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UK
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Response to consultation on Statement of Policy on Penalties under Chapter 1 of Transport Act 2000

CAP2983b

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Consultation Response

Background and purpose of this document

1. We have reviewed our approach to our enforcement powers under the Transport Act 2000 ("TA00") in the light of the changes introduced to the TA00 by section 10 of the Air Traffic Management and Unmanned Aircraft Act 2021.

2. Between 20 December 2023 and 31 January 2024, we consulted on a draft Statement of Policy on Penalties ("the Statement") to support our enforcement work under the TA00. NATS (En Route) plc ("NERL") was the only stakeholder to respond. Its response is available at CAP2983c.

3. The final version of the Statement has been published alongside this document as CAP2983.[1]

4. Overall, NERL considered that the draft Statement was well structured and reasoned, and that it was a positive contribution to an effective regulatory framework. Nevertheless, NERL made some comments by exception and suggested we made some changes to the Statement. In this document, we summarise NERL's response and explain how we have dealt with the points it has raised.

Reference to CAA's statutory duties on financing

5. NERL considered that the draft Statement should make a reference to the CAA's "financeability duty"[2] as a relevant balancing factor in deciding what scale of penalty, if any, to impose.

6. We note that the Statement already contains several references to CAA's statutory duties. For example:

   - In the section "Is a penalty appropriate?", sub-section "Considerations likely to be relevant in all cases" starts with "The CAA's Duties" and in paragraph 17 we state, "The CAA's starting point in considering whether a penalty is appropriate will be consideration of its statutory duties". The secondary duties are then listed in paragraph 18, which includes the financeability duty;

[1] This Statement is substantially the same as the version on which we consulted, save for small changes to improve the clarity and consistency of the drafting, and as discussed below.

[2] Section 2(2)(c) of TA00 provides that the CAA must exercise its functions under Chapter 1 of TA00 in the manner it thinks best calculated to secure that licence holders will not find it unduly difficult to finance activities authorised by their licences. This financeability duty is one among several secondary duties on the CAA within Section 2 of TA00.

- In the section "Considerations in determining the amount of the penalty", paragraph 32 provides that "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"; and
- Paragraph 41 again refers to our duties when applying an adjustment for aggravating or mitigating factors.

7. We do not consider it necessary to make additional references to the financeability duty given our clear and unambiguous statement that we will apply our statutory duties when considering whether to impose a penalty and its amount. The Statement also covers situations where penalties may be imposed on persons other than NERL and so consideration of the financeability duty would only be relevant when considering breaches or contraventions by NERL, as a licence holder.

8. NERL also noted that 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. It said that a fine at such a 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.

9. While we do not consider that it is appropriate to make further changes in respect of these matters to the Statement it may be helpful if we explain more about how our approach to setting any penalties for NERL will relate to our financeability duty. The primary objective of issuing a penalty remains to address non-compliance in general and, through deterrence, change the future behaviour so that NERL (or any other relevant person) has appropriate incentives to comply with all their obligations under Chapter 1 of TA00. When applied to NERL, such incentives (in the form of financial penalties) are likely to have the effect of reducing equity returns for NERL’s shareholders.

10. Nonetheless, in having regard to our statutory duties we would also take into account certain key elements of the approach we use to assess financeability in setting NERL’s price control, particularly in relation to the business being able to retain access to debt markets on reasonable terms. For instance, at the NR23 price control review we had regard to the advantages of the notionally financed company being able to retain investment grade status for its debt financing. Such an approach supports the regulated business in continuing to be able to access cost effective finance to sustain its investment programme and to continue to provide safe and resilient services to users, and is consistent with our statutory duties.

Novelty of potential breaches

11. NERL noted that

> "*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"*

and 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".*

12. As explained in Paragraph 19 of the Statement, the objectives of the penalties regime, including incentivising compliance and deterring future non-compliance, are likely to be relevant considerations when determining whether a penalty is appropriate. Paragraph 37 of the Statement also explains that the CAA will consider the culpability of users when determining the amount of a penalty:

> *"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."*

13. This should provide sufficient flexibility to take account of the situation where NERL has inadvertently breached a statutory requirement and this is subsequently revealed by new or novel analysis.

Evidential thresholds for suppressing or falsifying records and information

14. NERL considered that actions under the heading of suppression or falsification of records or information, would effectively be criminal offences and, as such, the bar for imposing a fine is high. This requires a deliberate or reckless act, proven "beyond reasonable doubt".

15. Paragraph 4 of Schedule C1 of TA00 refers to suppressing, intentionally altering or destroying a document which a person is required to produce by an information notice under Paragraph 1 of Schedule C1. However, these actions are not described as a criminal offence nor that we must be satisfied beyond reasonable doubt (unlike wording in Paragraph 3 of Schedule C1 – providing false information). As such, we consider that the relevant standard of proof in this context is the "balance of probabilities".

16. In our view, for the same reasons as above, this standard of proof also applies to the failure to comply with an information notice under Paragraph 1 of Schedule C1 without reasonable excuse (Paragraph 2 of Schedule C1).

17. If Parliament had meant these contraventions to be or "effectively be" criminal offences, it would have made this clear. As Parliament did not do so, we do not consider that the criminal burden of proof applies here.