

# Draft Policy on Penalties

A response to the CAA consultation

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Status: Final

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## Introduction

1. Heathrow Airport is broadly supporting of the concepts contained in the draft policy on penalties issued under Part 1 Chapter 1 of the Civil Aviation Act 2012 (the Act). However further detailed work will need to be carried out (through guidance or otherwise) so the licensee has a clear understanding of how the CAA will give effect to its policy. In particular further detail is required in relation to how the CAA will determine the appropriate penalty.
2. Heathrow does not believe the policy is sufficient to give the licensees real clarity on how penalties will be imposed. For this reason, we are concerned it does not give meaningful effect to the requirements of Section 58 of the Act (which sets out that the CAA must prepare and publish a statement of policy with respect to imposing penalties under sections 39, 40, 51 and 52, and, crucially, determining the amount of such penalties).
3. Aside from this general point, Heathrow Airport has specific concerns in relation to the CAA's desire to use the penalties regime to influence safety investigations and the CAA's desire to favour penalties generally over other options. Heathrow Airport disagrees with the CAA's intended approach on these matters.
4. Heathrow Airport can only provide preliminary comments on the CAA's draft penalties policies in the absence of further detail. These are set out below. Heathrow looks forward to working with the CAA on the further detail required to finalise the policy.

## Is a Penalty Appropriate?

5. The CAA's policy offers little to assist industry in understanding whether a penalty is appropriate other than to say the CAA will take into account the circumstances and facts. The draft statement adds very little to industry's current understanding and reveals little of the CAA's thinking. The CAA needs to provide more detail (with examples) to demonstrate the types of circumstances and facts that would lead to the imposition of a penalty.
6. The CAA also needs to articulate the types of circumstances where a penalty may not be required. Among other things, Heathrow considers that [any or all] of the following factors ought to lead to a conclusion that a penalty is not appropriate:
  - a. Where the infringement is an isolated occurrence;
  - b. Where the licensee took reasonable steps to avoid the breach (e.g. through a compliance policy);
  - c. Where the breach is *de minimis* in nature and/or where there is no demonstrable consumer harm;
  - d. Where the licensee has taken reasonable steps to correct the breach;
  - e. Where the breach was not intentional;
  - f. Where the licensee has "self-declared" the breach to the CAA.

7. It is of concern that the only issue the CAA raises in relation to whether a penalty is required is that it will take any safety investigations into account (paragraph 13 of the draft guidance). It is unclear exactly how this would be taken into account. There is a well-established and understood enforcement regime in relation to safety which is available to the CAA in the event of a safety investigation. It is that regime which Parliament has decided should apply to these safety breaches. Heathrow rejects any attempt by the CAA to enforce (or influence) safety regulation through economic regulation and the imposition of penalties if that is the intention. This would expose Heathrow to double jeopardy. It would also be very likely to breach the principle of proportionality and legal certainty. Further, it is unclear on what legal basis the CAA could take safety issues into account with regard to its functions under Part 1 of the Act. This is the case in general, but we would note in particular that the consultation simply refers to investigations and this could be taken to refer to investigations in which no breach is found which surely cannot be the intention.
8. Heathrow Airport is also concerned that the CAA have stated a preference for penalties over other mechanisms such as civil proceedings seeking injunctive relief. No evidence is presented to demonstrate why the imposition of penalties is a more effective means of encouraging compliance and deterring non-compliance. Indeed – through civil proceedings the CAA may be able to more effectively remedy the impact of any licence breach. The CAA should review this approach and provide greater detail on why penalties are the favoured route for encouraging compliance. In the absence of any compelling reason for adopting this as a policy, Heathrow considers that the appropriate enforcement route should be decided on a case-by-case basis.

## **Determining the Amount of the Penalty**

9. The CAA provides some relatively high level concepts outlining how they might determine the size of the penalty. While the concepts put forward are generally sound, they provide little detail over and above that that would be understood by informed industry participants reading the Act. Much of the commentary provided is straight forward but provides little detail of how the CAA would go about determining the size of a penalty.
10. The CAA should provide greater detail along with how mitigating or aggravating factors would be applied. For example the CAA could state that:
  - as a starting point a penalty will be based on X% of the potential full amount
  - the materiality of the breach including the degree of consumer harm could lead to significant increases or decreases of up to X% (the CAA should give examples of the types of issues that would lead to significant increases in penalty amounts)
  - once that base level had been set, taking into account the seriousness of the breach, mitigating /aggravating factors and leniency based on the degree of cooperation from the licensee that could then lead to significant reductions / increases in the penalty.
11. To take the issue forward the CAA should reflect further on the nine factors presented in the policy (paragraph 18) and provide guidance on how it would interpret each along with the potential impact on the value of the amount. The CAA could use the guidance provided by the Office of Fair Trading as a starting point. For example, what would constitute cooperation of the licensee? Does this mean responding promptly to all requests and

acting reasonably or does it mean something else? It is only with this type of information that the CAA will be able to give effect to its obligation to publish a policy to enable industry to understand how the CAA will determine the amount of any penalty.

12. Heathrow is concerned about the sole concrete example given (in paragraph 10 of the consultation paper), which is that Heathrow might consider paying for a capital project which would then not be included in the RAB. It is extremely difficult to see how this would work in practice or, indeed, how it could constitute concrete mitigation for the vast majority of the obligations in the licence.

## **Next Steps**

13. We welcome the opportunity to contribute to the debate in the area and look forward to further discussion.

