CAA Consultation on Statement of Policy on Penalties under Chapter 1 of Transport Act 2000, CAP2617

NERL response, January 2024

NATS Public

Summary

NATS (En Route) plc (NERL) welcomes the opportunity to comment on the CAA Statement of Policy on Penalties under the Transport Act 2000. The CAA's powers to impose fines are an important and powerful regulatory tool to incentivise NERL and its directors and responsible officers to act in accordance with the Licence and the law. It is therefore helpful that the CAA is now fulfilling its own statutory requirement to consult and then put in place a Statement of Policy on Penalties. This should help inform NERL and other stakeholders about the factors that the CAA will take into account when considering whether to impose a penalty and the potential scale of any penalty imposed.

NERL has two main comments on the Statement of Policy on Penalties:

1. The CAA has a statutory duty in the exercise of its regulatory functions to secure that NERL will not find it unduly difficult to finance its regulated activities. A fine of 10% of qualifying turnover, from the provision of regulated air traffic services, would prima facie be very likely to create financing challenges – a fine at such level would be equivalent to 130% of the annual equity return allowed in the NR23 price control, or 25% of the total equity return over the five year period. The draft Statement of Policy does not make any reference to the CAA's duty to NERL's financing as a relevant balancing factor in deciding what scale of penalty, if any, to impose. The CAA should address this omission in a revised final version of its Statement of Policy.
2. Any finding by the CAA of breach by NERL of its statutory duties and/or licence obligations would necessarily involve novel regulatory analysis, since such breaches are extremely rare and since many of the requirements on NERL are not specified at a granular compliance level on the face of the Act or Licence or in regulatory guidance. Enforcement therefore relies to a significant extent on the judgement of the CAA which effectively creates new precedents retrospectively. Against the backdrop of such regulatory ambiguity, we suggest that the scale of any penalty should be moderated by the novelty of the assessment leading to a finding of breach and a subsequent possibility of imposing a penalty. The CAA should address this concern in a revised final version of its Statement of Policy.

Comments

The CAA draft Statement of Policy is, overall well structured and reasoned, and is a positive contribution to an effective regulatory framework, by clarifying the operation of penalties as a deterrent against non-compliance by NERL or its staff. We comment by exception on those aspects of the draft Statement which we consider could be further improved.

We have categorised our comments into the four types of circumstances in which the CAA may impose a fine:

1. Suppressing or falsifying records or information
2. Anti-competitive behaviour
3. Breach of licence enforcement notification
4. Fines for breach of Section 8 duties

1 Suppressing or falsifying records or information

Actions under this heading would effectively be criminal offences, and as such the bar for imposing a fine is high: deliberate or reckless act, on a 'beyond reasonable doubt' burden of proof. Such circumstances should not arise, and we have no specific comments on the CAA's statement of policy in this area. We note that the financial deterrence to wrong-doing in this area would be felt directly by all directors and senior officers of NERL, as there is no insurance cover provided by the company's Directors and Officers insurance policy for such fines.

2 Anti-competitive behaviour

We understand that any fines for such alleged behaviour would only arise following clear guidance and proposed undertakings having been specified by the CAA to avoid anti-competitive behaviour, and then those undertakings having been breached. As such, there would adequate time and process for NERL to understand the basis of the CAA's findings, and to make representations on the findings, proposed undertakings and any penalties stemming from non-compliance. This process should provide adequate notice for NERL to consider modifying its actions and/or to understand the basis for any proposed penalty. The process described by the CAA for the application of its penalty powers under the Transport Act 2000 is equivalent to that which applies under the Competition Act 1998, and as such is well understood and accepted.

3 Breach of Licence Enforcement Notification

Where the CAA has issued NERL with a notice that requires specific actions (including providing information to the CAA) or desisting from specific actions, then there are procedural pathways for NERL to challenge the content of such a notice, and requirements on the CAA to ensure that the steps required of NERL are appropriate for addressing the identified licence breach. These mechanisms provide adequate safeguards for NERL, so there is no need for any additional specific checks on the exercise of the CAA's powers to issue penalties in such circumstances.

4 Breach of Section 8 duties

This is the area of the CAA's power to fine that raises the primary concern for NERL. This concern arises because of the lack of specification for the outcomes NERL is required to work

towards, under its Section 8 duties, and the potential for divergent assessment of compliance with the more specific requirements placed on NERL by the Licence.

With regard to safety, the CAA emphasises that this is its primary duty and the penalties policy should incentivise NERL to comply with its own principal statutory duty towards safety under Section 8. There is close alignment here between the statutory objectives of the CAA and NERL with regard to the primacy of safety and the objective of minimising safety risk. The Statement of Policy on Penalties reinforces this point.

However, the CAA also notes that its own statutory duties extend to users' interests, licence holder's effiency and financeability, the UK's international obligations and any environmental objectives and guidance from Government. NERL's own Section 8 duties, beyond safety, mirror these to some extent, requiring NERL to provide, maintain and develop a safe system, to do so efficiently, to take reasonable steps to meet current demand and have regard to future demands in developing the system. The standards implicit in these duties are not defined except in the broadest terms[1]. For staffing delay, there is no definition of delay targets at a level below the average for the UK across a whole year, and (as shown in the Palamon investigation and findings) it is feasible for NERL to be within the delay targets specified in its licence whilst also in breach of less defined Section 8 duties towards meeting current and future demands.

This overlap between the incentives imposed by the regime of service quality targets, bonuses and penalties, under the licence, and the incentives from the CAA's penalty powers towards similar but much less well defined goals of meeting user demand, creates two issues.

First, the exposure of NERL to additional financial risk from penalties for a shortfall in delivering sufficient capacity adds to its financeability risk, but in a way which is not adequately considered by the CAA in considering the overall financeability of each price control settlement. At present, the financeability check with regard to the size of the proposed financial incentives on service delivery, notably delay, considers these in isolation, and without reference to potential penalties (under Schedule B1 of the Transport Act 2000) which may be imposed in addition to, or instead of, service penalties under the NERL licence.

The CAA has a statutory duty in the exercise of its regulatory functions to secure that NERL will not find it unduly difficult to finance its regulated activities. A fine of 10% of qualifying turnover, from the provision of regulated air traffic services, would prima facie be very likely to create financing challenges – a fine at such level would be equivalent to 130% of the annual equity return allowed in the NR23 price control, or 25% of the total equity return over the five year period. The draft Statement of Policy does not make any reference to the CAA's duty to NERL's financing as a relevant balancing factor in deciding what scale of penalty, if any, to impose. The CAA should address this omission in a revised final version of its Statement of Policy.

Second, any finding by the CAA of breach by NERL of its statutory duties and/or licence obligations would necessarily involve both novel regulatory analysis, since such breaches are extremely rare, and a high degree of judgment, since the requirements on NERL are not clearly

[1] see for example CAP 1682 'Decision on modifications to Condition 2 of NATS (En Route) plc licence in respect of resilience planning, policy statement on enforcement and resilience plan guidance', on thresholds for delay from technical incidents

specified on the face of the Act or Licence or in regulatory guidance. Against the backdrop of such regulatory ambiguity, we suggest that the scale of any penalty should be moderated by the novelty of the assessment leading to the decision to impose a penalty. Without such guidance on the application of its penalties power, there is a risk that NERL could be deterred from taking what it considers to be necessary and reasonable steps to deliver a safe service which meets, in a balanced fashion, its other Section 8 duties, for fear that the CAA could come to a different judgement about the balance and impose a penalty to incentivise NERL to adhere to the CAA's interpretation. The CAA should address this concern in a revised final version of its Statement of Policy.