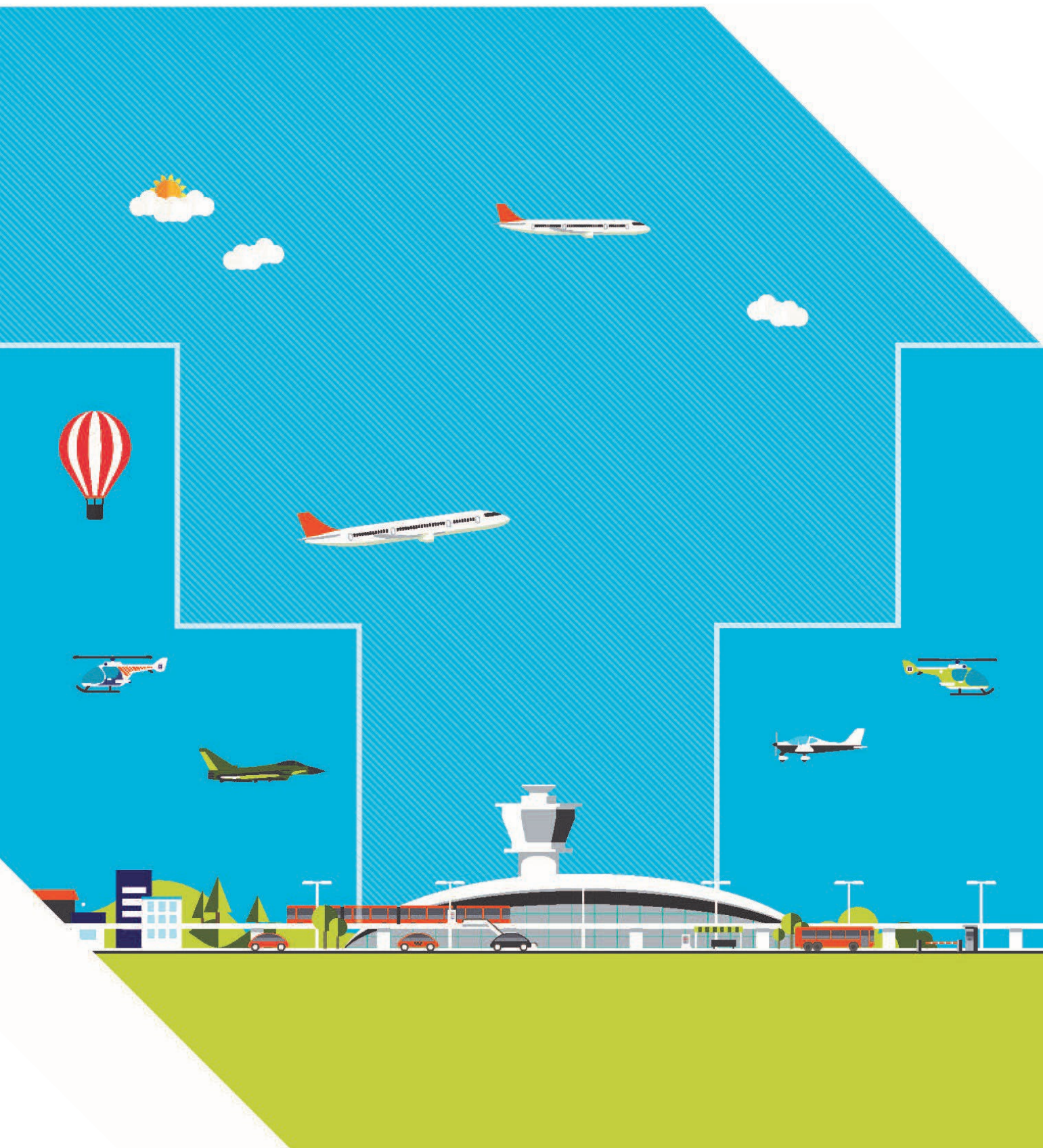


# Enforcement Guidance and Draft Statement of Policy on Penalties - Air Traffic Management and Unmanned Aircraft Act 2021 Part 1

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## About this document

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1. Following the enactment of the Air Traffic Management and Unmanned Aircraft Act 2021<sup>1</sup> (or as “the Act” throughout this document), the CAA has new roles and powers in relation to Part 1 of the Act, relating to ‘Airspace Change Proposals’.
2. This document provides:
  - A summary of the CAA’s roles relating to Part 1 of the Act.
  - Details of the CAA’s advisory role regarding the use of the Direction powers contained in Part 1 of the Act, and the impact on General Aviation - at Appendix A.
  - Enforcement Guidance covering the powers brought about by Part 1 of the Act - at Appendix B.
  - A draft Statement of Policy on Penalties, which the CAA is required to consult on under Part 1 of the Act - at Appendix C.

## Views invited

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3. We are asking for responses to a number of questions concerning the draft Statement of Policy on Penalties contained in Appendix C through our [dedicated consultation website](#). We are asking for responses by the closing date of 2 March 2022.
4. We cannot guarantee that any views submitted after that date will be taken into account. For any queries on how to access the consultation, please email [airspace.modernisation@caa.co.uk](mailto:airspace.modernisation@caa.co.uk).
5. When you complete the online consultation there will be an option for you to hide your identity or refuse publication. (In any event, your email address will not be published.) In the interests of transparency, we hope respondents will not refuse publication.
6. If you do send us a separate submission and it includes any material that you do not want us to publish, please also send us a redacted version that we can publish. You should be aware that information sent to and therefore held by the CAA is subject to legislation that may require us to disclose it, even if you have asked us not to (such as the Freedom of Information Act and Environmental Information Regulations). Therefore, if you do decide to send information to the CAA but ask that this be withheld from publication via redacted material, please explain why, as this will help us to consider our obligations to disclose or withhold this information should the need arise.

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<sup>1</sup> <https://www.legislation.gov.uk/ukpga/2021/12/contents/enacted>

7. If you require this document to be provided in a different format, please email [airspace.modernisation@caa.co.uk](mailto:airspace.modernisation@caa.co.uk) and we will endeavour to accommodate your need.

## Next steps

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8. We expect to publish responses we receive on our consultation website as soon as is practicable, with identifying and confidential information removed where requested. We will take your views into account and, where we feel it necessary to do so, will make modifications and publish our penalties policy statement and enforcement guidance in relation to Part 1 of the Act.

## Chapter 1

# Summary of CAA's roles and powers

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## Background

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- 1.1 The Government recognises that there will be a major challenge coordinating different airspace changes in the future to modernise the UK's airspace. Airspace modernisation requires a wider system planning approach, and this is a key component of the CAA's Airspace Modernisation Strategy (AMS).<sup>2</sup>
- 1.2 The feasibility work conducted by NATS<sup>3</sup> into airspace modernisation in the South of the UK showed that there is a high level of interdependence between different airports' future demands over airspace, especially in the South East. Given this, airspace change sponsors – usually airports or Air Navigation Service Providers (ANSPs) – will need to develop their airspace change proposals (ACPs) in close collaboration with each other and ensure that they develop and consult on these in a coordinated way.
- 1.3 In order to help airspace change sponsors overcome potential coordination challenges, the DfT and CAA commissioned NATS (En Route) Plc (NERL) to set up a new separate and impartial unit, the Airspace Change Organising Group (ACOG), to coordinate airspace changes across the UK by creating and maintaining an airspace change masterplan.<sup>4</sup> These requirements are now reflected in NERL's Licence conditions.
- 1.4 Historically, neither the government nor the CAA have had the powers to guarantee or compel that airspace change as part of a wider modernisation programme is taken forward. Following consultation<sup>5</sup> the Government introduced the Air Traffic Management and Unmanned Aircraft (ATMUA) Bill into Parliament to address this issue. The Bill received Royal Assent on 29th April 2021 and is cited as the Air

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<sup>2</sup> CAP 1711 Airspace Modernisation Strategy, December 2018

<https://publicapps.caa.co.uk/modalapplication.aspx?appid=11&mode=detail&id=8960>

<sup>3</sup> DfT: NATS Feasibility Report into Airspace Modernisation in the South of the UK, 2018

[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/763085/nats-cao-feasibility-airspace-modernisation.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/763085/nats-cao-feasibility-airspace-modernisation.pdf)

<sup>4</sup> See 'About ACOG' for more background on the role of ACOG: <https://www.acog.aero/about-acog/>

<sup>5</sup> DfT: Consultation Response on Legislation for Enforcing the Development of Airspace Change Proposals, October 2019

[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/841247/consultation-response-on-legislation-for-enforcing-the-development-of-airspace-change-proposals.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/841247/consultation-response-on-legislation-for-enforcing-the-development-of-airspace-change-proposals.pdf)

Traffic Management and Unmanned Aircraft Act 2021 (or as “the Act” throughout this document).

- 1.5 Part 1 of the Act relates to airspace change proposals and contains powers for the Secretary of State<sup>6</sup> to direct “a person involved in airspace change” to progress or cooperate in an ACP. Such persons are ANSPs, airports and other persons with functions relating to air navigation.

## CAA's advisory role

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- 1.6 As the Act passed through Parliament, a number of commitments were made by the Government including that:
- the CAA provides advice to the Secretary of State if the CAA considers the Secretary of State's powers contained in Part 1 of the Act should be utilised; and
  - the CAA provides a report on the impact of Part 1 of the Act on General Aviation.
- 1.7 On 15<sup>th</sup> November 2021 the Department for Transport wrote to the CAA confirming the scope and type of advice and information that the CAA may be required to provide in the future, should the need arise.<sup>7</sup> The advice concerning the use of powers is required to cover the following issues, where possible:
- The extent to which the ACP would assist in the delivery of the CAA's airspace strategy.<sup>8</sup>
  - The complexity of the ACP and the cost of progressing it.
  - Whether there is a case for an alternative sponsor to progress the ACP.
- 1.8 For the avoidance of doubt, when the CAA is asked to advise on the giving of a Direction under section 3 of the Act that a person co-operate with another person involved in airspace change, our advice will always be that the Direction requires that any information shared for that purpose should be kept confidential by the recipient and only used or disclosed in connection with the purposes stated in the Direction.
- 1.9 Further details of the scope and type of advice and information that the CAA may be required to provide are included in Appendix A.

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<sup>6</sup> The Secretary of State may delegate certain of their functions to the CAA by giving a notice to the CAA but has not done so.

<sup>7</sup> The Secretary of State will request this advice from the CAA under s16 of the Civil Aviation Act 1982 as and when the need arises.

<sup>8</sup> The CAA's coordinated strategy and plan for the use of all UK airspace for air navigation up to 2040, including for the modernisation of the use of such airspace (required by Air Navigation Directions 2017, Direction 3(e)) is known as the CAA's Airspace Modernisation Strategy or AMS.



## Enforcement powers

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- 1.10 Should the Secretary of State issue a Direction to a person involved in airspace change with which the recipient does not comply, the Act provides the CAA with enforcement powers including the ability to issue an Enforcement Order and to impose a penalty. The decision to issue a Direction and the CAA's use of its enforcement powers is subject to the right to appeal to the Competition Appeal Tribunal.
- 1.11 Appendix B sets out our policy and guidance concerning the use by the CAA of its enforcement powers contained in Part 1 of, and Schedule 2 to the Act.
- 1.12 This is consistent with the CAA's overarching Regulatory Enforcement Policy<sup>9</sup> which sets out the CAA's general approach to enforcement.
- 1.13 Delivery of the CAA's AMS is our ultimate goal. Our enforcement approach is aimed at bringing the recipient of the Direction into compliance, thereby progressing airspace modernisation. We aim to achieve the right balance of formal and informal approaches, depending on what we consider to be appropriate in the circumstances.
- 1.14 Our choice of approach will be guided by the impact of non-compliance on the progress of airspace modernisation and the type of action which in our view will most likely bring the recipient of the Direction into compliance. Our approach will be informed by information received from dialogue with the recipient of the Direction, from ACOG and other stakeholders. Our approach will also be informed by knowledge of the recipient of the Direction's intent and past behaviour.

## Ability to determine and impose a penalty

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- 1.15 The CAA may impose a penalty on a person if the CAA has determined that the person has contravened a requirement of an Enforcement Order. The CAA's decision to impose a penalty is subject to the right to appeal to the Competition Appeal Tribunal.
- 1.16 Schedule 2 of the Act requires the CAA to prepare and publish a statement of its policy on imposing penalties and determining their amount. The CAA is required to consult on this policy with appropriate stakeholders. Appendix C contains a draft Statement of Policy on Penalties for consultation.
- 1.17 We are seeking your views on the following questions:
  - **Question 1:** Do you have any comments on the CAA's proposed approach to imposing a penalty under Schedule 2 of the Act?

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<sup>9</sup> CAP1326 CAA Regulatory Enforcement Policy, October 2012  
<https://publicapps.caa.co.uk/modalapplication.aspx?appid=11&mode=detail&id=7069>

- **Question 2:** Do you have any comments on the CAA's proposed approach to determining the amount of penalty?
- **Question 3:** Do you have any comments on the CAA's consideration of mitigating and aggravating factors?
- **Question 4:** Do you have any comments on the CAA's proposed approach to determining the form of penalty?

## APPENDIX A

## CAA's Advisory Role

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### CAA advice in relation to exercise of Direction making powers

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- A1. As the Act passed through Parliament, a number of commitments were made by the Government including that:
- the CAA provides advice to the Secretary of State if the CAA considers the Secretary of State's powers contained in Part 1 of the Act should be utilised; and
  - the CAA provides a report on the impact of Part 1 of the Act on General Aviation.
- A2. On 15 November 2021 the Department for Transport wrote to the CAA confirming the scope and type of advice and information that the CAA may be required to provide in the future, should the need arise. A summary is set out below.

### Stage at which CAA advice will be required

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- A3. The powers in the Act are to be used as a last resort, and only if the Secretary of State considers that doing so will assist in the delivery of the CAA's strategy and plan it is required to prepare and maintain under Direction 3(e) of the Civil Aviation Authority (Air Navigation) Directions 2017.
- A4. Before using the powers, the Secretary of State must first consult with the proposed recipient of a Direction (and in the case of a Direction to co-operate in the development of an ACP, the person with whom co-operation would be directed).
- A5. Before carrying out such consultation, the Secretary of State will require the CAA's advice, in the form of a recommendation, as to whether the Secretary of State should consider using the Direction making powers in section 2 or section 3 of the Act.
- A6. Similarly, section 4 of the Act also enables the Secretary of State to vary or revoke a Direction given under sections 2 and 3. The Secretary of State will also therefore require the CAA's advice, as to whether the Secretary of State should consider varying or revoking a Direction ahead of consultation with the proposed recipient of a Direction.

## ACPs which will require CAA advice

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- A7. Initially, the Government's intention, as set out in Department for Transport 'Consultation Response on Legislation for Enforcing the Development of Airspace Change Proposals', is to use the powers in Part 1 of the Act solely in respect of ACPs that have been identified as part of the airspace change masterplan (which, once accepted by the CAA having consulted the Secretary of State, will form part of the CAA's AMS). As a result, initially, the advice the CAA may be asked to provide will be only in respect of ACPs that form part of the masterplan, once accepted into the CAA's AMS.
- A8. The Department for Transport will keep this position under review and may therefore increase the scope of the CAA's advice to include other elements of the CAA's AMS in the future. This could include for example, airspace classification changes proposed through the Procedure for the CAA to review the classification of airspace.<sup>10</sup>

## Advice and information the CAA may be requested to provide

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- A9. It is important that the use of the powers in Part 1 of the Act will assist in delivering the CAA's AMS, but also that these powers are used proportionately and as a last resort, taking into account individual circumstances. The Act contains procedural safeguards for the potential recipient of a Direction to progress or co-operate in an ACP, designed to ensure that any Direction is proportionate and robustly justified.
- A10. In the future, should the Secretary of State consider using the powers contained within Part 1 of the Act, the CAA may be asked to provide advice including, where possible, consideration of the following issues:

**The extent to which the ACP would assist in the delivery of the CAA's airspace strategy including:**

- Whether any legal obligations may be impacted.
- The number of other ACPs that are dependent on the ACP under.
- The impact on the delivery of airspace modernisation benefits.

**The complexity of the ACP and the cost of progressing it:**

- The stages of work that need to be undertaken to allow dependent sponsors to proceed, or for benefits to be realised.
- An estimate of the costs associated with undertaking these stages of work.

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<sup>10</sup> CAP1991 Procedure for the CAA to review the classification of airspace  
<https://publicapps.caa.co.uk/modalapplication.aspx?appid=11&mode=detail&id=9865>

**Whether there is a case for an alternative sponsor to progress the ACP:**

- Reasons an alternative sponsor may be better placed to progress the ACP.
- Any risks in terms of the alternative sponsor taking forward the ACP.
- Whether the original sponsor would be required to co-operate with the alternative sponsor to progress the ACP, and what level of co-operation would likely be required.

A11. The issues on which the CAA may be asked to advise above are not exhaustive. The CAA can also advise on any other issues which it considers relevant to assist the Secretary of State in considering whether to exercise their discretion to give, vary or revoke Directions under sections 2, 3 and 4 of the Act.

## Impact on General Aviation

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**A12.** In addition to the advice above, a commitment was also made by the Government in Parliament to require the CAA to provide a report on the impact of Part 1 of the Act on General Aviation. The Secretary of State wishes to obtain this advice and information from the CAA to fulfil that commitment should the powers be used.

## APPENDIX B

## Enforcement Policy and Guidance

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### Scope

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- B1. This policy and guidance sets out our approach to enforcement under Part 1 of, and Schedule 2 to, the Act, and outlines the legal framework in which our work fits. This is not subject to consultation, and covers two areas:
- **Enforcement of Directions:** this applies to those involved in airspace change issued with a Direction under Part 1 of the Act. The CAA may issue a Contravention Notice and Enforcement Order and impose penalties for breach of such Orders.
  - **Use of information powers under the Civil Aviation Act 1982 (CAA Act):** this applies to any person from whom we can request information under section 84 of the CAA Act. A person failing to comply with the requirement shall be guilty of an offence and liable on summary conviction to a fine.
- B2. We define enforcement in this guidance as any activity that we carry out to seek to remedy a breach, or suspected or potential breach, of a Direction under Part 1 of the Act, or an information request under section 84 of the CAA Act 1982. A breach is defined as a failure to comply.

### Expectations

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- B3. This section sets out what industry can expect from the CAA when considering taking enforcement action, and what the CAA expects from industry. The CAA will:
- deal with stakeholders in a professional and courteous way.
  - aim to drive the progression of airspace changes required to assist in the delivery of the AMS through collaboration and facilitation.
  - consider how best to ensure compliance with the terms of the Direction rather than focusing primarily on penalising conduct.
  - normally raise issues informally and proactively seek solutions before using enforcement powers. However, in some cases, we might immediately use enforcement powers. This is likely to include cases where time is of the essence or there are significant impacts on others and the delivery of the CAA's AMS is at risk, and we judge that these impacts can be remedied most effectively in this way.
  - take a consistent approach to enforcement.
  - protect commercial and personal data that is provided to us in line with legal disclosure constraints.

- have regard to the Regulator's Code<sup>11</sup> the CAA's Regulatory Principles<sup>12</sup> and CAA Regulatory Enforcement Policy.<sup>13</sup>
  - Publish information on the enforcement action taken and its circumstances.
- B4. Delivery of the CAA's AMS is our ultimate goal and, in order to achieve this, we expect relevant industry stakeholders who have a role in the delivery of the CAA's AMS will:
- engage in the development and maintenance of the AMS led by the CAA and the masterplan creation process led by ACOG.
  - discuss with us where the requirements of the AMS appear unclear, or there are difficulties in ensuring compliance.
  - develop delivery plans for airspace changes that will assist in the delivery of the AMS. Where requested, we expect industry to co-operate with us in building confidence that these plans are robust and effective.
  - be aware of their legal obligations and observe them.

## Enforcement approach

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- B5. We aim to achieve the right balance of formal and informal approaches, depending on what is appropriate in the circumstances. The diagram below shows, at a high level, how we anticipate we will approach individual issues.
- B6. It should be noted that the diagram below is for illustrative purposes only. It is not intended to imply that there is a fixed order or that any enforcement action will progress through all stages from the bottom up. For example, informal dialogue could take place before formal guidance is issued and formal advice is provided. Alternatively, a very serious issue which is impacting multiple stakeholders and delaying significant benefits may warrant immediate formal action.
- B7. Our approach will be informed by information received from dialogue with the recipient of the Direction, from ACOG and other stakeholders. Our approach will also be informed by knowledge of the recipient of the Direction's intent and past behaviour.

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<sup>11</sup> [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/300126/14-705-regulators-code.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/300126/14-705-regulators-code.pdf)

<sup>12</sup> [https://publicapps.caa.co.uk/docs/33/CAA%20Horizon%20Regulatory%20Principles%20\(CAP2185\).pdf](https://publicapps.caa.co.uk/docs/33/CAA%20Horizon%20Regulatory%20Principles%20(CAP2185).pdf)

<sup>13</sup> <https://publicapps.caa.co.uk/modalapplication.aspx?appid=11&mode=detail&id=7069>



**Figure B1 – Stages of Enforcement (illustrative only)**

### Information and guidance

- B8. The CAA will regularly monitor delivery progress and may be able to assist in providing information and guidance in meeting the requirements of any Direction under Part 1 of the Act that has been issued.

### Alternative solutions / requesting information

- B9. We will seek to help in finding solutions where there are difficulties to overcome, for example in terms of expertise or resources.
- B10. We may request information before giving a Contravention Notice, Enforcement Order or imposing a penalty if required, and we will normally initially ask that this information is provided voluntarily. We will only expect to use our formal legal powers provided under section 84 of the CAA Act to obtain information if the information is not provided voluntarily.
- B11. We will protect information that is provided to us in line with legal disclosure constraints. These include:
- **Section 23 of the Civil Aviation Act 1982** prohibits the disclosure by the CAA of any information provided to it under certain provision of the Civil Aviation Act 1982 or of an Air Navigation Order without the consent of the person concerned or in other limited circumstances. This will include information provided under a section 84 CAA Act 1982 request and s23



operates to inhibit disclosure of such information if sought under the FOI Act; and

- **The Freedom of Information Act 2000 (FOI Act) and Data Protection Act 1998 (DPA).** Information on how we handle requests for any information under the FOI Act and DPA can be found on our website at <https://www.caa.co.uk/Our-work/Information-requests/Freedom-of-Information/>.

B12. Where we receive a request for disclosure of information which has been obtained by us, we will normally ask the party to which the information relates to confirm whether they consider any of the information provided to be confidential, why they consider this to be the case and the harm that could be caused by disclosure. It will ultimately be for the CAA to determine whether it is appropriate to disclose the information.

## Contravention Notice

B13. The CAA may give a Contravention Notice to a person if the CAA has reasonable grounds for believing that the person has contravened a Direction requirement. The decision on whether to give a Contravention Notice will be made by the CAA's Board.

B14. The Contravention Notice must set out the relevant Direction requirement and contravention, the action that we may take, and explain that representations may be made about the matters in the notice before the end of the representation period. The Act does not require us to specify at this stage what steps we consider the recipient of the Direction needs to take to return to compliance. Where possible and appropriate, however, we would normally do so, in order to give the recipient of the Direction and, where appropriate, other relevant stakeholders, the opportunity to comment on those steps.

B15. The CAA must publish the notice as soon as practicable. A period of 14 days (which may be extended by the CAA) is provided for representations, after which the CAA may withdraw the Contravention Notice or may proceed to enforcement stage. There is no right of appeal against a Contravention Notice.

## Enforcement Order

B16. If a Contravention Notice has not been withdrawn, the representation period has ended, representations have been considered and the CAA has determined that the contravention has occurred and is in whole or part continuing, then we may issue an Enforcement Order. The decision on whether to issue an Enforcement Order will be made by the CAA's Board.

B17. The Enforcement Order must specify the Direction requirement and the contravention, require steps to be taken to remedy the consequence of the contravention in a specified reasonable period, explain a penalty may be imposed if the recipient fails to take those steps within that period and the reasons for giving

the Enforcement Order. The CAA may vary or revoke the Enforcement Order and must provide reasons for doing so.

- B18. The person subject to an order must comply with it. We may impose a penalty for the breach of an Enforcement Order. Our Statement of Policy on Penalties is intended to set out how we will decide whether a penalty is appropriate and the amount. A draft penalties statement (for consultation) is provided in Appendix C.

## Communication

- B19. Our aim is always to be transparent and open about the reasons why we are taking formal enforcement action and will provide information about the process to any recipient of a Direction who is the subject of enforcement action. This will include details of:
- the Direction that we believe is being breached.
  - the reasons we have identified which we believe make enforcement necessary.
  - an explanation of the next steps, including timescales and the possible consequences of failures to comply.
- B20. We will always encourage open dialogue with the recipient of a Direction and, where appropriate, relevant stakeholders, and will take into account any written or oral representations they may make.
- B21. In return, we expect the recipient of a Direction to engage with us in a similar manner, advising us of any actions they are planning to take to ensure compliance and to provide any information reasonably requested in a timely manner, taking into account the seriousness of the breach.

## Publication of notices

- B22. We will publish our notices in accordance with our Regulatory Enforcement Policy and the relevant provisions of the Act.

## Appeals and complaints

- B23. The Act allows a person who is given a Direction to appeal the decision to give or vary the Direction to the Competition Appeals Tribunal (CAT). A further appeal may be brought to the appropriate court if there is a point of law arising from a decision of the Tribunal.
- B24. The CAT will also hear appeals against Enforcement Orders and Penalties. Standard CAT rules apply which can be found at <https://www.catribunal.org.uk/rules-and-guidance>.
- B25. We operate a complaints procedure that allows stakeholders to provide feedback and comments regarding how we carry out our activities (as opposed to any regulatory decision we have made). Complaints and comments should initially be

addressed to Head of Airspace Modernisation at  
[airspace.modernisation@caa.co.uk](mailto:airspace.modernisation@caa.co.uk)

- B26. If you remain dissatisfied you can use the CAA complaints process detailed on our website.<sup>14</sup>

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<sup>14</sup> <http://www.caa.co.uk/Our-Work/Make-a-report-or-complaint/CAA-complaints-policy/>

## APPENDIX C

# Draft Statement of Policy on Penalties

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## Background

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- C1. Schedule 2, Paragraph 11(1) of the Act provides that the CAA must prepare and publish a statement of policy with respect to imposing penalties under Schedule 2 to the Act, and determining the amount of such penalties. By virtue of Schedule 2, Paragraph 11(3) of the Act, when imposing such a penalty or determining its amount, CAA must have regard to this policy statement.
- C2. This statement explains how the CAA will determine whether a penalty is appropriate, based largely on the Macrory principles on imposing penalties, and in particular on the aim to incentivise compliance. This statement also explains the factors the CAA will use to determine the amount of the penalty, based primarily on the harm (or potential harm), culpability and/or the gain or intended gain. The CAA will also take into account any aggravating or mitigating factors.
- C3. Under Schedule 2, Paragraph 11(4) of the Act, when preparing a statement of policy, the CAA must consult such persons as it considers appropriate. This draft penalties statement provides a practical guide to the use of the CAA's powers to impose a penalty on a person<sup>15</sup> involved in airspace change for the contravention of an Enforcement Order under Part 1 of the Act.

## Consultation questions

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**Question 1:** Do you have any comments on the CAA's proposed approach to imposing a penalty under Schedule 2 of the Act?

**Question 2:** Do you have any comments on the CAA's proposed approach to determining the amount of penalty?

**Question 3:** Do you have any comments on the CAA's consideration of mitigating and aggravating factors?

**Question 4:** Do you have any comments on the CAA's proposed approach to determining the form of penalty?

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<sup>15</sup> In this statement, the term 'person' refers to a company or individual who may be subject to a penalty under Part 1 of and Schedule 2 to the Act.

## Imposing a penalty

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- C4. The purpose of the power to issue a Direction in the Act is to assist in the delivery of the CAA's AMS. It is therefore the CAA's policy that the CAA will use its power to issue penalties for contravention of an Enforcement Order to aid this by encouraging recipients of a Direction to comply with the requirements of a Direction given under the Act and to deter that recipient and others from non-compliance.
- C5. The CAA may impose a penalty on a person if the CAA has determined that the person has contravened a requirement of an Enforcement Order. The penalty must be appropriate and proportionate to the contravention (Schedule 2, Paragraph 6(1)). The CAA must also have regard to, in particular, any steps taken by the person on whom the penalty is to be imposed for contravening a requirement of an Enforcement Order towards— (a) complying with, or remedying the consequences of the contravention of, the requirement of the order; (b) complying with, or remedying the consequences of the contravention of, the Direction requirement specified in the Enforcement Order (Schedule 2, Paragraph 6(3)).
- C6. The penalty may consist of a fixed amount not exceeding 10% turnover and/or a daily amount not exceeding 0.1% turnover. Turnover will be calculated in accordance with Regulations made under Schedule 2, paragraph 12 of the Act. The draft Air Traffic Management and Unmanned Aircraft Act 2021 (Airspace Change Directions) (Determination of Turnover for Penalties) Regulations 2021 were laid before Parliament on 15<sup>th</sup> November 2021. The CAA will include details of any Regulations, once in force, in our final penalties statement. Please note that these draft Regulations are not subject to this consultation.
- C7. The Act lays out procedural requirements to be followed by the CAA, both before and after imposing a penalty (Schedule 2, Paragraph 5). These include giving the person a notice that the CAA has imposed a penalty.
- C8. In deciding whether to impose a penalty, the CAA will be guided by the six penalty principles set out in the 2006 Macrory report "Regulatory Justice: Making Sanctions Effective". These principles are summarised as follows:
- Principle 1: Changing behaviour - a sanction should aim to change the behaviour of the offender.
  - Principle 2: No financial benefit - a sanction should aim to eliminate any financial gain or benefit from noncompliance.
  - Principle 3: Responsive sanctioning - a sanction should be responsive and consider what is appropriate for the particular offender and the regulatory issue.
  - Principle 4: Proportionate sanctioning - a sanction should be proportionate to the nature of the offence and the harm caused.
  - Principle 5: Restore the harm caused - a sanction should aim to restore the harm caused by regulatory non-compliance, where appropriate.
  - Principle 6: Deterrence - a sanction should aim to deter future non-compliance.

- C9. 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 of their obligations, and to deter non-compliance in general, rather than to punish retrospectively. 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. This should also incentivise others to comply with their own obligations. 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.
- C10. In deciding whether to impose a penalty, the CAA will take full account of the particular facts and circumstances of non-compliance, including any representations made in response to the Contravention Notice given under Schedule 2, Paragraph 1 of the Act and in other dialogue with the recipient of the Enforcement Order.

## Determining the amount of penalty

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- C11. In determining the amount of penalty, the CAA will take a two step approach:
- Step 1 - determine a basic penalty, taking account of the factors in Table C1 below.
  - Step 2 – adjust the penalty to account for mitigating and/or aggravating factors.

### Step 1a – Assessing the degree of seriousness

- C12. The basic amount of the penalty must be the amount that the CAA determines to be appropriate, and proportionate to the contravention. In order to assess the overall degree of seriousness, the CAA will consider the harm done (or potential harm), as well as the culpability of and/or the gain to the recipient of the Enforcement Order.
- C13. In considering these factors, the CAA will look at the benefits and opportunities foregone by, or harm caused to delivery of the CAA's AMS and relevant stakeholders, as a result of the breach. This will include nugatory or repeated work, and loss of benefits or potential benefits.
- C14. The CAA will also consider the culpability of the recipient of the Enforcement Order, including whether they have acted negligently, recklessly, knowingly or intentionally, or whether the non-compliance was accidental or inadvertent.
- C15. The general level of penalty will also be influenced by any gain (financial or otherwise) that the person has made or is expected to make as a consequence of the breach and the duration of the non-compliance.
- C16. Table C1 sets out how the CAA will assess these factors. These are examples and it may not be appropriate to consider every factor in each case.

**Table C1 – Assessment of Seriousness**

<b>Factor</b>	<b>Assessment</b>	<b>Score</b>
<b>Harm (or potential harm)</b>		
There was little harm (or potential harm) on the delivery of the CAA's AMS, airspace modernisation benefits and/or interdependent sponsors.	Low	1
There was some harm (or potential harm) on the delivery of the CAA's AMS, airspace modernisation benefits and/or interdependent sponsors.	Medium	2
There was significant harm (or potential harm) on the delivery of the CAA's AMS, airspace modernisation benefits and/or interdependent sponsors.	High	3
There was very significant harm (or potential harm) on the delivery of the CAA's AMS, airspace modernisation benefits and/or interdependent sponsors.	Very High	4
<b>Culpability</b>		
There was little culpability by the person and/or the breach of the Enforcement Order was accidental, inadvertent or unavoidable.	Low	1
There was some culpability by the person and/or there was an inadequate attempt to avoid or mitigate the breach of the Enforcement Order.	Medium	2
There was significant culpability in that the person to some extent negligently, intentionally, knowingly or recklessly failed to comply with the Enforcement Order and/or little effort was made to avoid or mitigate the breach.	High	3
There person was wholly culpable and negligently, intentionally, knowingly or recklessly failed to comply with the Enforcement Order and/or no effort was made to avoid or mitigate the breach.	Very High	4
<b>Gain (or intended gain)</b>		
The person made, or intended to make, a small gain from the breach of the Direction and/or Enforcement Order.	Low	1
The person made, or intended to make, some gain from the breach of the Direction and/or Enforcement Order.	Medium	2
The person made, or intended to make, a significant gain from the breach of the Direction and/or Enforcement Order.	High	3

The person made, or intended to make, a very significant gain from the breach of the Direction and/or Enforcement Order.	Very High	4
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### Step 1(b) - arriving at a basic penalty

C17. The CAA will add these scores together to arrive at an overall band for the seriousness of the contravention and a basic penalty bracket using Table C2 below. A score of 8 or more will attract the highest basic penalty bracket.

Table C2 – Determining the basic penalty

Penalty Band	Overall Score	% of maximum penalty <sup>16</sup>	% of a person's turnover for fixed and/or daily amounts <sup>17</sup>	
A	1-2	1-20%	0.1-2% fixed	0.001-0.02% daily
B	3-4	21-50%	2.1-5% fixed	0.021-0.05% daily
C	5-7	51-85%	5.1-8.5% fixed	0.051-0.085% daily
D	8 or more	86-100%	8.6-10% fixed	0.086-0.1% daily

### Step 2 – Adjustments for mitigating and aggravating factors

- C18. In determining whether a penalty should be towards the lower, mid or upper part of a penalty bracket, the CAA will be guided by the score itself and any aggravating and/or mitigating factors.
- C19. Having determined a basic penalty, the CAA then assesses all of the circumstances to decide whether it is appropriate to adjust this sum to take account of mitigating and/or aggravating factors.
- C20. The CAA will apply an overall adjustment reflecting the net effect of the mitigating or aggravating factors. 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 to the maximum limits specified in the Act.

<sup>16</sup> The maximum allowed by the Act is either or both of - a fixed amount not exceeding 10% of turnover, a daily amount not exceeding 0.1% of a person's turnover.

<sup>17</sup> As defined by Regulations. The draft Air Traffic Management and Unmanned Aircraft Act 2021 (Airspace Change Directions) (Determination of Turnover for Penalties) Regulations 2021 were laid before Parliament on 15<sup>th</sup> November 2021.



C21. The following factors may be considered, as appropriate, in this regard:

- Any steps which have been taken to minimise the risk of a contravention occurring, such as new resources put in place. Lack of such action to resource could be an aggravating factor that could lead to an increase in the overall penalty.
- The speed with which steps have been taken to comply with the Direction and Enforcement Order, including whether these were initiated by the person or in response to CAA's informal or formal approaches to ensure compliance (prompt and voluntary action are likely to attract a reduction in the overall amount; forced and slow action, or lack of action altogether are likely to lead to an increase).
- The extent of involvement of directors or senior management in the action or inaction which caused the contravention or their lack of appropriate involvement in action to remedy it.
- Repeated or continuing infringements of obligations in a Direction.
- Whether the person reported the likelihood of a contravention or not.
- The existence and effectiveness or otherwise of proactive preventative measures and internal mechanisms to ensure progress.
- Evidence that the contravention was genuinely accidental or inadvertent.
- Cooperation with the CAA, including, but not limited to, speed of responses, availability, openness and willingness of staff (including senior managers) to engage, and the availability of data.

C22. 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 contravention. 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. The sooner commitments of such actions are made to the CAA, the more significant the reduction in the overall penalty is likely to be.

C23. Other mitigating or aggravating factors may arise depending on the specific facts and circumstances of the case.

C24. 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 particular factor.

#### Example case study – for illustrative purposes only

C25. Airport A has been given a Direction under section 2 of the Act to progress an airspace change proposal to Stage 3 of the CAA's airspace change process<sup>18</sup> by a certain date. Airport B is relying on Airport A's airspace change proposal reaching

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<sup>18</sup> CAP1616 Airspace change: Guidance on the regulatory process for changing the notified airspace design and planned and permanent redistribution of air traffic, and on providing airspace information.

that stage so that interdependencies between design options are understood and can be addressed in a co-ordinated manner before Airport B's proposals can be considered further. The potential benefits of these changes are significant in terms of environmental improvements, and Airport B has invested several million pounds in developing its proposals.

- C26. Airport A initially attempts to progress their airspace change proposal, and engages with the CAA throughout. However, there is evidence that senior management made a decision to withdraw resources and deprioritise their work. As a consequence, Airport A's airspace change proposal did not progress as required.
- C27. After giving a Contravention Notice and following the procedures under the Act, the CAA issues Airport A with an Enforcement Order requiring that Airport A take reasonable steps to progress to a Stage 3 gateway assessment by a certain date. Airport A reassembles a small team but they lack adequate resources to make progress effectively. Airport A does not meet the required timescale, thus breaching a requirement of the Enforcement Order. The CAA decides to impose a penalty for this contravention.
- C28. In the hypothetical scenario of Airport A, the CAA might reasonably conclude that the harm is assessed as high (a "harm score" of 3) due to the potential benefits being significant, and that the airport had some culpability, therefore assessed as a medium (a "culpability score" of 2). The CAA was satisfied that there was no intended gain (a "gain score" of 0). By adding the scores (a total of 5) the CAA will arrive at an assessment of the overall seriousness: penalty band C. The CAA is therefore guided that an appropriate penalty bracket is between 51% and 85% of the maximum penalty under the Act. The CAA is likely to tend towards the lower end of the range due to the score of 5, but may increase this due to the aggravating factor of lack of senior management involvement in avoiding the breach and the absence of proactive preventative measures and internal mechanisms to ensure progress. Considering all factors, this may lead penalty being imposed of 60% of the maximum penalty. This equates to 6% of Airport A's turnover for a fixed amount and 0.06% of turnover for a daily amount. This is an illustrative example only, each case will be considered on its own circumstances.

## Determining the form of the penalty – fixed and/or daily amounts

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- C29. The penalty may consist of either or both of the following—
- (a) a fixed amount not exceeding 10% of a person's turnover (Schedule 2, Paragraph 7).
  - (b) a daily amount not exceeding 0.1% of a person's turnover (Schedule 2, Paragraph 8).
- C30. The CAA's decision on whether to impose either or both a fixed amount and/or a daily amount for non-compliance of an Enforcement order will depend on the specific facts and circumstances of the case, but will have regard to keeping the overall penalty proportionate.

- C31. As a general guide, rather than imposing both a fixed and daily penalty immediately, the CAA expects that it is more likely to impose a fixed penalty for breach of a requirement of an Enforcement Order, followed by a daily penalty after a reasonable period if the breach has not been remedied. The CAA considers that this reflects a more proportionate balance in circumstances where the recipient of an Enforcement Order's ability to remedy a breach will not usually be immediate and may take time.
- C32. 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 Schedule 2, Paragraph 5 of the Act stating that it has imposed a penalty, and must end before the day on which the contravention ceases.
- C33. 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.

## Procedure after imposing a penalty

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- C34. As soon as practicable after imposing a penalty under Schedule 2, Paragraph 4 of the Act, the CAA must give notice to the person on whom the penalty is imposed and publish the notice. The notice must (Schedule 2, Paragraph 5(2)):
- State that the CAA has imposed a penalty.
  - State the amount of the penalty.
  - Specify the requirement in the Enforcement Order and contravention in respect of which it is given.
  - Specify a reasonable period within which the penalty must be paid or reasonable periods within which different portions of the penalty must be paid.
- C35. If a penalty is to be calculated entirely or partly by reference to a daily amount, as discussed above, then the notice must also specify the day on which the daily amounts begin to accumulate, and the day on which, or the circumstances in which, they cease to accumulate.
- C36. As soon as practicable after the daily amounts cease to accumulate, the CAA must give a notice to the person on whom the penalty was imposed confirming the day on which they ceased to accumulate, and publish the notice.
- C37. The person receiving a penalty may appeal to the Competition Appeals Tribunal under Schedule 2, Paragraph 14 of the Act.
- C38. The CAA may withdraw a penalty, for example, where it thinks it is no longer required or an alternative arrangement has been made. In this event, the CAA must provide a notice to the person on whom the penalty was imposed, which includes the reasons for withdrawing the penalty. This notice must be published as soon as practicable.

## Recovery of penalties

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- C39. If all or part of the penalty imposed on a person under this Act is not paid within the period specified in the notice, then the unpaid balance carries interest from time to time at the rate for the time being specified in section 17 of the Judgments Act 1838. The CAA may recover both the unpaid balance and any interest on the penalty that has not been paid.
- C40. Any sums received by the CAA by way of a penalty under the Act, or interest, must be paid into the Consolidated Fund operated by the Treasury.

## Revision of the statement of policy

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- C41. Schedule 2 of the Act provides that the CAA may revise the statement of policy, and if it does, it must publish the revised statement. Prior to doing so the CAA must first consult such persons as it considers appropriate. A revised statement of policy will not apply retrospectively.