Secretary of State may seek to agree amendments with the operator. If agreement cannot be reached, the Secretary of State may impose her requirements by issuing an enforcement order and / or imposing a penalty under the 1993 Act.

5.9 Compliance by the operator with the terms of the remedial plan or remedial agreement will ordinarily result in no further enforcement action being taken by the Secretary of State. However, in some cases the Secretary of State may consider it appropriate also to impose a financial penalty and / or to seek to agree passenger benefits with the operator (as described at paragraph 5.15).

5.10 Non-compliance with a remedial plan or remedial agreement may result in the Secretary of State making an enforcement order against the operator. In addition, material non-compliance with a remedial agreement will be an event of default under the terms of the operator's franchise agreement and may therefore lead to termination of its franchise.

Termination

5.11 If a franchise operator's performance against one of the benchmarks in its franchise agreement falls to the default level for a specified number of periods, that will constitute an 'event of default' and the Secretary of State may have the right to terminate the franchise.

5.12 Various other events will also be events of default for the purposes of the franchise agreement, and may give the Secretary of State the right to terminate the franchise.

5.13 Events of default differ slightly between franchise agreements. However, franchise agreements typically include the following events of default:

- Insolvency of the franchise operator
- Non-payment of sums due to the Secretary of State
- Change of control of the franchise operator without the prior consent of the Secretary of State
- Revocation of an operating licence
- Breach of law
- Failure to comply with a remedial agreement or enforcement order
- Non-membership of inter-operator schemes
- Ceasing to provide passenger services
- Defaults in relation to performance bonds, season ticket bonds or guarantees
- Termination of key contracts without the Secretary of State's prior approval
- Breach of financial ratios
- Termination of another franchise agreement, where the operator in question is also the operator of a franchise which has been terminated, or is affiliated to that operator i.e. a cross-default
- Continuing material contravention of other obligations under the franchise agreement.

5.14 An event of default does not automatically lead to the termination of the franchise agreement. The Secretary of State will have the right to terminate where there is an event of default which is unremedied or continuing, and which she considers to be material. She is not obliged to exercise that right. However, in some cases, termination may be the most appropriate action for the Secretary of State to take. Events of default will be considered on a case-by-case basis to ensure that appropriate action is taken.

Passenger Benefits

5.15 There may be circumstances where an operator has contravened its franchise agreement or a closure restriction and the Secretary of State, instead of imposing a penalty under the 1993 Act, agrees with the operator that the operator will make investments in services or infrastructure. Such investments are known as 'passenger benefits'. Passenger benefits may in some circumstances be included in a remedial agreement or may be provided for in a stand-alone amendment to the operator's franchise agreement.

5.16 The Secretary of State will only agree passenger benefits instead of a penalty where to do so is consistent with the overall objectives of her enforcement policy and, in particular, with the objective of deterring operators from future contraventions.

5.17 If passenger benefits were agreed with an operator, the operator's franchise agreement would be amended to include a requirement to make the relevant investment.

Annex A: Statutory Instrument 2005 No. 218: The Railways Act 1993 (Determination of Turnover) Order 2005

STATUTORY INSTRUMENTS

2005 No. 2185

TRANSPORT

The Railways Act 1993 (Determination of Turnover) Order 2005

Made 2nd August 2005

Coming into force 3rd August 2005

Whereas a draft of this Order has been laid before, and approved by a resolution of, each House of Parliament pursuant to sections 55(7B) and 57A(3) of the Railways Act 1993[1];

Now, therefore, the Secretary of State, in exercise of the powers conferred upon him by sections 55(7B) and 57A(3) of the Railways Act 1993, hereby makes the following Order:

Citation and Commencement

1. This Order may be cited as the Railways Act 1993 (Determination of Turnover) Order 2005 and shall come into force on the day after the day on which it is made.

Interpretation

2. —(1) In this Order—

"the Act" means the Railways Act 1993;

"applicable turnover" means the turnover of the relevant operator derived from its railway business activities in Great Britain during a business year after deduction of trade discounts, value added tax and other taxes directly related to turnover, and where a business year does not equal 12 months, the applicable turnover shall be the amount which bears the same proportion to the applicable turnover during that business year as 12 months does to the period of that year;

"business year" means a period of more than six months in respect of which a relevant operator publishes accounts or, if no such accounts have been published for the period, prepares accounts; and

"railway business activities" means so much of any business carried on by a relevant operator as consists in either or both of the following:

(a) the provision of railway services; and

(b) the ownership or operation of a railway asset;

together with any business carried on incidental to that business.

(2) In this Order, turnover derived from railway business activities includes (without limitation) amounts derived from:

- (a) aid granted to the relevant operator by a public sector operator, if the aid facilitates or promotes the relevant operator's railway business activities;
- (b) fares paid in respect of railway passenger services;
- (c) fees paid in respect of services for the carriage of goods by railway;
- (d) catering services provided at stations or on trains;
- (e) car parking facilities at stations;
- (f) the sale of land forming part of a station; and
- (g) leases and licences granted in respect of land forming part of a station.

Determination of Turnover for the purposes of section 55(7B)

3. —(1) The turnover of a relevant operator, for the purposes of section 55(7B), is—

- (a) the applicable turnover for the business year preceding the date on which the relevant operator first made a specified contravention of the final or provisional order to which it was subject; and
- (b) where the length of the infringement is more than 12 months, in addition the amount of the applicable turnover for the business year preceding that identified under sub-paragraph (a) which bears the same proportion to the applicable turnover for that business year as the period by which the length of infringement exceeds 12 months bears to 12 months;

save that the amount added under sub-paragraph (b) shall not exceed the amount of the applicable turnover for the previous business year in question.

(2) For the purposes of this article, "length of the infringement" means the period of the specified contravention of a final or provisional order by the relevant operator.

Determination of Turnover for the purposes of section 57A(3)

4. —(1) The turnover of a relevant operator, for the purposes of section 57A(3), is—

- (a) the applicable turnover for the business year preceding the date on which a notice pursuant to section 57C(1)[2] of the Act was served on the relevant operator; and
- (b) where the length of the infringement is more than 12 months, in addition the amount of the applicable turnover for the business year preceding that identified under sub-paragraph (a) which bears the same proportion to the applicable turnover for that business year as the period by which the length of the infringement exceeds 12 months bears to 12 months;

save that the amount added under sub-paragraph (b) shall not exceed the amount of

the applicable turnover for the preceding business year in question.

(2) For the purposes of this article, "length of the infringement" means the period of the contravention of the relevant condition or requirement or final or provisional order by the relevant operator.

No preceding business year

5. Where in the application of article 3 or 4 there is a date in respect of which there is no preceding business year then the applicable turnover shall be the turnover derived by the relevant operator from railway business activities in Great Britain during the business year in which that date falls.

Signed by authority of the Secretary of State for Transport

Derek Twigg

Parliamentary Under Secretary of State Department for Transport

2nd August 2005

EXPLANATORY NOTE

(This note is not part of the Order)

This Order makes provision for the determination of the turnover of a relevant operator for the purposes of sections 55(7B) and 57A(3) of the Railways Act 1993 ("the Act").

Section 55(1) and (2) provides that certain bodies have power to make final and provisional orders in order to secure compliance by relevant operators with relevant conditions or requirements (as such terms are defined in section 55(10)). Section 55(7A) provides that such power includes a power to require the relevant operator to pay a reasonable sum as is specified in, or determined in accordance with, the final or provisional order in the event of any specified contravention of the terms of the order.

Section 55(7B) provides that the amount of that reasonable sum shall not exceed 10 per cent. of the turnover of the relevant operator determined in accordance with an order made by the Secretary of State.

Until the provisions amending section 55 of the Act set out in paragraph 21 of Schedule 1 to the Railways Act 2005 are commenced, the bodies with power to make final and provisional orders under that section are the Strategic Rail Authority and the Office of Rail Regulation. Following commencement of these provisions, the relevant bodies will be the Secretary of State, the Scottish Ministers and the Office of Rail Regulation.

Section 57A(1) provides that certain bodies have power to impose a penalty on relevant operators where they are satisfied that a relevant operator has contravened or is contravening either a relevant condition or requirement or a final or provisional order.

Section 57A(3) provides that the amount of that penalty shall not exceed 10 per cent. of the turnover of the relevant operator determined in accordance with an order made

by the Secretary of State.

Until the provisions amending section 57A of the Act set out in paragraph 23 of Schedule 1 to the Railways Act 2005 are commenced, the bodies with power to impose penalties under that section are the Strategic Rail Authority and the Office for Rail Regulation. Following commencement of those provisions, the relevant bodies will be the Secretary of State, the Scottish Ministers and the Office of Rail Regulation.

The term "public sector operator", used in article 2(2)(a), is defined in section 25(1) of the Act, as amended by section 202 of the Greater London Authority Act 1999.

A full Regulatory Impact Assessment has been prepared on the effect of this Order on the costs of business. A copy of that assessment has been placed in the library of both Houses of Parliament. Copies may be obtained from the Department for Transport, Great Minster House, 76 Marsham Street, London SW1P 4DR. The assessment may also be accessed by visiting the website of the Office of Public Sector Information at www.opsi.gov.uk.

Notes:

[1] 1993 c. 43; sections 55(7B) and 57A(3) were inserted by the Transport Act 2000 (c. 38), sections 225(2) and 225(1) respectively.

[2] Section 57C(1) was inserted by the Transport Act 2000, section 225(1).

ISBN 0 11 073252 9

Annex B: Table showing relevant sections of the Railways Act 1993

The sections of the 1993 Act which relate to the Secretary of State's power to enforce compliance with franchise agreements and closure restrictions are:

Section 55	Orders for securing compliance with a franchise agreement or closure restrictions ("enforcement orders")
Section 56	Procedural requirements for making enforcement orders
Section 57	Validity and effect of enforcement orders
Section 57A	Penalties
Section 57B	Requirement to publish a statement of policy in respect of the imposition of penalties and the determination of their amount
Section 57C	Procedural requirements for imposing penalties
Section 57D	Time limits for imposing penalties
Section 57E	Interest and payment of instalments
Section 57F	Validity and effect of penalties
Section 58	Power to require information for the purposes of sections 55 and 57A