

Economic regulation of airports: Statement of policy on penalties

CAP 1156



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Economic regulation of airports: Statement of policy on penalties under Chapter 1 of the Civil Aviation Act 2012

Civil Aviation Authority

February 2014

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Executive Summary

1. The Civil Aviation Act 2012 (the Act) allows the CAA to impose appropriate and proportionate penalties on:
 - holders of airport licences issued by the CAA under the Act, for breach of licence or breach of an enforcement order: the CAA may impose a fixed amount up to 10% of the licence holder's qualifying turnover and/or a daily amount up to 0.1% of its qualifying turnover;
 - any person who, without reasonable excuse, fails to provide information or documents required by the CAA by notice under its powers in Chapter 1 of the Act: the CAA may impose a fixed amount up to £2m and/or a daily amount up to £100,000; and
 - any person who knowingly or recklessly provides false or misleading information to the CAA or who intentionally alters, suppresses or destroys a document that they are required to provide by a notice issued by the CAA under Chapter 1 of the Act. There is no specified limit on penalties for this offence.
2. The Act requires the CAA to consult on and publish a statement of its policy (the penalties statement) with respect to imposing penalties under Chapter 1 of the Act and determining their amount. The CAA consulted on a draft statement in May 2013.¹ The CAA received five responses to this consultation.²
3. This document sets out the CAA's decision following this consultation and includes the CAA's penalties statement.
4. The penalties statement has followed precedents set by similar statements in other regulated sectors. It explains the criteria by which the CAA will determine whether a penalty is appropriate, based largely

¹ The Consultation can be found at: <http://www.caa.co.uk/default.aspx?catid=78&pagetype=90&pageid=14781>.

² Responses from Heathrow Airport Limited, Gatwick Airport Limited, Ryanair, the Heathrow LACC & AOC and the Gatwick Airport ACC can be found at: <http://www.caa.co.uk/default.aspx?catid=78&pagetype=90&pageid=15062>

on the Macrory principles on imposing penalties and in particular on the aim to incentivise compliance.

5. The penalties statement also explains the criteria the CAA will use to determine the amount of the penalty, based primarily on the seriousness of the breach or failure to provide information. The CAA will also take into account any aggravating or mitigating factors.

CAA

13 February 2014

CHAPTER 1

Responses to the consultation on the CAA's draft penalties statement and the CAA's final decision

Introduction

1.1 The Civil Aviation Act 2012 (the Act) allows the CAA to impose appropriate and proportionate penalties on:

- holders of airport licences issued by the CAA under the Act, for breach of licence or breach of an enforcement order: the CAA may impose a fixed amount up to 10% of the licence holder's qualifying turnover and/or a daily amount up to 0.1% of its qualifying turnover;
- any person who, without reasonable excuse, fails to provide information or documents required by CAA by notice under its powers in Chapter 1 of the Act: the CAA may impose a fixed amount up to £2m and/or a daily amount up to £100,000; and
- any person who knowingly or recklessly provides false or misleading information to the CAA or who intentionally alters, suppresses or destroys a document that they are required to provide by a notice issued by the CAA under Chapter 1 of the Act. There is no specified limit on penalties for this offence.

1.2 The Act requires the CAA to consult on and publish a statement of its policy with respect to imposing penalties under Chapter 1 and determining their amount. The CAA consulted on a draft statement in May 2013.³ The CAA received five responses to this consultation.⁴ The penalties statement is set out in the Appendix.

³ The Consultation can be found at: <http://www.caa.co.uk/default.aspx?catid=78&pagetype=90&pageid=14781>.

⁴ Responses from Heathrow Airport Limited, Gatwick Airport Limited, Ryanair, the Heathrow LACC & AOC and the Gatwick Airport ACC can be found at: <http://www.caa.co.uk/default.aspx?catid=78&pagetype=90&pageid=15062>

The penalties statement

Draft statement

- 1.3 The CAA considers that a single statement is suitable for all three types of penalty as the principles and criteria it considers should be the same whenever it decides to impose a penalty. The CAA has published a similar statement regarding its powers under its more general information gathering functions in sections 86 and 87 of the Act for provision of consumer and environmental information.⁵
- 1.4 In preparing the penalties policy, the CAA has had regard to its duties under section 1 of the Act (its section 1 duties), its published enforcement policy⁶, the Macrory principles on imposing penalties⁷ and the penalties statements published by other regulators.
- 1.5 The statement starts with a factual description of the CAA's powers to impose penalties and its procedural obligations. The CAA then separates out the decisions on whether a penalty is appropriate and what the amount should be, in line with its obligations under the Act.

Stakeholder responses

- 1.6 The airports and the airlines were broadly supportive of the CAA's proposals in the draft statement. However, they all considered that the penalties statement did not give enough clarity on the CAA's policies and lacked the detail required to give those people potentially subject to a penalty a clear understanding of how the CAA will give effect to its policy. The airlines thought the statement was open to very wide interpretation and appeared to give the CAA freedom to impose any penalty it liked at the time.

CAA final statement

- 1.7 The CAA notes the comments that the draft statement did not give enough detail. The CAA's statement was designed to set out the criteria that the CAA would use to make its decisions but as there could be a very wide range of incidents, each with its own particular circumstances, it is difficult to be too specific or prescriptive on how

⁵ The consumer and environment information penalties statement can be found at <http://www.caa.co.uk/docs/33/CAP%201143%20Jan%2014.pdf> (see Part 2).

⁶ The CAA's enforcement policy can be found at <http://www.caa.co.uk/default.aspx?catid=2516>.

⁷ See footnote 15 in the penalties statement in the Appendix.

those criteria would be applied in practice. This is particularly so for the CAA as it has not yet imposed any penalties under the Act so has no precedents to use as indicators. The CAA notes that where other regulators have included examples in their statements, these are usually included in updated statements and are based on precedents from previous breaches of licence conditions.

- 1.8 In response to the consultees' comments, however, the CAA has made a number of changes to the statement to clarify the requirements of the Act and to give some more detail on the criteria the CAA will use to make its decisions. Where relevant, the CAA has included some generic examples from other regulators' statements but many infringements and issues will be sector specific and the CAA will use its judgement in these areas.
- 1.9 The CAA must exercise its discretion and make its decisions in accordance with its section 1 duties, in particular to act in a proportionate, accountable, consistent, transparent and targeted manner. If the CAA does not do so in imposing a penalty, the decision is appealable to the Competition Appeals Tribunal.

Is a penalty appropriate?

Draft statement

- 1.10 The draft statement set out that the primary purpose in deciding whether to impose a penalty should be to incentivise future compliance by both the offender and others with similar obligations, and to deter non-compliance. In assessing whether a penalty is appropriate in each case, the CAA must also have regard to its section 1 duties and will have regard to the Macrory principles.
- 1.11 The draft statement also stated that, although the CAA has an alternative enforcement mechanism for civil proceedings for an injunction, it would normally favour the imposition of penalties, as this would generally offer the most proportionate and targeted way of encouraging compliance.

Stakeholder response

- 1.12 The consultees thought that the statement gave little assistance to industry in understanding whether a penalty was appropriate other

than to say the CAA would consider the circumstances and facts of each case. HAL suggested that a number of other criteria should be used in this decision, many of which the CAA had included as aggravating or mitigating factors in the draft statement. The airlines considered that the statement should implement the Macrory principles more explicitly in the objectives for setting a penalty. In particular, they felt that the objectives should include the need to eliminate gains from non-compliance and to remedy the harm caused by non-compliance.

- 1.13 The airlines also considered that the CAA should give more clarity on how it will determine that the person has failed to comply with its licence or the information obligations in the Act. They suggested that the statement should follow that of the draft Ofgem REMIT⁸ statement which first requires Ofgem to establish that an infringement has taken place.
- 1.14 HAL also raised a concern that the CAA was proposing to take into account any safety investigations. It said that, as there is already an enforcement regime in place for safety breaches, including safety considerations as a criterion for penalty decisions could expose the licensee to double jeopardy. HAL considered that the CAA should not be able to enforce or influence safety regulation through the economic licence and it questioned whether the CAA had vires to take safety issues into account with regard to its functions under Part 1 of the Act. These comments were also pertinent to the criterion relating to safety in the list of mitigating and aggravating factors.
- 1.15 Both the airports and the airlines also questioned the CAA's proposed policy that it would always favour the imposition of a penalty over the enforcement of an order through civil proceedings.

CAA final statement

- 1.16 The statement is clear that the CAA will be guided by the Macrory principles in determining the reasons for imposing a penalty as well as determining the amount. However, of these principles, the CAA is primarily concerned with incentivising companies and individuals to be compliant with their obligations in the first place and so avoid

⁸ An EU Regulation on wholesale energy market integrity and transparency which would require Ofgem to consider various criteria at one or more steps in the decision making process.

penalties, rather than using penalties to punish failures that may have already caused harm to others. The CAA considers that these incentives will be created by setting out those unacceptable behaviours that would lead to a higher penalty and highlighting the ways in which a company's more positive actions before, during and after a failure to comply could lead to a lower penalty.

- 1.17 The CAA notes the consultees' comments and suggestions on where in the decision making process the different criteria are considered, such as in determining whether a penalty is appropriate, in setting the starting point for calculating the amount or making adjustments for aggravating and mitigating factors. The CAA has reviewed other regulators' statements carefully and notes that there are variations on the point in the decision making process where various criteria are considered but in general the different statements largely follow the same logic⁹ and the CAA has followed these established policies and precedents.
- 1.18 For example, HAL suggested that a consideration of whether a penalty is appropriate should take account of whether the failure is an isolated occurrence, but the CAA notes that a one-off event could still have serious consequences or be due to hitherto undetected process shortcomings that need to be addressed. The CAA considers it is right that these factors should be considered when assessing the amount of a penalty, rather than the need for one.
- 1.19 With regards to the comments that there should be greater clarity on how the CAA will determine non-compliance, the Act requires the CAA to specify in the notice proposing to impose a penalty the reasons why the person is not compliant. The CAA has amended the statement to make this clearer:

⁹ Ofwat is different in that it has merged the decision on whether a penalty is appropriate and determining the amount into decision based on a number of criteria. Ofgem has recently consulted on a statement for penalties under the new REMIT statement which would require Ofgem to consider each criteria at one or more steps in the decision making process.

- For breaches of a licence, the CAA must set out the relevant licence condition or requirement and the acts or omissions that the CAA has determined constitutes a contravention of the licence condition or requirement. The CAA's policies and guidance on compliance with specific licence conditions are set out in the notices granting the licence and associated consultation documents. The CAA has made clear in the statement that it will consider the reasons given in the contravention notice issued under section 31 of the Act.
- For penalties under the information requirements, the CAA must set out its reasons for imposing the penalty. Section 51 of the Act states that the CAA may impose a penalty on a person who fails to comply with an information notice under section 50 without reasonable excuse. The CAA has included some guidance in the statement on the types of reasons for non-compliance that it would consider reasonable and made clearer the criteria for assessing whether a penalty is required for providing false information or destroying documents etc.

1.20 The CAA notes HAL's view that there should be a distinction between the different safety and economic enforcement regimes and agrees that the person in breach should not be subject to double jeopardy for an incident. The CAA notes that it has no vires under the Act to impose obligations that relate to safety. Therefore the CAA cannot issue a penalty under the Act that is directly a punishment for endangering safety or an incentive to comply with safety requirements. This does not, however, prevent the CAA taking the view that a breach of economic regulations under the Act that also endangers safety is worse than one that does not. The CAA has therefore clarified in the penalties statement that it may take breaches of safety requirements into account when determining whether a penalty is appropriate and in setting the amount, but will take into account any fines issued or other action taken under safety legislation.

1.21 In setting its policy on the use of civil sanctions to enforce enforcement notices in addition to, or instead of penalties, the CAA considers that in general, the deterrent effect of penalties offers a more immediate, targeted and proportionate way of incentivising compliance with an enforcement order. It is right that the CAA

should use the powers conferred on it by the Act as part of the regulatory regime as far as possible without having to seek relief from the courts, and in most cases these powers and sanctions will be enough to ensure compliance. Therefore the CAA would normally seek such relief if it is clear in a particular case that the imposition of a penalty, or the threat of one, is unlikely to change the behaviour of the person to ensure compliance.

- 1.22 Section 46 of the Act also requires the CAA to consider whether it would be more appropriate to proceed under the Competition Act 1998 (the CA98) before taking enforcement action and before issuing a penalty under section 39 and 40 of the Act for a breach of a licence condition or a breach of an order. The CAA has added some guidance on how it will take account of this requirement when considering whether a penalty under the Act is appropriate. The presumption will be that, where the CAA has already satisfied itself that it would be more appropriate to take enforcement action with regards to a breach of a licence condition under the Act rather than the CA98, for consistency the CAA will also consider penalties under the Act, unless there had been any change of circumstances or additional evidence that suggest it would be more appropriate to proceed under the CA98.

Determining the amount – the starting point

Draft statement

- 1.23 In the draft statement, the CAA considered that the penalty should be proportionate to the offence, so the starting point should be based on the seriousness of the offence including the degree of harm done to the consumer or other market participants. The CAA also proposed that it should take into account at this stage how long the person has been non-compliant and whether they have gained from the non-compliance, either financially or otherwise.
- 1.24 The CAA considered that the degree of culpability is also an important criterion in determining the seriousness. If the offender acted knowingly, intentionally, recklessly or negligently then the starting point of the penalty would be higher, if it was accidental or inadvertent, the starting point may be lower.

Stakeholder response

- 1.25 The airports felt that the statement gave some relatively high level indication of how the CAA would determine the amount of a penalty but there was little detail to inform stakeholders over and above what could be found in the Act.
- 1.26 The airlines suggested that the CAA followed the ORR penalties statement in giving a better indication of the level of seriousness of an infringement, setting out five levels from 'de minimis' through to 'very serious'. They felt this would better explain how the CAA would assess the proportionality of a penalty.
- 1.27 The airlines also suggested that penalties statement should be more consistent with the Macrory principles, with the CAA giving more weight to ensuring that any gain obtained from non-compliance is removed by the penalty, again citing the ORR's policy that 'the starting penalty should not be less than any benefit for the licence holder from the breach'. They also suggested that the penalty should be designed to punish according to the seriousness of the offence, the reasons for non-compliance, the history of non-compliance and the degree of cooperation.

CAA's final statement

- 1.28 Without precedents and experience of setting penalties under the new regime in the Act, it is difficult to give detailed examples of the levels of penalties that might be imposed, but the CAA has considered examples set out in other regulators' statements, particularly the ORR statement, and has developed some generic indications based on the seriousness of the non-compliance. These distinguish four levels of seriousness (minor, moderately serious, serious or very serious) for each of the criteria that the CAA would consider in determining the starting point of the penalty.
- 1.29 Each situation will have its own particular circumstances so the CAA will not necessarily need to consider each criterion in each case. Where different criteria that are considered fall into two or more different levels of seriousness, the CAA will use its judgement, in accordance with its section 1 duties, to decide the overall level of seriousness for that particular situation.

- 1.30 The CAA has not included at this stage any indication of the percentage of the maximum amount allowable that the different levels of seriousness might attract. This is because it has no precedent or experience of imposing penalties on which to base such a limit and the CAA does not want to fetter its discretion in this matter. This is consistent with most other regulators' penalties statements apart from ORR; the CAA notes that the ORR levels were based on the experience of past breaches of licence conditions.
- 1.31 The CAA agrees with the airlines that the starting point of the penalty should be influenced by the amount of gain that the person has made from the infringement and the level of seriousness for this criterion will depend the amount of any direct or indirect financial gain and an assessment of any other non-financial benefits that the person may have made. The CAA notes that these will differ widely from case to case and it may, where relevant, seek evidence from third parties on the extent of any benefits derived.
- 1.32 With regards to the other criteria suggested by the airlines, the CAA considers that these should be considered as aggravating or mitigating factors that may raise or lower the final amount of the penalty.

Determining the amount – mitigating and aggravating factors

Draft statement

- 1.33 The CAA proposed in the draft statement that it allows for mitigating and aggravating factors to be taken into account to adjust the amount of any penalty. This allows greater flexibility to take all the relevant factors into account. The proposed statement includes a non-exhaustive list of factors that could be taken into account. These are general factors which could be considered either aggravating or mitigating, depending on the circumstances of the case. Most of these factors point to the culture and attitude of the organisation towards compliance, particularly at senior levels.
- 1.34 One factor that is does nt point to the culture and attitude of the organisasiton regards allowing for reparations as a mitigating factor. Several regulators allow for any compensation or other reparations

that the licensee may have made to those consumers directly affected by its failure to comply. The aim behind these policies is to ensure that the money remains in the industry to benefit those most affected by the person's failure to comply. Ofwat's legislation specifically allows for it to allow for undertakings and ORR's penalties statement has allowed for the possibility of reparations as a mitigating factor in determining the amount. Ofgem's current statement does not specifically mention reparations but in May 2012 year it reduced a £4.5m penalty imposed on EDF to £1.00 to take into account compensation payments. Ofgem has subsequently consulted on a draft statement under REMIT which specifically allows for reparations to be made and includes procedural guidelines on the circumstances in which Ofgem can use this option.

Stakeholder responses

- 1.35 The airports said that the CAA should provide greater detail about how the mitigating and aggravating factors would be applied, for example indicating the percentage by which a particular factor might affect the starting point of the penalty and giving examples of the types of issues that could change the overall amount. It asked that the CAA give more detail about what would constitute acceptable or unacceptable behaviour for each of the factors listed in the draft statement, along the lines of the examples set out in the OFT penalties statement.
- 1.36 The airlines suggested that the aggravating and mitigating factors should be set out in two separate lists, as some other regulators have done, to make the CAA's decision making process clearer. They also suggested that the CAA should be clearer about how it will approach a negotiated settlement along the lines proposed by Ofgem.

CAA's final statement

- 1.37 These factors generally look to the behaviour of the person. The more the person does to remain compliant with its obligations and to mitigate the impact should it be in breach of a licence condition or failing to comply with an information notice, and if it is clear that the person is taking their responsibilities and the situation seriously, the more likely there is to be a reduction in the overall amount of the penalty. Conversely, if it is clear from the investigation that the

person does not take compliance seriously, does not have adequate policies and processes and does little to deal with non-compliance once it has occurred, the penalty is likely to be increased.

- 1.38 The CAA is not able to set out in detail how each of these factors would be assessed, or the percentage by which they would change the amount of the penalty as the degree to which the person exhibits positive or negative behaviour will vary considerably from case to case. As with all aspects of the decision, the CAA will use its judgement in a proportionate, consistent, transparent and targeted manner and will be accountable for its decisions through the right of appeal.
- 1.39 The CAA has made some changes to the list of mitigating and aggravating factors to help clarify the types of behaviours that might reduce the overall amount of a penalty. These examples are based on generic examples included in other regulators' statements but this is not exhaustive and there may also be other sector-based issues that the CAA will consider on a case by case basis.
- 1.40 The CAA has also added some clarification to the issue of reparations as a mitigating factor. The CAA notes that Ofgem has specific powers and processes set out in the REMIT legislation to negotiate settlements in lieu of penalty. The Act is silent on this option, but is clear that any money from penalties is intended to be paid to the Government's Consolidated Fund. The CAA must therefore consider reparations on a case by case basis and it will discuss the options with the person during its decision-making process and will consider any offers made during the consultation period on any proposed penalty. However, the CAA would give greater weight to offers volunteered at an early stage.
- 1.41 The CAA also notes HAL's comments on including safety considerations as an aggravating and mitigating factor. The CAA agrees that, where an incident has safety implications significant enough to warrant action under relevant safety legislation, it should be dealt with under that legislation and the person should not be subject to the risk of double jeopardy, particularly if the CAA is seeking civil sanctions against the person. However, there may be circumstances where the CAA considers it appropriate to take into account whether the non-compliance has directly led to any safety regulatory issues which result in licensing or certification action.

Determining the form of a penalty – fixed or daily amounts

Draft statement

- 1.42 The draft statement also included a section setting out the CAA's proposed criteria for deciding whether to impose a fixed and/or a daily amount. The CAA's principle consideration will be to balance the need to return to compliance as quickly as possible with its aim to incentivise future compliance, while keeping the overall penalty proportionate to the seriousness of the offence. So, for example, it could adjust the level of a fixed penalty downwards if it were also imposing a daily amount that was likely to be payable for a prolonged period.

Stakeholder responses

- 1.43 There were no responses on this proposal.

CAA's final statement

- 1.44 The CAA has not made any changes to this proposal.

Other comments

Stakeholder responses

- 1.45 Ryanair felt that the CAA's data requests can be excessive and/or unnecessary, often with unreasonable timeframes. It suggested that the statement should include a requirement on the CAA to act reasonably when requesting data and to discuss the degree and scope of formal data requests with the person before those requests are issued to allow for more effective data exchange and mitigate the risk of penalties.
- 1.46 Ryanair also suggested that the statement should be clear that penalties imposed on an airport operator cannot be passed on to airport users, for example, through OPEX or increased risk allowances.

CAA's final statement

- 1.47 The CAA does not consider it is necessary to include a requirement regarding the reasonableness of an information request in the statement as it is already required under its duties in section 1 of the Act to act in a proportionate, consistent, transparent, accountable

and targeted manner and must therefore do so when giving notice under section 50 and issuing a penalty under section 51. The right of the penalised person to appeal means that, if the CAA does not act in such a manner, its decision would likely be overturned. Section 51 contains an additional safeguard in that the CAA can only take action if there is no reasonable excuse for the non-compliance. The CAA must therefore be aware that an unrealistic demand for information could be considered to be a reasonable excuse for a failure to comply with the information notice if any penalty was appealed.

- 1.48 The CAA is not able to specify in the statement how the person should fund any penalty imposed. However, the price cap conditions in the licence would prevent a licensee from passing through the additional costs of a penalty.

Appendix A

Statement of policy on penalties under Chapter 1 of the Civil Aviation Act 2012

1. BACKGROUND

- 1.1 Section 58 of the Civil Aviation Act 2012 (“the Act”) provides that the CAA must prepare and publish a statement of policy with respect to imposing penalties under sections 39, 40, 51 and 52 of the Act, and determining the amount of such penalties. By virtue of section 58(3) of the Act, when imposing such a penalty or determining its amount, CAA must have regard to this policy statement.
- 1.2 Under section 58(4) of the Act, when preparing a statement of policy, the CAA must consult such persons as it considers appropriate. The CAA consulted on this policy in May 2013¹⁰. In addition, the CAA published its wider Regulatory Enforcement Policy in October 2012¹¹.
- 1.3 This penalties statement refers to the CAA’s powers to impose a penalty on a person¹² who:
- (a) holds an airport licence granted by the CAA under section 15 of the Act, for the contravention of:
 - (i) a licence condition: under section 39 of the Act the CAA may impose a fixed amount that must not exceed 10% of the licensee’s qualifying turnover and/or a daily amount up to 0.1% of its qualifying turnover. A daily amount can only be imposed if the contravention has been continuous

¹⁰ The letter to stakeholders including the draft penalties statement can be found at <http://www.caa.co.uk/default.aspx?catid=78&pagetype=90&pageid=14781>.

¹¹ The enforcement policy sets out the CAA’s approach to enforcement generally, using a proportionate and risk-based approach, taking independent, evidence-based decisions and including its approach to publicising enforcement action in the interests of the consumer and the public. It can be found at <http://www.caa.co.uk/default.aspx?catid=2516>.

¹² In this statement, the term ‘person’ refers to a company or individual who may be subject to a penalty under Chapter 1 of the Act.

since the end of the representation period for the relevant contravention notice;

- (ii) an enforcement order: under section 40 of the Act the CAA may impose a fixed amount that must not exceed 10% of the licensee's qualifying turnover and/or a daily amount up to 0.1% of its qualifying turnover;
- (b) is required to provide information to the CAA in accordance with a licence condition or in response to an information notice issued under section 50 of the Act:¹³
- (i) to enforce compliance with an information notice under section 50 of the Act: under section 51 of the Act, the CAA may impose a fixed amount that must not exceed £2m and/or a daily amount up to £100,000; and
 - (ii) for the provision of false or misleading information, or the alteration, suppression or destruction of a document required to be produced under section 50 of the Act, under a licence condition or if the person knows that the CAA is likely to use the information for the purpose of carrying out its functions under Chapter 1 of the Act: under section 52 of the Act, there is no limit on the amount that the CAA may impose for this offence.

- 1.4 A penalty under each of these sections must be such amount as the CAA determines to be appropriate and proportionate to the failure or action in respect of which it is imposed. The period during which daily amount accumulate must be such period as the CAA considers appropriate.
- 1.5 Any sums received by the CAA by way of a penalty under the Act must be paid into the Consolidated Fund operated by the Treasury.
- 1.6 The Act lays out procedural requirements to be followed by the CAA, both before and after imposing a penalty¹⁴. These include giving the person a notice under sections 41 or 43 of the Act that the CAA proposes to publish a penalty, specifying:

¹³ Section 50 of the Act allows the CAA to require information or documents that it reasonably requires for the purpose of carrying out its functions under Chapter 1 of the Act.

¹⁴ Sections 41, 42, 53 and 54 of the Act.

- (a) the proposed amount of the penalty;
- (b) the relevant licence condition or requirement; and
- (c) the act or omission that the CAA has determined constitutes a contravention of the condition or the requirement.

1.7 The notice must be published and sent to relevant airport operators and providers of air transport services, or their representatives. The CAA must allow at least 21 days for consultation and must consider any representations made within that period. As soon as practicable after imposing a penalty, the CAA must notify the person under sections 42 or 54 of the Act, specifying the same information as in the first notice and setting a reasonable period in which the penalty must be paid.

1.8 Under section 51(1)(b) of the Act, it is open to the CAA, in the event of non-compliance with a notice under section 50 of the Act to provide information, to either impose a penalty, or enforce the duty to comply with the notice by means of an injunction, or both.

1.9 The person receiving a penalty may appeal to the Competition Appeals Tribunal under sections 47 and 55 of the Act.

2 IS A PENALTY APPROPRIATE?

2.1 The CAA's primary duty under section 1 of the Act is to further the interests of users of air transport services and it will use its penalties policy to aid this by encouraging both the aviation community generally and individuals to comply with their own obligations under the Act or their licence and to deter non-compliance. The CAA must also have regard to its other duties under section 1 of the Act, for example, to be transparent, accountable, proportionate and consistent, and to target only those cases where action is needed. In deciding whether a penalty is appropriate, the CAA will be guided by the six penalty principles set out in the 2006 Macrory report "Regulatory Justice: Making Sanctions Effective"¹⁵

¹⁵ The Macrory report can be found at: <http://www.berr.gov.uk/files/file44593.pdf>. In summary, a penalty should:

- aim to change the behaviour of the offender;
- aim to eliminate any financial gain or benefit from non-compliance;

- 2.2 In considering these six principles, the CAA's primary objective in issuing a penalty is to change the future behaviour of the person so that they are better able to comply with all their obligations, and to deter non-compliance in general, rather than to punish retrospectively. The CAA also aims to incentivise others to comply with their own obligations under the Act or under a licence. The CAA will also aim to eliminate any financial gain or benefit that the person may have made from the failure to comply and to restore any harm caused. The CAA will therefore normally impose a penalty if it considers that the penalty would achieve these objectives. In doing so, the CAA will take a proportionate approach to the particular offender and the particular issue.
- 2.3 In deciding whether a penalty is appropriate, the CAA will take full account of the particular facts and circumstances of non-compliance, including;
- (a) the reasons given in the contravention notice required under section 31 of the Act for finding a breach of a licence condition, including any representations made to that notice; and
 - (b) any representations made in response to the penalty notice given and published under the procedures in sections 41 and 53 of the Act.
- 2.4 Where there is an additional and alternative enforcement mechanism available to the CAA by way of civil proceedings¹⁶ to ensure compliance with enforcement orders, the CAA's approach will normally be that which best achieves the goals set out above. Given the primacy we give to deterrence, the CAA is likely to favour the imposition of penalties over seeking injunctive relief. However, the CAA would be likely to consider civil proceedings in cases where it considered that deterrence may not be the most effective way to

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- be responsive and consider what is appropriate for the particular offender and regulatory issues, which can include punishment and the public stigma that should be associated with a criminal conviction;
 - be proportionate to the nature of the offence and the harm caused;
 - aim to restore the harm caused by regulatory non-compliance, where appropriate; and
 - aim to deter future non-compliance.

¹⁶ Under section 38(7) of the Act, the CAA may enforce enforcement orders in civil proceedings for an injunction or any other appropriate remedy or relief, or in Scotland, for specific performance of a statutory duty under section 45 of the Court of Session Act 1988.

further its section 1 objectives.

- 2.5 The CAA has no *vires* to impose obligations under the Act that relate to safety, so no penalty under the Act is directly a punishment for endangering safety or an incentive to avoid endangering safety. That does not, however, prevent the CAA taking the view that a breach of economic requirements that also endangers safety is worse than one that does not. Therefore, in deciding whether a penalty is appropriate for breach of an airport licence or certificate, the CAA will take into account any breach of the licence holder's aerodrome licence which arises from substantially the same set of facts. If the CAA decides that a penalty is appropriate under the Act, to avoid the risk of double jeopardy for a single incident the CAA will take any such safety issues into consideration in determining the amount of the penalty in relation to the seriousness of the breach and will take into account the amount of any fine issued under safety legislation.
- 2.6 Section 46 of the Act requires the CAA to consider whether it would be more appropriate to proceed under the Competition Act 1998 (the CA98) before issuing a contravention notice under section 31 of the Act, giving an enforcement order under section 33 of the Act and before issuing a penalty under section 39 and 40 of the Act for a breach of a licence condition or a breach of an order. When considering its duty under section 46 before issuing a penalty under sections 39 or 40 of the Act, the CAA will already have carried out a similar exercise at an earlier stage when it was considering whether to take enforcement action. Having already satisfied itself therefore that enforcement action under the Act in response to the licence breach was more appropriate than using its CA98 powers, the question for CAA would now be whether instead of imposing a fine for non-compliance with an enforcement order or compliance notice, it should use its CA98 power and open an investigation into whether the airport operator had breached the prohibitions in that Act.
- 2.7 In practice, there may be an expectation that the judgment under section 46 taken when deciding between licensing action and CA98 would be mirrored when the CAA came to apply the test under section 46 at the penalties stage. However, this will very much depend on what intervening events or additional evidence about the conduct of the airport operator had come to light in the period

between opting for licensing enforcement action and making a decision to impose penalties in the wake of that licensing action.

- 2.8 For failures to comply with the requirements of an information notice under section 50 of the Act, the CAA must take into account any reasonable excuses. The CAA considers such reasonable excuses would include circumstances outside of the person's control such as a loss of IT or reliance on third parties. However, the CAA would expect the person to inform it as soon as possible of any difficulties identified before the deadline for submission of the information.
- 2.9 In determining whether a penalty is required for providing false information or destroying documents etc, the CAA must, in accordance with section 52(3) of the Act, show that the person has knowingly or recklessly provided false or misleading information or has intentionally altered, suppressed or destroyed documents.

3 DETERMINING THE AMOUNT OF THE PENALTY - PROPORTIONALITY

- 3.1 The amount of the penalty must be such as the CAA determines to be appropriate and proportionate to the failure in respect of which it is imposed. When determining the amount of a penalty, CAA will also consider whether any adjustments are appropriate to reflect mitigating or aggravating factors in the particular case.
- 3.2 In line with the Macrory principles, a penalty should be proportionate to the seriousness of the non-compliance, and this will be CAA's usual starting point in considering the general level of the penalty. In considering this, the CAA will look at the benefits and opportunities foregone by, or harm caused to, users of air transport services, the wider public and other market participants as a result of the offence. The general level of penalty will also be influenced by any gain (financial or otherwise) that the person has made as a consequence and the duration of the non-compliance.
- 3.3 The CAA will also consider the culpability of the person, including whether they have acted negligently, recklessly, knowingly or intentionally, or whether the non-compliance was accidental or inadvertent. While one or more of these elements will almost invariably manifest themselves in the non-provision of information, all but negligence form a specific and required element of offences relating to the provision of false information or destruction of

documents.

- 3.4 An indication of the degree of seriousness for each of the criteria above is set out in Table 1. These are examples and it may not be appropriate to consider every criterion in each case. In each case, where the relevant criteria fall into two or more levels of seriousness, the CAA will exercise its discretion, in accordance with its section 1 duties, to decide which overall level should apply. This decision will be based primarily on the harm done (including potential harm), the gain or potential gain the person had made from the non-compliance and the culpability of the person and secondly on the duration. For example, a serious incident may have occurred on a single day whilst a minor breach of a licence condition could have been occurring for some time before it was noticed.

Table 1

Level of seriousness	Indications of the level of seriousness for each criterion.
Minor	<ul style="list-style-type: none"> • There was little or no harm (or potential harm) to users or to the CAA's ability to carry out its functions. • There was little or no culpability on the part of the person; or the infringement was clearly accidental and could not be mitigated by the person. • The person did not gain and did not intend to gain from the infringement.
Moderately serious	<ul style="list-style-type: none"> • There was some harm or potential harm to users or it delayed the CAA's ability to carry out its functions. • There is evidence that there was some culpability on the part of the person; or the infringement was not wholly accidental, or the person made inadequate efforts to mitigate. • The person made a small gain (either financially or otherwise) from the infringement.
Serious	<ul style="list-style-type: none"> • There was a significant harm or potential harm to some users or it significantly delayed or hindered the CAA's ability to carry out its functions. • There was some culpability on the part of the person in that the person to some extent negligently, intentionally, knowingly or recklessly failed to comply with their obligations; or the infringement was not accidental, or little or no effort was made to mitigate the infringement. • The person made a significant gain (either financially or otherwise) from the infringement.
Very serious	<ul style="list-style-type: none"> • There was a significant amount of harm or potential harm to a large numbers of users or it prevented the CAA from carrying out its functions. • The person was wholly culpable, negligently, intentionally, knowingly or recklessly failing to comply with their obligations. • The person made a large gain (either financially or otherwise) from the infringement.

- 3.5 Where false or misleading information is provided (pursuant to a formal notice), a penalty may be imposed where knowledge of this is shown, or, absent that, recklessness. Where a document has been altered, suppressed or destroyed, a penalty may be imposed if an intention to do so can be shown. The seriousness of such offences is apparent from the fact that unlike non-provision of information, there is no limit on the penalty that may be imposed for these offences. As such, it is unlikely that a breach attracting a penalty imposed under section 52 of the Act would be considered minor or moderately serious.

4 DETERMINING THE AMOUNT OF THE PENALTY – MITIGATING AND AGGRAVATING FACTORS

- 4.1 The CAA will take account of relevant mitigating and aggravating factors. The following factors may be considered, as appropriate, in this regard:
- (a) the speed with which steps have been taken to return to compliance, including whether these were initiated by the person or in response to CAA's actions (prompt and voluntary action would attract a reduction in the overall amount; forced and slow action, or lack of action altogether would lead to an increase);
 - (b) any steps which have been taken to minimise the risk of non-compliance recurring, such as new processes put in place or training needs addressed. Lack of such actions could be an aggravating factor that could lead to an increase in the overall penalty;
 - (c) the extent of involvement of directors or senior management in the action or inaction which caused the non-compliance or their lack of appropriate involvement in action to remedy it;
 - (d) repeated or continuing infringements of their licence obligations generally;
 - (e) whether the person reported the non-compliance or tried to conceal it;

- (f) the existence and effectiveness or otherwise of proactive preventative measures and internal mechanisms to ensure compliance;
- (g) evidence that the breach was genuinely accidental or inadvertent;
- (h) cooperation with the CAA's infringement investigation, including, but not limited to, speed of responses, availability, openness and willingness of staff (including senior managers) to engage, and availability of data.; and
- (i) whether the breach could have endangered the safety of airport users, employees or the public.

4.2 In addition, the CAA will take into account any actions, including financial compensation, which have been or will be taken to make worthwhile restoration to persons who suffered the consequences of the non-compliance, or to a wider group of persons of a similar kind where the persons suffering detriment cannot be identified or where no mechanism exists to provide restoration to those persons. Any committed expenditure in providing such compensation would have to be verifiably additional to any actions taken to rectify the failure and to mitigate the impacts at the time. Such restorative action should be identified, at the latest, in representations to notices published by the CAA under sections 41 or 53 of the Act stating the CAA proposes to impose a penalty. However, the sooner commitments of such actions are made to the CAA, the more significant the reduction in the overall penalty is likely to be.

4.3 Other mitigating or aggravating factors may arise depending on the specific facts and circumstances of the case.

4.4 Where the facts about a mitigating or aggravating factor are unclear or disputed, the CAA may take account of the strength of the evidence in deciding what weight to place on a factor.

4.5 In accordance with its section 1 duties, the CAA will apply an overall adjustment reflecting the net effect of the mitigating or aggravating factors.

4.6 The net effect of these factors may be significant, capable in the most favourable circumstances of reducing the penalty to zero, or in

the worst cases, to increase it within the limits specified in the Act.

5 DETERMINING THE FORM OF THE PENALTY – FIXED AND/OR DAILY AMOUNTS

- 5.1 The specified period during which daily amounts accumulate must be such as the CAA considers appropriate. However it must begin after the day on which the CAA gives notice under sections 42 or 54 of the Act stating that it has imposed a penalty, and must end before the day on which the contravention ceases.
- 5.2 The CAA's decision on whether to impose either or both a fixed amount and/or a daily amount for non-compliance will be based on the factors set out above, particularly having regard to keeping the overall penalty proportionate. The appropriate balance between the two will depend on the specific facts and circumstances of the case.
- 5.3 With regards to information notices given under section 50 of the Act, the CAA is likely to impose both a fixed amount and a daily amount for non-compliance with an information notice, based on the factors set out above. A penalty for providing false information (or other offences of dishonesty in section 52 of the Act) will be a fixed amount.
- 5.4 It is open to the CAA to propose to vary the amount of the penalty (and implicitly the balance between any fixed and daily amounts), subject to further notice requirements, enabling the penalty to be more targeted to the particular case should emerging circumstances suggest that this is necessary.

6 REVISION OF THE POLICY

- 6 Section 58 of the Act provides that the CAA may revise the statement of policy, and if it does so, it must publish the revised statement. Prior to doing so CAA must first consult such persons as it considers appropriate.