CAA draft penalties policy

Response by the Gatwick Airport ACC

Introduction

In a document dated 31st May containing further information about the draft licence and other matters, the CAA set out its draft penalties policy (Annex C) that would apply to three types of breaches of Part 1 Chapter 1 of the Civil Aviation Act 2012[1]:

1. breaches of airport licences or breaches of licence enforcement orders;
2. failure to provide the CAA information, without reasonable excuse, that the CAA reasonably requires for carrying out its airport economic regulation duties; and
3. providing false or misleading information to the CAA knowingly or recklessly, or alteration, destruction or suppression of documents

The Act requires the CAA to publish policies for these areas and the CAA considers that a single policy is suitable for all three types of penalty.

Summary

The ACC considers that the CAA's draft policy is too vague to serve its purpose and does not properly take account of the Macrory principles

1. The proposed policy is too vague to serve its purpose

Combining the penalty policy for three types of breaches has resulted in a very general document that gives little practical guidance as to the amount of the penalties that would be levied in any particular case. Aside from general principles and the list of mitigating/aggravating factors that would be considered, this policy is open to very wide interpretation and appears to give the CAA freedom to impose whatever penalty it wishes at the time. Therefore it is not clear what purpose is served by having such a policy.

For example, for any breach, the Act states that the CAA will only set a penalty if it is appropriate in the circumstances and if action is needed. The amount of the penalty (not exceeding amounts set out in the Act), must be appropriate and proportionate to the failure. The policy does not set out any scale of penalties but merely includes a non-exhaustive list of factors that could affect the amount, along with a list of mitigating or aggravating circumstances that could vary the amount. The CAA's purpose in making such broad and vague statements is apparently to preserve flexibility. However, the effect is to say that the CAA will decide on the penalty at the time, according to the factors it then decides are relevant.

[1] NB This covers only the CAA's airport economic regulation powers and does not, for example, cover airline requirements to provide environmental information, or information for the benefit of passengers, ior the CAA's new security powers

The purpose of requiring the CAA to publish a penalties policy (under S58 of the 2012 Civil Aviation Act) is therefore not met as the policy provides no clear guidance and serves no practical purpose. We propose that the CAA sets out more explicitly:

1. the purpose or objectives of penalties
2. the circumstances in which penalties would and would not be likely to be levied;
3. the approach to calculating a penalty amount;
4. clarifying the scope for both negotiated settlements and compensation payments to those adversely affected by the breach

Ofgem published in June a proposed penalty policy statement for failures under the REMIT electricity and gas market regulations. That statement sets out the above matters.[2] In July 2012, the ORR set out its penalty policy which gave clearer guidance on the calculation of penalties. The ORR and Ofgem documents would therefore appear to establish good regulatory practice on penalties.

2. The CAA policy should implement the Macrory Principles

The stated primary objectives are to encourage compliance and to deter non-compliance. While we support these objectives, they fall short of the Macrory principles which, in addition, state that penalties should also aim to eliminate any financial gain or benefit from non-compliance and to restore the harm caused by non-compliance where appropriate.

The penalties policy suggests only that the CAA should take account of the harm caused in setting the penalty, rather than attempting to eliminate it. The policy also deals with restoration only as a possible mitigating factor. The penalties policy is therefore weak in its ability to correct the effects of failures, unlike, for example, the proposed Ofgem approach which is explicit in reducing penalties where compensation payments are made (under both determining the amount and the settlement discount provisions).

The policy therefore does not send a clear signal that penalties will be used to eliminate gains and correct distortions and therefore probably fails even in the CAA's limited objective of encouraging compliance and deterring non-compliance.

3. Suggested purpose or objectives

As well as encouraging compliance and deterring non-compliance, we therefore propose that two further objectives are set, based on the Macrory principles:

- to eliminate the gains from non-compliance; and
- to restore the harm caused by non-compliance where possible

4. Deciding whether to impose a penalty

However, there is a suggestion that where an alternative remedy exists, this will generally be more suitable (paragraph 12). Certainly this is a question that should be considered, but we do not accept the presumption.

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http://www.ofgem.gov.uk/About%20us/enforcement/Documents1/REMIT%20proposed%20penalties%20statement%20published%20version%206%20June.pdf

Other than that, it is very difficult to tell from the draft policy when a penalty would be imposed. More guidance can and should be given.

The Ofgem draft policy first requires it to be established that an infringement has taken place (3.1-3.2) and then sets out eight factors that would make a penalty more likely to be imposed (3.3) and five factors that would make it less likely to be imposed. (3.4). The policy also sets out some behavioural tests that are intended to establish culpability (3.6) and questions about related actions (3.5).

The Ofgem approach could be adapted to the airport context relatively easily and would provide greater clarity and consistency of approach. The Ofgem policy, like the CAA approach, aims to follow best regulatory practice including the need to ensure that any penalties are effective, dissuasive and proportionate.

The first step in deciding whether to impose a penalty is to establish whether or not an infringement has taken place. It might be helpful if the CAA could set out how this would be done for the three types of infringement mentioned. For example, if requested information had not been provided, the CAA would first need to justify its request for the information by explaining why it was reasonably required for the carrying out of the function. Then it would need to examine the reasons for non-compliance to determine whether this constituted a "reasonable excuse". This test of non-compliance would be different from a breach of the licence, for example, where it would be necessary only to establish whether or not there had been a breach.

5. Determining the amount of the penalty

The ORR penalties policy[3] sets out how the principle of proportionality will be used to calculate the amount of penalty, based on the actual and potential harm caused and the culpability of the offender. This results in classifying the offence into 5 categories of seriousness, ranging from technical/de-minimis, where no penalty would be payable to very serious where the maximum penalties payable would be levied. For four of the five categories, example offences are listed.

Setting out the scale of penalties in this way gives meaning to terms such as proportionality, which are otherwise open to wide interpretation.

Consistent with the Macrory principles, we consider that the amount of a penalty should be designed to:

1. ensure that all gain from the breach is removed, preferably through restitution; and to
2. punish the offender according to the seriousness of the offence, the reasons for non-compliance, the relationship with previous or related offences, and the company's attempts to cooperate and put the matter right

This is consistent with the ORR statement that "…*the starting penalty should be not less than any benefit for the licence holder from the breach*." (4.17)

6. Adjustments for mitigating and aggravating factors

[3] http://webarchive.nationalarchives.gov.uk/20121217104016/http://www.rail-reg.gov.uk/upload/pdf/economic-enforcement-statement.pdf

The CAA's list of factors is similar to the lists set out by the ORR and Ofgem, though the Ofgem approach is clearer, by virtue of its separate lists for aggravating and mitigating factors and the explicit provision for a negotiated settlement.

7. The scope for negotiated settlements and compensation

As discussed above, the Ofgem provision for negotiated settlement is attractive in that it supports speedy resolution and compensation where appropriate. As with the Ofgem approach, it would be important for there to be consultation of affected parties to ensure that wider interests are not compromised and offences are properly dealt with.