

# Statement of Policy on Penalties under Chapter 1 of Transport Act 2000

CAP2983

Published by the Civil Aviation Authority, 2024

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First published 2024

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# Statement of the CAA's policy on imposing penalties under Chapter 1 of the Transport Act 2000

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## Background

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1. This statement of policy on penalties ("Statement") sets out the basis on which the CAA will calculate penalties under the Transport Act 2000 ("TA00") where it decides to exercise its discretion to impose a penalty following contraventions or acts (also referred as breaches) under Schedule B1 or Schedule C1 TA00.
2. The CAA is issuing this Statement in performance of its statutory obligation to publish a statement of its policy with respect to imposing penalties under Chapter 1 TA00 and determining their amount, as required by s.25C TA00. The CAA does not consider that it is appropriate or possible to define all the circumstances that could be relevant in a particular case. Nonetheless, the CAA will apply this Statement flexibly according to the circumstances of each case.
3. In this Statement, any reference to a Part, Chapter, section or Schedule refers to a section or Schedule in the TA00 unless specified otherwise.

## The CAA's powers to impose a penalty under TA00

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4. This Statement refers to the CAA's powers in the TA00 to impose a penalty:
  - (a) on a person<sup>1</sup> who holds an air traffic services licence issued under the TA00 ("licence holder") and where the CAA has determined that the licence holder is contravening or has contravened:
    - (i) a duty imposed on the licence holder by section 8 and/or an obligation imposed by a condition in its licence (each a "Chapter 1 requirement" and together the "Chapter 1 requirements"), in circumstances where the CAA has given the licence holder a contravention notice and the representation period has ended (paragraph 9, Schedule B1);
    - (ii) a requirement of an enforcement order (paragraph 10(a), Schedule B1); or

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<sup>1</sup> In this Statement, the term 'person' refers to a company or individual who may be subject to a penalty under Chapter 1.

(iii) a requirement of an urgent enforcement order that has been confirmed (paragraph 10(b), Schedule B1);<sup>2</sup>

the CAA may impose a fixed amount up to 10% of the licence holder's qualifying turnover for the qualifying period and/or a daily amount up to 0.1% of its qualifying turnover as set out in paragraphs 13, 14 and 15 of Schedule B1;

(b) on any person who is required to provide information or documents to the CAA in response to an information notice issued under paragraph 1, Schedule C1 and where that person:

(i) fails to comply with that information notice without reasonable excuse: the CAA may impose a fixed amount that must not exceed £2 million and/or a daily amount that must not exceed £100,000 (paragraph 2, Schedule C1); or

(ii) intentionally alters, suppresses, or destroys a document that they are required to produce under that information notice: the CAA may impose a fixed amount that must not exceed £2 million (paragraph 4, Schedule C1);

(c) on any person who has given information in relevant circumstances<sup>3</sup> and where the CAA is satisfied beyond reasonable doubt that the person, in giving information to the CAA, has committed an offence under section 101:<sup>4</sup> the CAA may impose a fixed amount up to a maximum of £2 million (paragraph 3, Schedule C1).

5. In addition to the above:

(a) where a person fails to comply with the information notice without reasonable excuse (paragraph 2, Schedule C1), the CAA may do either or both of the following (a) impose a penalty; or (b) enforce the duty to comply with the notice by bringing civil proceedings for an injunction or, in Scotland, for specific performance of a statutory duty under section 45 of the Court of Session Act 1988; and

<sup>2</sup> Schedule B1 sets out the CAA's powers to issue contravention notices, enforcement orders and urgent enforcement orders.

<sup>3</sup> Under section 101(2), a person gives information or makes an application in relevant circumstances if they give or make it in pursuance of (a) a provision contained in or made under Part I, or (b) a direction given, notice served or other thing done in pursuance of such a provision.

<sup>4</sup> Under section 101(1) a person commits an offence if in giving information or making an application in relevant circumstances (a) they make a statement which he knows to be false in a material particular, or (b) they recklessly make a statement which is false in a material particular.

- (b) where the CAA decides to impose a penalty on a person in respect of the provision of false information (paragraph 3, Schedule C1), that person may not at any time be convicted of the offence under section 101 in respect of the act or omission giving rise to the penalty.
6. The situations outlined in paragraph 5(b) above are set out in Schedule C1 which, pursuant to section 25, makes provision to enable the CAA to obtain information for the purposes of carrying out its functions under section 34 and Schedule B1, for enforcement in connection with the exercise of those powers and for connected appeals.
7. Any penalty imposed under the paragraphs above must be such amount as the CAA determines to be appropriate and proportionate to the contravention or act in respect of which it is imposed. In this context it is important to note that while the CAA considers there should be broad consistency in its approach, the CAA is not necessarily bound by the precedent established by its previous decisions.
8. Any sums received by the CAA by way of a penalty or interest under the TA00 must be paid into the Consolidated Fund operated by HM Treasury.<sup>5</sup>

## Procedure for imposing a penalty

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### The CAA must issue a notice before imposing a penalty

9. Schedules B1 and C1 lay out procedural requirements to be followed by the CAA, both before and after imposing a penalty. While there are small differences between the procedures under Schedules B1 and C1, broadly, the CAA must:<sup>6</sup>
- (a) give notice to the person on whom the CAA proposes to impose a penalty;
  - (b) publish the notice as soon as practicable;
  - (c) send a copy of the notice to those specified in paragraph 11(3), Schedule B1 or paragraph 5(4), Schedule C1 as appropriate;
  - (d) allow at least 21 days for making representations; and
  - (e) consider any representations made within that period (and not withdrawn).
10. The notice must in all cases specify that the CAA proposes to impose a penalty and the proposed amount of that penalty. Where a penalty includes a daily amount, the notice must specify the day on which the daily amounts would begin to accumulate and the day on which, or the circumstances in which, they would

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<sup>5</sup> Section 25B(4)

<sup>6</sup> Paragraphs 11-12, Schedule B1 and paragraphs 5-6, Schedule C1.

cease to accumulate. These procedural requirements apply afresh if the CAA intends to vary the proposed amount of a penalty.<sup>7</sup>

11. In respect of a penalty imposed under Schedule B1, the notice must also specify:
  - (a) the Chapter 1 requirement that the CAA has determined is being or has been contravened;
  - (b) the act or omission that the CAA has determined constitutes a contravention of the requirement; and
  - (c) where the penalty would be imposed under paragraph 10, Schedule C1, the Chapter 1 requirement in respect of which the enforcement order or urgent enforcement order (as the case may be) was given.
12. In respect of a penalty imposed under Schedule C1, the notice must give the CAA's reasons for imposing a penalty.

### **The CAA must issue a notice that it has imposed a penalty**

13. As soon as practicable after imposing a penalty under Schedule B1 or Schedule C1, the CAA must give a notice to the person on whom the penalty is imposed, publish the notice and send a copy of the notice to the persons specified in paragraph 12, Schedule B1 or paragraph 6, Schedule C1 as appropriate. The notice must specify the same information as in the notice proposing the penalty and set a reasonable period in which the penalty must be paid or reasonable periods within which different portions of the penalty must be paid.
14. Where the CAA imposes penalties of a daily amount, it must, as soon as practicable after those daily amounts have ceased to accumulate, give a notice to the person on whom it imposed the penalty confirming the day on which they ceased to accumulate, send a copy of that notice to the same persons referred to in the previous paragraph and, in the case of penalties imposed under Schedule B1, publish the notice.
15. The person receiving a penalty may appeal to the Competition Appeals Tribunal.<sup>8</sup>

### **Is a penalty appropriate?**

16. It may not be appropriate to set a penalty in all cases where the CAA has determined there has been a relevant contravention, act or omission. Set out below are examples of the considerations that the CAA will take into account when determining whether to exercise its discretion to impose a penalty.

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<sup>7</sup> Paragraph 11(6), Schedule B1, and paragraph 5(6), Schedule C1.

<sup>8</sup> Paragraph 19, Schedule B1 or paragraphs 7, Schedule C1.

## Considerations likely to be relevant in all cases

### The CAA's Duties

17. The CAA's starting point in considering whether a penalty is appropriate will be consideration of its statutory duties. The CAA's primary duty under section 2 is to exercise its functions under Chapter 1 so as to maintain a high standard of safety in the provision of air traffic services. This Statement will aid this duty by encouraging a holder of an air traffic services licence to comply with the Chapter 1 requirements, as well as deterring potential breaches in relation to the information enforcement provisions in Schedule C1, and helping to ensure that any enforcement action is taken on the basis of information which is as accurate and comprehensive as practicable.
18. The CAA must also exercise its Chapter 1 functions in the manner it thinks best calculated to:
  - (a) further the interests (regarding the range, availability, continuity, cost and quality of air traffic services) of operators and owners of aircraft, owners and managers of aerodromes, persons travelling in aircraft and persons with rights in property carried in them. This includes furthering the interests (where the CAA thinks it appropriate) by promoting competition in the provision of air traffic services;
  - (b) promote efficiency and economy on the part of licence holders;
  - (c) secure that licence holders will not find it unduly difficult to finance activities authorised by their licences;
  - (d) take account of any international obligations of the United Kingdom notified to the CAA by the Secretary of State (whatever the time or purpose of the notification); and
  - (e) take account of any guidance on environmental objectives given to the CAA by the Secretary of State after the coming into force of this section.

### The CAA's objectives in setting a penalty

19. In making regulatory decisions, the CAA will have regard to its statutory duties. The CAA's primary objective in issuing a penalty will be to deter non-compliance in general and to change the future behaviour of the person so that they comply with all their obligations. The CAA also aims to incentivise compliance by all parties that have obligations under the TA00 or under their licence.
20. To the extent it is practicable, the CAA will seek to eliminate any financial gain or benefit that the person may have made from the failure to comply and to deter non-compliance in a proportionate manner to the seriousness of the breach.



21. The CAA will normally impose a penalty if it considers that the penalty would achieve these objectives. In doing so, the CAA will take a proportionate approach, bearing in mind the circumstances of the infringing party and the particular infringement or issue.

### **Considerations relating to the facts of the case**

22. 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 for issuing the relevant contravention notice or enforcement order, including any representations made to that notice; and
  - (b) any representations made in response to the notice setting out the CAA's proposal to impose a penalty.
23. Where a person has failed to comply with the requirements of an information notice under paragraph 1, Schedule C1, the CAA must take into account any reasonable excuses. Such reasonable excuses are not defined in legislation, and the CAA would consider these on a case-by-case basis. Nevertheless, they may include circumstances that are genuinely unforeseeable and outside of the person's control which directly prevented compliance with the obligation. In addition, the CAA would expect the person concerned to inform it as soon as practicable of any difficulties identified before the deadline for submission of the information.
24. In determining whether to impose a penalty for providing false information, the CAA must be satisfied beyond reasonable doubt that the person has knowingly or recklessly made a statement which is false in a material particular. In determining whether to impose a penalty for altering, suppressing or destroying a document required by a notice under paragraph 1, Schedule C1, the person must have intentionally altered, suppressed or destroyed documents that they are required to produce by a notice under paragraph 1, Schedule C1.<sup>9</sup>

### **Considerations where the CAA has multiple enforcement tools**

#### **Imposing a penalty or seeking an injunction**

25. Where the CAA has a choice between imposing a penalty or using civil proceedings or a combination of both,<sup>10</sup> the CAA's approach will normally be to seek to use the approach which is most likely to achieve the goals set out in paragraphs 19 to 21 above.

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<sup>9</sup> See section 101 and paragraphs 3 and 4, Schedule C1.

<sup>10</sup> Paragraph 2(1)(b), Schedule C1 and paragraph 8(7), Schedule B1

26. Given the importance of deterrence, the CAA is likely to favour the imposition of penalties over seeking injunctive relief. However, the CAA would consider civil proceedings in cases where deterrence may not be the most effective way to further its duties under section 2.

### **Imposing a penalty under TA00 or using competition law**

27. Paragraph 16, Schedule B1, requires the CAA to consider whether it would be more appropriate to proceed under the Competition Act 1998 (the “CA98”) before imposing a penalty under paragraphs 9 and 10, Schedule B1.
28. By this stage of the process, the CAA will usually have already carried out a similar exercise in its initial consideration of whether (and how) to take enforcement action. Having already satisfied itself that enforcement action under the TA00 in response to the relevant contravention was more appropriate than using its CA98 powers or taking enforcement action in relation to matters of safety, the question would then be whether to open an investigation using its competition law powers rather than imposing a penalty for non-compliance with an enforcement order or contravention notice under TA00.
29. While the CAA might be expected to take the same view at this stage as it had done in deciding whether to commence enforcement action, the CAA would act consistently with the statute and consider these matters afresh. The outcome of these considerations would depend on all the information the CAA had available, including in relation to any intervening events or whether additional evidence about the conduct of the licence holder had come to light in the period between opting for enforcement action under TA00 and making a decision to impose penalties.

### **Imposing a penalty under TA00 or criminal proceedings for the offence of providing false information**

30. The CAA may impose a penalty where it is satisfied beyond reasonable doubt that the person, in giving information to the CAA, has committed an offence under section 101 (making of false statements etc). Where a penalty is imposed, that person may not then be convicted of the offence under section 101 in respect of the act or omission giving rise to the penalty.
31. The CAA will consider investigation with a view to prosecution or imposing a penalty whenever there is an alleged breach of section 101. Factors taken into consideration in determining whether to prosecute or impose a penalty include, but are not limited to whether:
- the false statement was made knowingly or recklessly;
  - the provision of false information had or may have had any safety implications;
  - the person cooperated with the CAA’s investigation; and

- the CAA is satisfied that a decision to prosecute would comply with the Code for Crown Prosecutors.

## **Considerations in determining the amount of the penalty**

32. As noted above, the amount of the penalty must be such as the CAA determines to be appropriate and proportionate to the contravention or action for which the penalty is imposed. Set out below are examples of the considerations that the CAA will take into account in determining the amount of a penalty, including whether any adjustments are appropriate to reflect mitigating or aggravating factors in the particular case. It is possible that not all considerations will be relevant in a specific case. In each case, the CAA will exercise its discretion, in accordance with its duties under section 2, to decide what level of penalty should apply and in accordance with the statutory maximum penalty prescribed in each case.

### **Considerations required by Schedule B1**

33. Paragraph 13(3), Schedule B1 provides that, in determining the amount of a penalty under Schedule B1, the CAA must have regard, in particular, to factors summarised as follows:
- representations received during the consultation period set out in the notice (see section on “Procedure for imposing a penalty” above);
  - steps taken by the licence holder to comply with the relevant requirements; and
  - any steps taken by the licence holder towards remedying the consequences of the relevant contravention.

### **Considerations in relation to the seriousness of the contravention or act**

34. Any penalty should be proportionate to the seriousness of the relevant contravention or act. This will be the CAA’s usual starting point in considering the general level of the penalty.
35. The CAA will consider the level of harm (or potential harm) to airspace users, the wider public and other market participants as a result of the contravention or act, including:
- whether the breach could have seriously endangered such persons;
  - the numbers of such persons affected;
  - the benefits and opportunities foregone by, or harm caused to, such persons;
  - the duration of the harm caused and the duration of the breach; and

- (to the extent relevant) the level of harm to the CAA's ability to carry out its functions.

36. The general level of penalty will also be influenced by any gain (financial or otherwise) that the person has made because of the contravention or act (which may include an estimate of the cost savings associated with not complying with the relevant obligation).

### **Considerations in relation to the culpability of the person**

37. The CAA will also consider the culpability of the person, including (depending on the type of contravention or act) whether they have acted negligently, recklessly, knowingly or intentionally, or whether the contravention or act was accidental or inadvertent. In so doing, the CAA may also consider whether:

- the person had identified (or should have identified) the risk of a contravention and failed to put in place an effective mitigation strategy; and
- what steps (if any) the person had taken (or should have taken) to avoid a breach before it took place.

38. While in some cases, there may be comparatively little evidence in relation to these matters, in general, the CAA expects licence holders to have clear and effective licence compliance strategies and good standards of record keeping and document retention (bearing in mind the CAA's statutory powers to request information as discussed further below).

### **Aggravating and mitigating factors**

39. The CAA will take account of relevant mitigating and aggravating factors. These might include:

- (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 the CAA's actions;
- (b) any steps which have been taken to minimise the risk of the contravention or act recurring, such as new processes put in place or training needs addressed may be considered a mitigating factor. Conversely, not identifying or implementing 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 contravention or act or their lack of appropriate involvement in action to remedy it;
- (d) repeated or continuing contraventions or acts (whether of the same or a different nature);

- (e) whether the person reported the contravention or act promptly after it took place or, conversely, whether the person tried to conceal it. The CAA considers that self-reporting and on-going comprehensive reporting, including additional information as it comes to light should be duly incentivised and considered as a mitigating factor;
  - (f) cooperation with the CAA's investigation, including, but not limited to, speed of responses, availability, openness and willingness of staff (including directors and senior managers) to engage, and availability of data;
  - (g) whether the relevant person has sought to compensate other persons affected by the contravention or act in addition to taking steps to rectify the breach; and`
  - (h) any other mitigating or aggravating factors relevant to the specific case.
40. 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 that factor.
41. In accordance with its duties under section 2, the CAA will apply an adjustment reflecting the net effect of the mitigating or aggravating factors. The net effect of these factors may be significant, including reducing the penalty to zero or increasing it to the maximum limit specified in the TA00.

### **Considerations in relation to provision of false information, or altering, suppressing or destroying a required document**

42. Where false information is provided, the CAA may impose a penalty where it is satisfied beyond reasonable doubt that the person providing that information has committed an offence under section 101. This will be the case where that person knows that the information is false in a material particular or is reckless as to whether it is false in a material particular.
43. Where a required document has been altered, suppressed or destroyed, a penalty may be imposed if an intention to do so can be shown.
44. In both cases, it is likely that the CAA will consider such acts to be either serious or very serious.

### **Consideration of the overall level of the penalty**

45. In all cases, having considered the factors set out above, the CAA will consider the overall level of the penalty in the round to assure itself that it deters non-compliance, is appropriate and proportionate to the contravention or act in question, while ensuring the penalty does not exceed the maximum specified in statute.

46. As noted in paragraph 10 above, the CAA can propose varying the amount of any penalty (and, so, the balance between any fixed and daily amounts) if it gives a further notice (see paragraph 5(6), Schedule C1). This allows the CAA to better target the penalty to the particular case if emerging circumstances suggest this is appropriate and proportionate and, at the same time, effectively incentivises compliance by all parties that have obligations under the TA00 or under their licence.

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

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47. The TA00 sets out for which contraventions under Schedule B1 and which acts under Schedule C1 the CAA may impose fixed and/or daily penalties. Where relevant, the CAA will decide whether to impose a fixed or daily penalty, (or a combination of the two), in the light of the circumstances of the case. Where both may be imposed, the appropriate balance between the two, including the period the CAA considers appropriate for a daily penalty to accumulate, will depend on the specific facts and circumstances of the case.
48. The CAA notes that daily penalties, (either alone or in combination with a fixed penalty) may be more appropriate for ongoing infringements as they create greater incentives to comply quickly.<sup>11</sup> If the contravention or act has ended before the penalty is imposed, a fixed penalty will most likely be appropriate.

### Schedule B1

49. In respect of a penalty in relation to a contravention by a licence holder under Schedule B1, a daily amount is an amount payable where the contravention in respect of which the penalty is imposed continues after it is imposed.
50. In respect of a penalty imposed under paragraph 9, Schedule B1, a daily amount can only be imposed if the contravention has been continuous since the end of the representation period for the relevant contravention notice (paragraph 15(2), Schedule B1).

### Schedule C1

51. The CAA is likely to impose both a fixed amount and a daily amount for non-compliance with an information notice given under paragraph 1, Schedule C1, based on the factors set out above.

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<sup>11</sup> The period during which daily amounts accumulate must be such as the CAA considers appropriate. However, it must begin after the CAA gives notice that it has imposed a penalty and end before the contravention(s) cease.

52. A penalty for providing false information or for destroying documents etc will be a fixed amount as set out in paragraphs 3 and 4, Schedule C1.

## **Qualifying turnover and qualifying period for penalties**

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53. Under paragraphs 14 and 15, Schedule B1:
- (a) where a fixed penalty is imposed, this may not exceed 10% of the licence holder's "qualifying turnover" for the "qualifying period";
  - (b) where a daily penalty is imposed, the daily amount must not exceed 0.1% of the licence holder's "qualifying turnover" for the "qualifying period".
54. A licence holder's "qualifying turnover" is the turnover from its provision of air traffic services as reported in accounts that the licence holder is required to prepare by a licence condition.
55. The "qualifying period" is the last regulatory year ending on or before the day on which the notice proposing the penalty is given (see "Procedure for imposing a penalty") except in certain circumstances as provided in paragraphs 14(4)-(5), Schedule B1.

## **Revision of the policy set out in this Statement**

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56. The CAA may, from time to time, review the policy set out in this Statement. If the CAA decides to revise this policy, it must consult on the proposed revisions before making them in accordance with section 25C(4).

**APPENDIX A****Duties of licence holders under section 8**

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While a licence is in force its holder:

- (a) must secure that a safe system for the provision of authorised air traffic services in respect of a licensed area is provided, developed and maintained;
- (b) must take all reasonable steps to secure that the system is also efficient and co-ordinated;
- (c) must take all reasonable steps to secure that the demand for authorised air traffic services in respect of a licensed area is met; and
- (d) must have regard, in providing, developing and maintaining the system, to the demands which are likely to be placed on it in the future.

A licensed area is an area in respect of which the licence authorises its holder to provide air traffic services.

Authorised services are services of the description specified in the licence as the description of services which the holder of the licence is authorised to provide.