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Dear Mark,

Thank you for your contribution to the Grand Committee debate on the Air Traffic Management and Unmanned Aircraft Act 2021 (Airspace Change Directions) (Determination of Turnover for Penalties) Regulations 2022. I promised to write to you about the points you raised during the debate, regarding why we are bringing this legislation forward now, the rate of fine and about our relationship with the Ministry of Defence (MoD).

Why is this instrument being brought forward now?

Firstly, it is important to highlight that our intention is the Direction making powers in the Air Traffic Management and Unmanned Aircraft Act 2021 (the ATMUA Act) will be a last resort, and will only be issued where they can be practicably carried out. Before any Direction is made, consultation will take place as required by the ATMUA Act and the CAA's Airspace Modernisation Oversight team will seek to help sponsors in finding solutions where there are difficulties to overcome, before the need for a penalty arises.

For the powers to work, they need to be backed up with penalties, which in turn require the method of determining a person's turnover to be clear – that is what these Regulations do.

Having these Regulations in place before such a time when these powers may need to be used will mean the legislative framework can operate as intended and the enforcement powers are transparent and proportionate.

As you know, the Airspace Modernisation Programme is of national importance and the need for modernisation remains clear. The Government are working closely with industry, who are responsible for the delivery of the programme. It remains important for the Secretary of State to have the powers in the ATMUA Act to compel sponsors to progress and cooperate airspace change proposals (ACPs), in order to ensure that the Airspace Modernisation Programme is delivered.

The rate of fine

Penalties may consist of a fixed amount (not exceeding 10% of turnover) and / or a daily amount (not exceeding 0.1% of turnover). A person's turnover is determined with reference to the sum of all amounts received in the course of their business, as shown in their published accounts. If the person has not published accounts, the accounts prepared by that person will be used.

Turnover includes grants from any public or local authorities, but excludes capital receipts and loans made by a third party. The annual turnover considered is for the most recent business year, ending on or before the last day of the period specified in the enforcement order for complying with the requirement, the contravention of which is subject to the penalty. Where there is no preceding business year, then turnover from the 12-month period ending on the compliance date in the enforcement order is used.

Only one year of turnover is used in the calculation of penalties; the use of the 12-month period is in line with the Civil Aviation Act 2012, and Part 2 of the Transport Act 2000, which both specify calculations based on the "last regulatory year". We are using the same period here to ensure consistency of regulation across the aviation and wider sectors.

When considering the maximum rate of penalty to be set out in the ATMUA Act, DfT officials looked across legislation and policy across the aviation sector, other Government Departments and bodies and UK regulators to ensure that any limit was consistent.

Within aviation, the Civil Aviation Act 2012 (on the economic regulation of airports) and Transport Act 2000 (on regulation of NERL) sets out the same 0.1% and 10% limits. On 8 December 2021 the CAA published their Enforcement Guidance and a Draft Statement of Policy on Penalties Document, which can be found [here](#). This document was required under paragraph 11 of Schedule 2 to the ATMUA Act and includes a draft framework for how the CAA will make decisions regarding the level and type of penalty that is considered appropriate and proportionate. The CAA are currently consulting with the public on the Statement of Policy on Penalties until 2 March 2022, the consultation can be found [here](#).

When looking outside of the CAA and DfT, DfT officials considered other regulators and Government departments and identified that there were precedents and examples for a 10% limit for similar levels of breaches and penalties.

The Competition and Markets Authority (CMA) has the power to apply and enforce the Competition Act 1998 (CA98). These powers may be exercised concurrently with certain regulators, including the CAA. CA98 also sets out a maximum 10% limit.

Part 1 of ATMUA therefore uses the 0.1% and 10% rates to ensure consistency of regulation across the aviation sector, and to mitigate any possible disproportionality within aviation and between other sectors when considering similar levels of breaches.

Proportionality of penalties: how this is determined and who is responsible for deciding

These regulations have been drafted to take account of the diverse nature of persons involved in airspace change. Maintaining an appropriate level of penalty for all organisations will deter non-compliance, and support ACPs to take place in a coordinated manner, which will contribute towards a more effective airspace modernisation programme.

It is the CAA who will ultimately determine the level of penalty, which must in all cases be appropriate and proportionate. When determining the level of penalty, the CAA will of course have regard to the requirement of proportionality, in accordance with its statutory duties and the Better Regulation agenda. The CAA's decision on whether to impose either or both a fixed amount and/or a daily amount for non-compliance of an enforcement order will depend on the specific facts and circumstances of the case, but will have regard to keeping the overall penalty proportionate and to steps taken by the person to comply with the requirement or to remedy consequences of contravention. The CAA would also consider representations made by the person after the contravention notice was issued.

In their consultation on the Enforcement Guidance and a Draft Statement of Policy on Penalties Document, the CAA has set out how they intend to take into account the Macrory Principles. That can be found [here](#). This report was commissioned by the then Chancellor of the Duchy of Lancaster, John Hutton, to examine the system of regulatory sanctions, with the aim of identifying a set of fit for purpose sanctioning tools that can be used effectively, fairly and proportionately by regulators and those enforcing regulations in situations of regulatory non-compliance and gain some consistency.

As a general guide, rather than imposing both a fixed and daily penalty immediately, the CAA expects that it is more likely to impose a fixed penalty for breach of a requirement of an enforcement order, followed by a daily penalty after a reasonable period if the breach has not been remedied. The CAA considers that this reflects a more proportionate balance in circumstances where the recipient of an enforcement order's ability to remedy a breach will not usually be immediate and may take time.

I must again stress that our intention is the direction making powers in the ATMUA Act will be a last resort and will only be issued where they can be

practicably carried out. Before any direction is made, consultation will take place as required by the ATMUA Act and CAA's Airspace Modernisation Oversight team will seek to help sponsors in finding solutions where there are difficulties to overcome before the need for a penalty arises.

Appeal process for any fines that are imposed

Following any decision to exercise powers, a right of appeal to the Competition Appeals Tribunal (CAT) is available for the organisation given the enforcement order or penalty by the CAA.

Again, I must highlight that the Direction making powers are to be used proportionately and only as a last resort, taking into account individual circumstances. Before Directions are even considered, the Secretary of State will consult with the Civil Aviation Authority (CAA), who will then provide advice on the use of the powers.

The CAA's Airspace Modernisation Oversight team will also seek to help sponsors in finding solutions where there are difficulties to overcome before the need for a penalty arises, for example in terms of expertise or resources.

Relationship with the Ministry of Defence

MoD and MoD sponsors submit ACPs in accordance with CAP1616 but have opportunities to have their requests considered within the light of National Security and Defence needs if situations allow. The MoD are participating in the Future Airspace Strategy Implementation through their involvement in the RAF Northolt airspace change, for example.

It is true that the MoD can technically be a "person involved in airspace change" as defined by the ATMUA Act, due to the nature of their activities. This means that the MoD could potentially be subject to Direction, Enforcement Order and/or penalty.

It is, however, *very* unlikely that a situation would ever arise whereby the Secretary of State would make Directions to the MoD, as the following layers of cooperation exist to prevent an issue escalating to that level:

- CAP740, the CAA's UK Airspace Management Policy (ASM) sets out how airspace management is structured in the UK, and the expectations around how the MoD and CAA work together. This is known as the Joint and Integrated approach (J&I).
- Section 70(2)(e) of the Transport Act 2000 requires the CAA to exercise its air navigation functions in the manner best calculated to facilitate the

integrated operation of air traffic services provided by or on behalf of the armed forces of the Crown and other air traffic services.

- The CAA/MoD Memorandum of Understanding (MoU), dated 1 January 2017 between the Secretary of State for Defence and the CAA, details the MoD's contribution to the J&I provision of Air Traffic Services within the UK.

As stated in CAP740, the UK ASM Process is so heavily integrated between Civil and Military participants that it is considered inconceivable that a breakdown in the process can occur.

Airspace Modernisation Strategy dispute mechanisms available to the MoD

You also asked what the MoD's route for dispute is, should a disagreement arise relating to future changes to the CAA's Airspace Modernisation Strategy (AMS). The current Air Navigation Directions provide certain safeguards for the MoD regarding ACP approvals. The CAA cannot approve an ACP that either the CAA or MoD perceive to have adverse impact on the ability of the armed forces to maintain operational capability, without approval from the Secretary of State for Defence and further consultation on the proposal, or unless the Secretary of State for Transport directs the CAA to approve the proposal.

The CAA are committed to reviewing and revising the AMS, to reflect impacts of the COVID-19 pandemic on the aviation industry, outcomes of the UK-EU Transition and to capture requirements of new emerging stakeholders. The CAA are currently consulting on their Draft Airspace Modernisation Strategy 2022-2040. The consultation is open until 4 April 2022 and can be found [here](#).

The MoD have been involved in a variety of stakeholder engagement undertaken by the CAA, including:

- An extensive series of stakeholder engagement sessions, held by the CAA over the last 12 months, to provide an understanding of stakeholder's requirements for airspace modernisation.
- The MoD have also been involved in smaller group co-creation workshops, utilised by the CAA to help draft the '2040 vision'. The vision and roadmap include new areas of focus, for example, the lower airspace outside Controlled Airspace and benefits identification to the environment from modernisation.

Furthermore, the CAA established a group of expert representatives derived from all stakeholder groups to review the outputs, this included MoD representatives (the AMS Review Group).

The CAA is currently consulting on a review and refresh of its Strategy, which the MoD are able to respond to formally if they so wish. The consultation opened on 10th January 2022 and will close on 4 April 2022.

In addition to this, the MoD have been engaged by the Airspace Change Organising Group (ACOG) in developing the Masterplan (a single coordinated implementation plan for airspace changes in the UK) and this engagement will continue, to ensure that the Masterplan commission is met in the future. One of the requirements is to identify 'where ACPs are needed to enable Military access to airspace for training and national security'.

I hope this provides some clarity and reassurance on our relationship with the MoD, and the CAA's commitment to working closely with them in the development and refresh of the AMS.

I thank you again for taking an interest in this statutory instrument. I am copying this letter to all Noble Lords who participated in the Grand Committee debate and I will place a copy in the Library of the House.

Yours,
Charlotte

BARONESS VERE OF NORBITON