



Department
for Transport



OFFICE OF RAIL REGULATION

Memorandum of Understanding between the Highways Monitor and the Department for Transport

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1. Purpose

- 1.1. The Infrastructure Act 2015 (the Act) allows the Secretary of State for Transport to appoint a Strategic Highways Company, Highways England (the Company), to manage the Strategic Roads Network. The Highways Monitor (the Monitor) is a part of the Office of Rail Regulation (ORR), responsible for discharging that organisation's legal requirements set out in the Act.
- 1.2. At a high level, the Act requires the Monitor to carry out activities to monitor how the Company exercises its functions. Those monitoring activities may include investigating, publishing reports or giving advice to the Secretary of State on whether, how and at what cost the Company has achieved its objectives set out in the Road Investment Strategy (RIS) and on objectives for a future RIS and the effect of directions and guidance given to Highways England.
- 1.3. The Act also makes provision for ORR to take enforcement action if it is satisfied that the Company has contravened or is contravening compliance with the RIS or compliance with directions and regard to guidance given by the Secretary of State. In taking enforcement action ORR may give notice to the Company as to the contravention and the steps the Company must take to remedy it or require the Company to pay a fine to the Secretary of State.
- 1.4. The Monitor also has an essential role to play in helping secure value for public money in the operation of the strategic road network. Its advice is essential in making sure the Secretary of State is well informed about the state and future of the network, and of the Company's ability to deliver its obligations. A strong, productive relationship between the Secretary of State and the Monitor is important to the wider health of the institutional structure set out in the Infrastructure Act. To ensure that this takes place, and that the Secretary of State remains fully aware of events in the highways sector, the Monitor needs to ensure the Secretary of State receives regular and thorough advice.
- 1.5. This Memorandum of Understanding (MoU) sets out the relationship between the Secretary of State (represented by the Department for Transport (the Department)) and the Monitor including the behaviour which the Secretary of State, as owner of the Company, expects the Company to demonstrate. This MoU is not intended to be legally binding, and no legal obligations or legal rights shall arise between the parties from this MoU. The parties enter into the MoU intending to honour all their obligations.

2. Activities of the Monitor

Core activities of the Monitor include:

1. Monitoring performance and efficiency of the Company against the objectives and targets set in the different parts of the RIS.
2. Providing advice to support the setting of the Road Investment Strategy, including advice to confirm that the developing proposition remains deliverable and challenging.
3. Monitoring the Company's compliance with its statutory directions and regard to guidance.
4. Benchmarking the Company's performance and efficiency against comparable organisations in other countries or other sectors.
5. Assessing the Company's continued compliance with the assurance arrangements in sections 7.2 to 7.8 of the framework document and delegations letter, and advising whether outstanding requirements have been met.
6. Undertaking enforcement action.
7. Providing advice to the Secretary of State on the activities listed above, and on any other topics where he/she requests advice that are linked to the Monitor's duties.
8. Carrying out further investigations that the Monitor believes to be justified.
9. Assuring its own work to ensure its advice and decisions are of high quality.

Road Investment Strategy [1]¹

- 2.1. The Monitor will support the setting of the RIS, in line with the process set out in Schedule 2 of the Act and any additional guidance by providing advice on what the Secretary of State can expect to achieve with the funds identified. This advice is intended to ascertain whether the developing proposition is both challenging and deliverable, particularly in terms of efficiency.
- 2.2. Before the formal initiation of the RIS process, the Company will carry out preliminary work. The Company is required to engage with and take account of the views of the Monitor when producing the SRN Initial Report. The Monitor will participate and engage in this process where necessary and should advise the Secretary of State on the Company's compliance with its statutory directions and regard to guidance.
- 2.3. As part of the preparation of the Draft RIS, the Secretary of State will ask the Monitor to evaluate the Draft RIS to confirm that the government's proposed requirements are challenging and deliverable with the proposed financial resources. Advice may also be requested for subsequent iterations of the Draft RIS, if necessary. The Monitor may also provide advice to the Secretary of State and guidance to the

¹ These numbers correspond to the core activity outlined in section 2 (Activities of the Monitor).

Company about what elements to include in its response to the Draft RIS to assist the efficiency review (see point 2.4).

- 2.4. Once the Company has responded to the Draft RIS through its Draft Strategic Business Plan (Draft SBP), the Monitor will carry out an efficiency review to confirm that the Company's response will deliver the requirements of the Draft RIS, and does so in a way that represents an effective and efficient use of public money. In doing so, it will make use of the evidence base it has gathered from its wider interactions with the Company. Where necessary, the Monitor may request further information of the Company as required to provide informed advice and support the RIS process. The Department may provide information to assist this process.
- 2.5. If there are any further revisions of the RIS agreed between the Secretary of State and the Company, the Monitor will provide further advice about whether any revised proposition remains challenging and deliverable.
- 2.6. These proceedings will normally take place in the context of setting the RIS as part of a regular cycle. The proceedings may also take place in the event of a reopening of the RIS. If the RIS is reopened, the Monitor would be expected to assess the effects of any changes to the RIS, any change in the Statement of Funds Available or the requirements upon the Company as per the process when setting a new RIS, to determine their effects on the Company in exercising its functions, on the delivery of the original RIS and on the general efficiency of the Company.
- 2.7. As the RIS remains a live document, there will be an ongoing need for change control. The Secretary of State will set out clear processes which will include informing the Monitor of any changes. The Department will endeavour to inform the Monitor of any plans to initiate change control at the earliest opportunity.

Monitoring and benchmarking [2,3,4,5]

- 2.8. The Monitor will be responsible for assessing the Company's performance and efficiency in the areas of:
 - a. Delivery against the RIS, including the performance specification and the investment plan (taking into account any standalone protocol agreements where they have a significant impact)
 - b. The Company's financial performance; and
 - c. Any additional measures which either the Monitor or Secretary of State have determined need to be taken into account.
- 2.9. The Secretary of State will expect the Company to provide all information necessary to make this assessment including financial and operational information, noting the Monitor's right to data under the Act. Both the Company and Monitor should work closely to ensure that reporting is timely and can support the Secretary of State in making decisions about the Company.

- 2.10. The Monitor will work with the Secretary of State and the Company to generate an Operational Metrics Manual which the Secretary of State will approve. The Operational Metrics Manual will set out the definitions of operational metrics, including the KPIs and PIs set out in the Performance Specification.
- 2.11. The performance and efficiency of the Company should be assessed in quantitative terms. Some elements, however, may not be suitable for quantifiable assessment – either because the element is fundamentally unquantifiable or because a particular element is best suited to qualitative assessment. The Monitor may therefore need to assess performance and efficiency in other ways. If the Monitor considers that an element is best suited to qualitative assessment, it may seek agreement from the Department as to the suitability of the approach.
- 2.12. Where the Secretary of State has been made aware by other government departments of issues which relate to the Company exercising its functions (e.g. monitoring by external bodies such as the Environment Agency), they will inform the Monitor.
- 2.13. The Monitor will provide its assessment of the Company’s performance and efficiency to enable the Company and its management to be held to account by the Secretary of State. The Monitor will ensure that the Secretary of State is fully appraised of the nature of the Company’s performance, and of any areas where it has concerns about the Company’s ability to deliver on its obligations under the RIS or under wider guidance and directions. Where necessary, the Monitor will further explain its analysis to help further inform the Secretary of State.
- 2.14. In addition to assessments of performance and efficiency, the Monitor will periodically benchmark the Company to compare its efficiency against other infrastructure providers or other comparable organisations in the UK and overseas, this could include benchmarking against the performance of other UK road networks. The findings of this work will inform wider discussions, including those listed above for the RIS.
- 2.15. The Monitor will also assess the extent to which the Company is applying sections 7.2 to 7.8 of the framework document agreed between the Secretary of State and the Company, including details set out in the Delegations and Assurance Checklist, as a condition of the Company’s delegated authority to spend. In order to ensure that the framework is applied fairly and impartially, the Monitor may be required to judge the extent to which individual elements of the framework have been met. Where relevant, the Monitor may ask either the Company or the Secretary of State to provide evidence in relation to the points raised in the assurance framework to help the Monitor in providing its findings to the Secretary of State.

Advising the Secretary of State [7]

- 2.16. Based on its work of monitoring and benchmarking the activities of the Company, the Monitor will advise the Secretary of State about the efficiency and the overall performance of the Company exercising its functions. This advice should support major policy decisions (including the RIS), as well as the regular management of the Department's relationship with the Company in both a 'shareholder' and a 'client' capacity. The Secretary of State will look to the Monitor to inform his/her understanding of whether the Company has worked effectively over the course of both the year and the RIS period.
- 2.17. The Monitor will also inform the Secretary of State of any urgent issues, where it feels that immediate action may be required.
- 2.18. For both the Monitor and for Transport Focus as watchdog, transparency of advice is the default position but the Secretary of State should be provided with any reports prior to publication. Formal advice from the Monitor to the Secretary of State should be published unless the contents are commercially sensitive, or the Monitor feels that the advice itself is of a sensitive nature and restricting publication is compliant with the Freedom of Information Act.

Investigations [8]

- 2.19. The Monitor may also investigate and report on issues which it judges to be relevant to its duties under the Act and the remit set out in this document. The Monitor will inform the Secretary of State of its planned investigations, and the reasons for them, and seek to work in harmony with the Department's wider plans for research or investigations in order to ensure that any such investigations do not duplicate existing Department activities.

Enforcement [6]

- 2.20. The Monitor has the power to undertake enforcement action, including the power to issue improvement notices and the power to issue fines, and will notify the Secretary of State if it intends to do so. The Monitor will use this as a tool to encourage effective and efficient management of the network, for factors that are within the control of the Company. It will make public its policy on enforcement, setting out the different types of enforcement action that it can undertake, and how these will be applied on a consistent and proportionate basis. This policy will take into account any guidance published by the Secretary of State and by HM Treasury in relation to issuing fines.
- 2.21. Some enforcement action can be undertaken by the Secretary of State in his/her capacities as client and shareholder of the Company, as well as under his/her powers set out in wider legislation. The Monitor and the Secretary of State will cooperate in enforcement matters.

- 2.22. Further detail on enforcement is set out in section 4, guidance by the Secretary of State and HM Treasury and in the Monitor's own policy.

Assurance within the Monitor [9]

- 2.23. The Monitor (working with the ORR board) will carry out assurance on its own work, to ensure that it provides high quality advice to the Secretary of State and that its enforcement actions are based on sound evidence.
- 2.24. The Monitor will participate in the Department's evaluation of roads reform.
- 2.25. Both the Secretary of State and ORR recognise that the Monitor should be subject to independent review of its effectiveness and efficiency in exercising its functions. Secretary of State and ORR will jointly commission the reviews, with the first one after an appropriate period of time and periodically thereafter at dates to be agreed. This does not prejudice the Secretary of State's ability to issue relevant guidance to the Monitor.
- 2.26. The Monitor will make sure that any measures or statistics created by the Monitor (and not provided to the Monitor by other bodies) are classified as Official or National Statistics and comply with the Official Statistics Code of Practice.

3. Relationships

Meetings

- 3.1. The Department and Monitor will formally meet at least once every quarter to discuss the Monitor's findings and work. In addition to this and as part of maintaining productive working relationships, the Department and Monitor will hold regular liaison meetings and coordinate with the Department's wider plans for research.

Data Exchange

- 3.2. The Company is expected to submit appropriate data to the Monitor so that the Monitor is able to form an assessment and provide timely and well-evidenced advice to the Secretary of State about the performance and efficiency of the Company.
- 3.3. The Monitor has the legal right to require the Company to provide such information as it considers necessary for the purpose of carrying out its statutory activities. This power exists to ensure that the Monitor has access to all of the information required to assess the Company's performance (which is separate from the network performance of the network which it operates) and efficiency and hold it to account.
- 3.4. The Secretary of State and Monitor agree that the following categories of data are relevant to monitoring the Company:

- a. Information relating to the delivery of the RIS (this includes information to support all the measures and metrics agreed as part of the RIS, for example pavement condition)
 - b. Information relating to any activities relating to the tasks listed in section 2 of this MoU
 - c. Information required by the Monitor to benchmark the general performance and efficiency of the Company, or to assess any specific elements of performance and efficiency that the Monitor wishes to investigate.
 - d. Other data such that the Secretary of State should determine.
- 3.5. The data includes both financial and operational information of the Company exercising its functions; it covers both qualitative and quantitative information as well as associated explanations. Where relevant, data may need to be disaggregated to an appropriate level. Relevant data may cover the past, present and projected performance and efficiency of the Company exercising its functions. This list is not exhaustive, and further information may be judged relevant.
- 3.6. The Monitor should ensure that it completes its monitoring responsibilities in a way which is proportionate, seeking to minimise the burden on the Company where possible. In particular this will mean imposing reporting requirements only where necessary. To minimise the reporting burden on the Company, the Monitor will abide by the following principles:
- a. Aim as far as possible to require only data, commentary and analysis that the Company already requires and produces for its own business management purposes under the new framework;
 - b. Target information requests on areas of problems, and minimise requests on areas where performance and efficiency is consistent with the RIS;
 - c. Avoid requiring the Company to report information more than once;
 - d. Be clear over why data is needed, and agreeing the process for data submission with the Company first;
 - e. The Monitor will only request new information when existing sources have been exhausted and there is a clear need for the information to allow the Monitor to reach a conclusion;
 - f. The Monitor will support this process by setting out its requirements in publically available monitoring reporting guidelines and monitoring reporting templates.
- 3.7. Where full validation of data is likely to delay final results beyond the point at which they can support the effective management of the Company, the Monitor may, where appropriate, provide interim advice to the Secretary of State.
- 3.8. Where the Monitor is making public material based on the interpretation of Company data, the Monitor agrees to provide the Company and the Secretary of State with advanced copies of the relevant documents, so the Company can confirm

the factual accuracy of the data to be released. Data requests should be discussed and mutually agreed wherever possible.

- 3.9. Where new data sets need to be collected, the Monitor will provide the Company and the Secretary of State with reasonable notice of the requirement, taking account of the time needed to collect, collate and quality assure the information. This is without prejudice to the Monitor's statutory power to require the Company to disclose information.
- 3.10. Where the Monitor requests new data sets from the Company that do not already exist, and the Company contests the need for such a data source, the Monitor and the Company agree to refer the matter to their chief executives. If this still does not resolve the issue, the Monitor will commission an independent third party, such as the Secretary of State, to examine the question, assessing the value the new data sets will add, the implications of collection and processing for the Company and the steps taken to minimise any burden.
- 3.11. The Secretary of State and the Monitor on request, will share data received from the Company about it exercising its functions.

Other Partners and Government Departments

- 3.12. The Monitor will make appropriate arrangements with Transport Focus and its subsidiary bodies to support the delivery of one another's responsibilities under the Act, in particular for sharing information needed for the assessment of the requirements of the RIS and its performance specification such as information on user satisfaction. Responsibility for determining whether any relevant measures fulfil the terms of the RIS will rest with the Monitor.
- 3.13. The Monitor and any Secretary of State Client Advisor function will cooperate to assist the Monitor in delivering its responsibilities in regard to sections 7.2 to 7.8 of the Framework Document.
- 3.14. The Secretary of State will act as a conduit for all data requests from other parts of government in relation to the work of the Monitor. Should the Monitor receive any requests for data or analysis from other parts of central government, these should be referred to the Department's roads client team.

4. Enforcement action

- 4.1. The Secretary of State and Monitor agree that enforcement action is a tool to encourage good performance and efficiency and more effective patterns of behaviour. The decision on whether to take enforcement action will take account of exceptional circumstances. It will also consider the manner in which the situation became apparent, and the steps already being taken by the Company. When

considering enforcement action, the Monitor should consider any guidance issued by the Secretary of State and HM Treasury.

- 4.2. The Monitor may take non-statutory action, such as making public comment on the Company's performance and efficiency. It is also entitled to undertake formal enforcement action under the provisions of section 11(2) in the Act if it is satisfied that the Company has contravened or is contravening compliance with the RIS or compliance with directions and regard to guidance given by the Secretary of State. Statutory enforcement action may consist of:
- giving notice to the Company stating the contravention, and the steps the Company must take in order to remedy it;
 - requiring the Company to pay a fine to the Secretary of State.
- 4.3. Before beginning statutory enforcement action, the Monitor should:
- a. Write to the Company to inform them of the intention to take statutory enforcement action. This notice of potential enforcement will inform the Company of the grounds on which action is being taken and inform the Company of the date by which it must provide any evidence in defence of its own actions or to indicate steps being taken to rectify the cause for potential enforcement action.
 - b. Explain to the Secretary of State the grounds on which the action is being taken.
 - c. Take into account any evidence provided by the Company before deciding whether to formally proceed with statutory enforcement action. Any decision to proceed or not to proceed with statutory enforcement action will be communicated to the Company through a final notice of enforcement in writing.

Respective roles of monitor and Secretary of State

- 4.4. As the Secretary of State continues to hold separate powers of enforcement, the Department and the Monitor must work cooperatively in carrying out enforcement action.
- 4.5. While the Secretary of State and Monitor both possess the right to enforce independently, both parties shall inform one another of enforcement action and seek to coordinate as far as possible.
- 4.6. The Monitor will have primary responsibility for enforcement action relating to:
- a. Compliance with the RIS, including the performance specification and investment plan;
 - b. Achievement of efficiency targets set in the RIS;
 - c. Compliance by the Company with the statutory directions and its regard to other directions and guidance issued by the Secretary of State.

- 4.7. Conversely, the Secretary of State will take primary responsibility for enforcement action relating to:
- a. Management of the Company;
 - b. Fulfilment of the network management duty and other statutory responsibilities;
 - c. Other matters arising in relation to the Company;
 - d. Other matters such as the Secretary of State may determine.
- 4.8. The Monitor is expected to consider delivery of the RIS and its component elements, using reported information to assess delivery and impact on future delivery. In addition, the Secretary of State may wish to monitor the delivery of ongoing or planned projects of interest to him/her in real time, in order to ensure delivery of his/her objectives. Where there is a need for enforcement action relating to the failure to deliver specific programmes (for example if the Secretary of State was minded to take an immediate response to a failure to deliver a programme where the Monitor would be unlikely to act until later in its reporting cycle), the Secretary of State and the Monitor will discuss the situation before determining an appropriate course of action and, if necessary, determine which party should take enforcement action.
- 4.9. If either the Secretary of State or the Monitor believes enforcement action should be taken on a point where the primary responsibility rests with the other party, it will advise the other party of its assessment of the need to undertake enforcement action and agree a way forward.

5. Publication & Transparency

- 5.1. One of the aims of roads reform is to make the performance and efficiency of the strategic road network more transparent. There is a general expectation that the Monitor will make public its analysis and reports by default, in such a way as to help external observers and the general public reach an informed understanding as to how the Company is exercising its functions.
- 5.2. As part of its advice to the Secretary of State, the Monitor must produce:
- a. Advice during the development of a new or revised RIS including:
 - Evaluation of the Draft RIS, confirming that it is deliverable and challenging;
 - An Efficiency Review of the Company's Draft SBP.
 - b. An annual report, assessing the performance and efficiency of the Company exercising its functions against the RIS and other functions listed in section 2 over the past year and RIS period to date, supplemented by a further mid-year update to the Secretary of State as to the Monitor's progress. The Annual Report should be produced by the September following the previous financial year.

- c. Frequent reporting to the Secretary of State , in a format and periodicity to be agreed, assessing the performance and efficiency of the Company exercising its functions against the RIS over the agreed period, as well as any other factors which the Monitor deems relevant to bring to the Secretary of State’s attention.
- 5.3. The Monitor may also produce any further documentation required to communicate its analysis, including standalone advice, regular reports and data series.
- 5.4. Exceptions to the general principle of transparency include commercially sensitive information and analysis which the Monitor considers sensitive.

6. Monitor Governance

- 6.1. The Monitor will provide independent advice, and will be expected to hold the Company to account for its performance and efficiency on behalf of Parliament and the Public, advising the Secretary of State and helping to protect his/her investment in the Company and Network. The fulfilment of the Monitor’s duties, including the provision of advice, will be overseen by the Roads Committee, under the strategic oversight of the ORR board and Chief Executive. The Secretary of State is responsible for appointing members of the ORR board and will appoint a new non-executive member of the board with relevant experience for the new Monitor function.
- 6.2. The ORR will form its Roads Committee based on relevant skills to the road monitoring role and will write to the Secretary of State to agree the composition of the initial Roads Committee and how it meets the agreed requirements. The ORR will consult the Secretary of State prior to making any significant changes to the membership of the Roads Committee.
- 6.3. The ORR board, advised by the Roads Committee, will be responsible for the appointment of an expert panel of external specialists. This panel is intended to provide wider context on the assessment of performance and efficiency, drawing on relevant experience from the road sector or other relevant best practice.
- 6.4. Executive functions will be led by a Roads Director with appropriate skills and experience, appointed by ORR. The Roads Director in turn will be supported by a team dedicated to work on roads issues, who will be able to call on cross-ORR resource as appropriate.
- 6.5. ORR’s board will continue to be responsible for the overall quality of advice given by the Monitor and for any reputational risk associated with the Monitor carrying out its activities. ORR’s board will retain ultimate responsibility for oversight of the Road Committee’s work, including high level assurance of the advice function, and will retain control of key decisions, including the decision to fine.

7. Sponsorship by the Department

- 7.1. Sponsorship for the Monitor within the Department will rest primarily with the RIS client division, who also hold responsibility within the Department for overseeing the delivery of the RIS. Any advice for the Secretary of State should be shared with this division (or its designated successor), and any matters for discussion ahead of the submission of such advice should involve this division with adequate time to consider the documentation. The division will also serve as a focal point for any roads issues that the Monitor needs to resolve with the Secretary of State (including the Department).
- 7.2. For corporate matters, sponsorship will remain with the main ORR sponsorship team in the Department's rail executive.

8. Funding and resources

- 8.1. The Department shall agree a funding settlement for the Monitor with ORR on a triennial basis, sufficient to ensure that the duties of the Monitor are discharged in a meaningful way and reflecting wider allocations at the spending round. This process will take into account the on-going functions of the Monitor and will, where appropriate, agree how to adjust the scope of the Monitor's activity in a mutually satisfactory way to ensure work is funded adequately. The Secretary of State will communicate the agreed funding settlement for the Monitor in the form of a letter which will sit alongside this document and be refreshed with each settlement.
- 8.2. Funding for the Monitor must be in addition to and independent from ORR's funding from the rail sector. Activities on the road and rail sides must be accounted for separately. Funding for the Monitor will include an appropriate contribution towards the corporate activities of ORR, reflecting the share of central costs associated with roads activity.
- 8.3. Funding will be provided by yearly grant-in-aid on 1 April of each year, which the Monitor will manage to meet its expenses and risks. The level of grant will be as set out in the Secretary of State's letter on the agreed funding settlement. The Monitor should expect to justify its spending to demonstrate that it is efficient and proportionate to its responsibilities. If the Secretary of State requests that, in connection with its duties, the Monitor conducts significant and additional investigations, then the Secretary of State and ORR will agree the additional funding that will be provided to conduct this work.

For the Department for Transport

..... **Date**

John Hayes, MP
Minister of State

For the Office of Rail Regulation

..... **Date**

Anna Walker
Chair