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Economic Enforcement Policy Review Project
Operations and Network Regulation
Railway Planning and Performance
Office of Rail Regulation
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06th February 2015

Dear Samantha,

Consultation on Office of Rail Regulation Economic Enforcement Policy and Penalties Statement Review

The Civil Aviation Authority (CAA) welcomes this opportunity to respond to the ORR on its Economic Enforcement Policy and Penalties Statement review (the Consultation). Our response is set out below. As far as possible, we have tried to address the specific questions set out in Annex A to the Consultation.

General comments

We consider that one flexible economic licensing enforcement policy and penalties statement for all licence holders remains appropriate and that the ORR's proposal to ensure its policy is drafted to better reflect the range of licence holders covered by its economic enforcement functions is sensible.

We also consider the policy format and drafting of the Consultation is informative and user-friendly, and improves on the 2012 document by providing greater clarity and clearer signposting to stakeholders on the ORR's proposed policy and the key issues and potential areas of improvements. These areas of improvement are considered below.

Early intervention and engagement

We consider that taking a stepped approach to regulatory intervention and seeking to resolve issues through informal methods in the first instance through greater engagement with licence holders in the early stages of an investigation can resolve issues more effectively and benefit consumers. In particular, tools like the ORR's 'Regulatory Escalator' appear to be a sensible way to deal with potential risk arising from license holders' activities and performance at an early stage to encourage transparency and greater engagement. Further transparency and more effective use of reputational levers could also be achieved by publishing more intervention correspondence and associated documents as well as more information on which the ORR makes its judgments and decisions.

Penalties

We agree that financial penalties form an important part of a regulator's enforcement toolkit and should be used flexibly both as a single action and in combination with other actions to remedy the causes and consequences of the breach, and to build in mechanisms to ensure similar issues can be prevented in the future. When used correctly, financial penalties can ensure visible and meaningful consequences for licence holders that fail consumers and do not comply with regulatory obligations. In particular, we consider the threat of imposing a financial penalty/reasonable sum and its associated reputational impact can be an effective deterrent in itself.

We consider the seriousness of breach table in the 2012 policy statement is a useful tool for stakeholders. In particular, the categories and examples of seriousness are helpful and provide greater transparency into the ORR's decision-making process.

Reparations

We consider the ORR's proposal to revise its enforcement processes to enable offers of reparations to be considered at various stages of the enforcement process is sensible and could create stronger incentives for licence holders to make such offers, particularly if they are taken into account before the ORR decides that a penalty is appropriate.

We also consider that the ORR's criteria for offers of reparations are sound and should be applied flexibly.

Enforcement Orders

We see merit in the ORR's proposal to use provisional orders more proactively and innovatively to take targeted and swift action in circumstances where it is clear that the required process for making a final order will impact on the loss and damage suffered by any person as a result of the licence breach. This could result in shorter investigations and more effective and timely resolution of issues. Also, more proactive use of provisional orders could further encourage early intervention and incentivise licence holders to engage and resolve issues quickly.

Concluding comments

With respect to other issues raised in the Consultation, we are encouraged by the ORR's recognition that there are opportunities for sharing best practice and learning between regulators in their approach to enforcement and internal case handling processes for investigation and regulatory case management systems, and hope to engage more closely in the near future.

Finally, should the ORR consider that it is appropriate to produce an overarching statement setting out its enforcement powers and principles, including an overview of its prioritisation principles, we thought it would be helpful to note that the CAA has recently consulted on its revised prioritisation principles for its consumer protection, competition law and economic regulation work¹ as well as its economic licensing enforcement guidance.²

¹ See <http://www.caa.co.uk/application.aspx?catid=33&pagetype=65&appid=11&mode=detail&id=6483>

² See <http://www.caa.co.uk/default.aspx?catid=2902>

Yours sincerely,

Freya Whiteman

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Markets and Consumers Group
Civil Aviation Authority