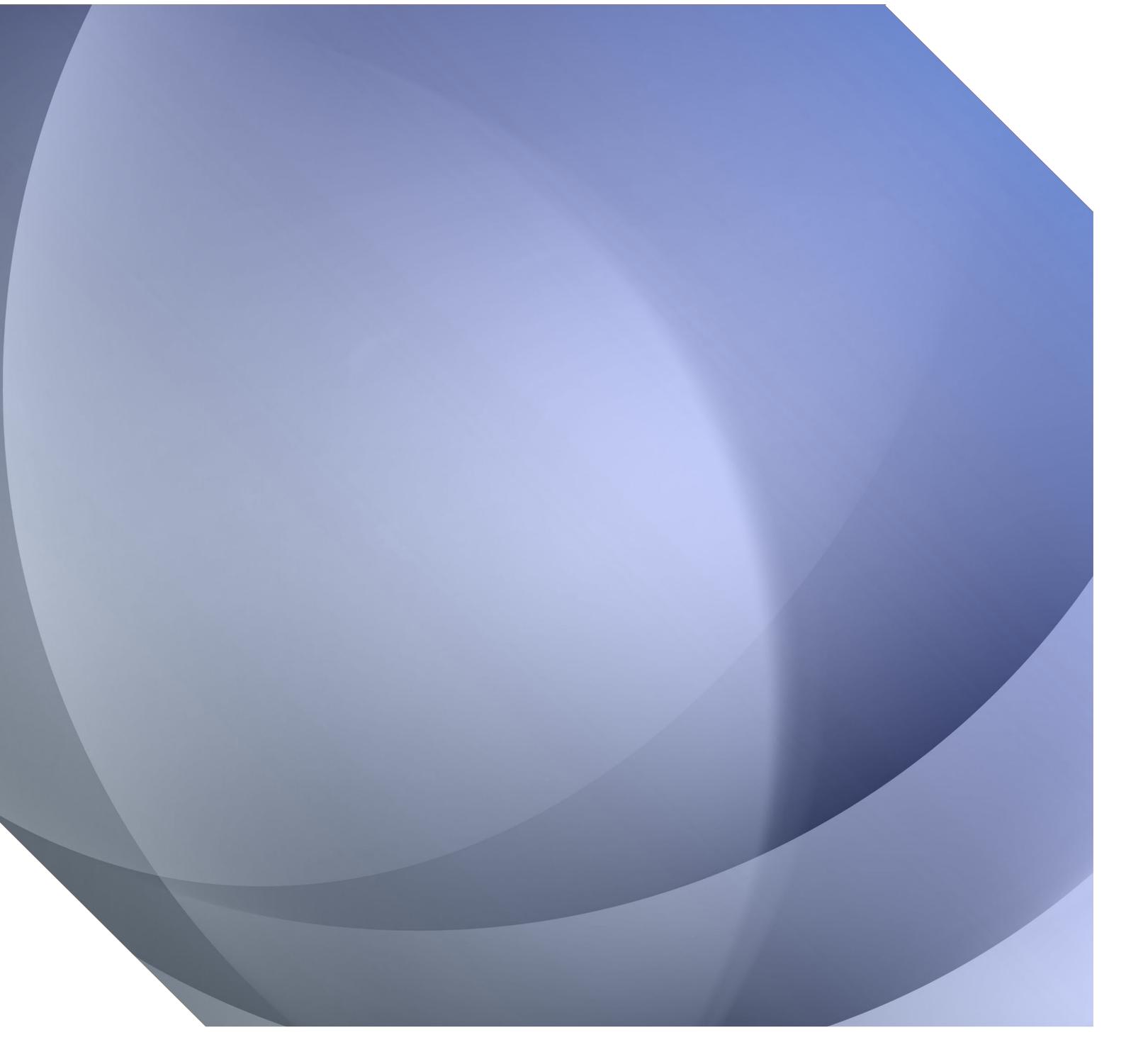


Stakeholder Consultation Responses to our Economic, Competition and Consumer Enforcement Guidance

CAP 1281

A large, abstract graphic composed of overlapping, semi-transparent blue shapes in various shades, creating a dynamic, layered effect that fills the lower two-thirds of the page.

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Executive Summary

Purpose

1. This document outlines stakeholder responses to our proposed, draft guidance, which are set out in the four documents listed below, and any changes we made to those documents. The four documents are:
 - Prioritisation Principles for the CAA's Consumer Protection, Competition Law and Economic Regulation work.
 - Guidance on Consumer Enforcement.
 - Economic Licensing Enforcement Guidance.
 - Guidance on the Application of the CAA's Competition Powers.

Consultations

2. On 31 October 2014, we published the four documents for consultation to gain stakeholders' comments on how we propose to apply our powers. We received responses from six stakeholders, which are published on our website.
3. We held a consultation workshop on 19 December 2014 to present the documents to stakeholders and to gather initial comment on them. Representatives from 16 stakeholders attended.

Stakeholder comments

4. Stakeholders' comments helped us to ensure that the final guidance is useful in explaining the powers we have. In finalising our guidance, we have taken account of the comments expressed at the workshop and the written responses that stakeholders submitted.
5. All stakeholders welcomed the CAA initiative in issuing and updating our guidance. Most of the points raised were matters of clarification or explanation. These are summarised in the main body of this paper.

Final guidance

6. The final documents are published alongside this responses document and are available on our website¹:
 - Prioritisation Principles for the CAA's Consumer Protection, Competition Law and Economic Regulation work.
 - Guidance on Consumer Enforcement
 - Economic Licensing Enforcement Guidance.
 - Guidance on the Application of the CAA's Competition Powers.
7. We will review the guidance from time to time to assess whether it needs updating. Updates could be required as a result of, for example, experience gained from applying the powers, changes to legislation, or new case law.

¹ The guidance documents are available from <http://www.caa.co.uk/default.aspx?catid=2516>

CHAPTER 1

Stakeholder general comments

Introduction

- 1.1 This chapter outlines stakeholder general comments gained from written responses to the consultation and comments at our workshop, which apply across all four consultations. It also sets out our final policy on the matters raised. The four consultations were:
- Draft Prioritisation Principles for the CAA's Consumer Protection, Competition Law and Economic Regulation work (Prioritisation Principles).
 - Guidance on Consumer Enforcement (Consumer Enforcement Guidance).
 - Draft Economic Licensing Enforcement Guidance (Licence Enforcement Guidance).
 - A Consultation –Guidance on the Application of the CAA's Competition Powers (Competition Powers Guidance).

Stakeholder comments and our response

Definition of consumer

Stakeholder comment

- 1.2 Stakeholders asked what definition of the concept of 'consumer' we were using in each document, and whether it was consistent between the four documents. They also asked whether the definition of consumer included airlines, on the grounds that passenger and airline interests are often aligned.

CAA proposed policy

- 1.3 The ways in which we refer to consumer in the four consultation documents are outlined below.
- 1.4 In the Licensing Enforcement Guidance and the Prioritisation Principles, the footnote to paragraph 1.1 defined an aviation consumer as:

- *In this consultation, an 'aviation consumer' is a user of an airport operation service (as defined in the Civil Aviation Act 2012), or an air traffic service (as defined in the Transport Act 2000), which will normally be a passenger arriving at or departing from an airport or travelling in an aircraft, or a person with property rights in cargo carried in an aircraft. See the CAA's Regulatory Enforcement Policy for more information.*

- 1.5 In the Consumer Enforcement Guidance, we referred to consumer and consumers of aviation services, but we did not define either term.
- 1.6 In the Competition Powers Guidance, we referred to consumer and aviation consumer but we did not define either term.

CAA response and final policy

- 1.7 The definition of a consumer set out in the CAA's Regulatory Enforcement Policy is "an end-user of an aviation service who does not himself provide an aviation service, such as a passenger, a freight customer, a student pilot or a buyer of flying lessons."²
- 1.8 The definition of consumer has some variations between the guidance documents, due to the different legal powers being applied. To reflect these different definitions, we have amended the Prioritisation Principles by replacing all references to 'aviation consumers' with the broader term 'user.' We have set out the relevant statutory definitions of 'user' and cross-referred to the corresponding guidance.
- 1.9 We consider this provides clearer signposting and greater accuracy with respect to our consumer protection, competition law and economic regulation powers and the respective definitions of users. We also consider that the term 'user' may include passengers, freight customers, student pilots, buyers of flying lessons and other consumers and is therefore consistent with the CAA's Regulatory Enforcement Policy. It is also broad enough to cover specific definitions used in the relevant legislation
- 1.10 We will make the following changes in the prioritisation principles to reflect this:

² See http://www.caa.co.uk/docs/2516/Regulatory_Enforcement_Policy.pdf

- In chapter 1, we will refer to the definition of consumer as set out in the CAA's Regulatory Enforcement Policy.
- In chapter 1, we will insert new paragraphs setting out the different definitions of user which will depend on the respective statutory definitions.
- In chapter 2, where applicable we will include the respective definitions of user according to the power in question.
- In chapter 3 and throughout the document we will remove all references to 'aviation consumers' and replace them with 'users.'

1.11 For the Consumer Enforcement Guidance, we have added:

- ***In this guidance when we refer to "consumers", we mean the end-users of an aviation service who do not themselves provide an aviation service. Examples of "consumers" in this context include passengers, freight customers, student pilots or buyers of flying lessons.***

1.12 This will also be the 'user' for the purposes of the prioritisation principles.

1.13 For the Licensing Enforcement Guidance we have removed the term 'aviation consumer' as it was only used once and, in the light of stakeholder comments, was too restrictive in that context. Instead the Licensing Enforcement Guidance refers to 'users' which are defined as:

- ***'Users' in relation to airport operation services (AOS) [under the Civil Aviation Act 2012] are passengers and those with an interest in cargo (cargo owners).***
- ***Users' in relation to air traffic services (ATS) [under the Transport Act 2000] include aircraft owners and operators, airport owners and managers, people travelling in aircraft and cargo owners.***

1.14 In the Competition Powers Guidance, the term 'consumer' is not restricted to those who use consumer aviation products or services but has a generic commercial meaning that applies it to a person or entity that consumes and a person or organisation that purchases or uses a commodity or service.

- 1.15 The term 'aviation consumer' in the Competition Powers Guidance, is defined as:
- ***In this guidance, an 'aviation consumer' is a user of an airport operation service (as defined in the Civil Aviation Act 2012), or an air traffic service (as defined in the Transport Act 2000).***
- 1.16 The CAA does consider that passenger/airline interests are often aligned in some areas but that airlines are nevertheless not a true or complete proxy for passengers. The extent of alignment needs to be assessed on a case-by-case basis. As such, the definitions do not make reference to passenger and airline interests being aligned in the various definitions of consumer that we use.

Timetables for our work

Stakeholder comment

- 1.17 One stakeholder suggested that it would be helpful if we set out expected timetables for all of our work, and a specific timetable at the start of an individual piece of work.

CAA proposed policy

- 1.18 The Prioritisation Principles did not mention timescales.
- 1.19 Paragraphs 1.31 and 1.32 of the draft Consumer Enforcement Guidance stated that:
- *We will aim to be transparent about the reasons why we are taking enforcement action and will provide information to any business being investigated about the process. This will include details of:*
 - *the business activity or practice causing concern;*
 - *the legislation we believe is being breached;*
 - *an invitation to open dialogue;*
 - ***an explanation of the next steps, including timescales and the possible consequences of failure to respond;***
 - *the risks we have identified which we believe make enforcement action necessary;*
 - *contact details for the CAA's Case Manager and Case Officer;*

- *information on any right to appeal following the outcome of enforcement action.*
- *We will normally continue to communicate with the business throughout the investigation. However, in some cases it will not be appropriate as it may prejudice the investigation.*

1.20 The Licence Enforcement and Competition Powers Guidance documents did not set expected timetables for applying the powers, except where there was a legal requirement to do so, for example where we are required to complete an investigation into a super complaint within 90 days. These documents also did not indicate that we would set specific timetables for individual pieces of work.

CAA response and final policy

1.21 Where there is legal imperative to complete a piece of work within a set period, we explain that in the guidance.

1.22 We do not, however, consider that it would be feasible to set out reliable generic timetables for our work under the guidance documents. This is because the timetable for each case or piece of work will depend on the circumstances of that case. We do not consider that generic timetables that are usually subject to exceptions are of much value to stakeholders.

1.23 Prioritisation Principles do not require a separate timetable as they are an internal tool that we use to choose which pieces of work to carry out.

1.24 We consider that it is appropriate to set a timetable for a specific case at the time we open a formal investigation under our licence enforcement and competition powers.

1.25 We have added a paragraph to the Licence Enforcement Guidance that says:

- ***We will give a provisional timeline for the key steps of an investigation and when we expect to give updates. Companies under investigation can expect regular updates, often by telephone or email. The timeline may change as the case progresses. If it does we will notify the company.***

1.26 We have added a paragraph to chapter 5 of the Competition Powers Guidance that says:

- ***Once the decision has been taken to open a formal investigation, we will send the businesses under investigation a case initiation letter setting out brief details of the conduct that we are looking into, the relevant legislation, the case-specific timetable, and key contact details for the case such as the Project Leader and the SRO.***

Ease of use of CAA website

Stakeholder comment

- 1.27 One stakeholder suggested that as the CAA and our website serve many purposes, it would be helpful if there were targeted notification subscriptions to make it easier to be alerted to documents by topic/focus.

CAA proposed policy

- 1.28 The guidance documents did not refer to the layout or ease of use of the CAA website.

CAA response and final policy

- 1.29 This comment coincides with a major redevelopment of the CAA website. Key aims of this work are to improve the navigation and make it easier for users to locate content.
- 1.30 We are also looking to improve how we proactively alert stakeholders to information and changes (from the current system of information notices and website alerts). We aim to roll this out at the same time as the new website.
- 1.31 We have not included any reference to this in the final guidance documents.

CHAPTER 2

Stakeholder comments on Prioritisation Principles

Introduction

- 2.1 The chapter outlines stakeholder comments and our final policy which apply to the Prioritisation Principles for the CAA's Consumer Protection, Competition Law and Economic Regulation work (Prioritisation Principles).

Stakeholder comments and our response

General comments

- 2.2 Stakeholders' general comments on the Prioritisation Principles included that they:
- endorsed our openness that the Principles are to be applied flexibly and will be kept under review;
 - considered that the prioritisation Principles provide a short, succinct and helpful overview of the scope of our powers and duties;
 - agreed that the four criteria set out as a framework were a sound theoretical basis for prioritisation and appeared to be a sensible and pragmatic approach to the prioritisation of workload;
 - considered that the Principles take into account the close and complex interrelationships between regulation, competition and consumer protection and the varied nature of likely workload that needs to be addressed; and
 - agreed that where adverse impacts on consumers are great, but the likelihood of success is low, action will still be considered.

Prioritisation and Monitoring

Stakeholder comment

- 2.3 Stakeholders asked if we prioritise the extent to which we collect information and organise our monitoring activities and how this fits with the risk based framework used in other CAA activity.

CAA proposed policy

- 2.4 The Prioritisation Principles are specifically aimed at how and when we decide whether to take action by using our formal enforcement powers under the relevant legislation. It is not intended as a set of principles by which we will carry out all our economic regulatory functions, although in practice we consider a similar set of factors that are consistent with Better Regulation Principles.

CAA response and final policy

- 2.5 We have not made any changes to the Prioritisation Principles in the light of this comment.

Prioritisation and resources**Stakeholder comment**

- 2.6 Stakeholders suggested that the relationship between prioritisation and resources should not assume rigidities. The view expressed was that resources can and should be increased if there are enough deserving cases.

CAA proposed policy

- 2.7 Our proposed Prioritisation Principles stated that in applying the principles, we will consider whether the resource implications of doing the work are proportionate by having regard to:
1. how best to allocate our resources in the most efficient way;
 2. the resources required for the project compared to the expected benefits of taking action;
 3. the amount and type of resource required;
 4. the expected period over which the resource will be required;
 5. the possible informal and formal tools that we could use and the relative resource implications for each; and
 6. the alternative uses to which resources could be put and the possible impact of taking resources away from other projects.

CAA response and final policy

- 2.8 We agree with the point made, although balancing it against the consideration that all organisations have limited resources and need

to prioritise how best to use their resources. If we were to have more cases, that we considered warranted action, than we had resources available, we would assess our options as to whether we could undertake all of this work. These options may include, as appropriate: adapting our internal resources more flexibly across the organisation; requesting secondees from the CMA or other regulators; and recruiting new staff. We would also consider the order in which to undertake work, and other possible tools to address the issues raised.

- 2.9 We have not made any changes to the Prioritisation Principles in the light of this comment.

Private action and CAA action

Stakeholder comment

- 2.10 One stakeholder considered that private actions in competition law should be seen as a last resort. They requested further clarity on assessing whether a harmed party has sufficient resources to bring a stand-alone action and how the CAA can support the claimant.
- 2.11 This has also been discussed in the Competition Powers Guidance chapter of this guidance.³

CAA proposed policy

- 2.12 We proposed that we would consider whether private enforcement action in court is realistically feasible for an aviation consumer or a business which considers itself to have suffered loss as a result of a competition law or consumer law infringement. In doing so, we would have regard to whether the party that had suffered harm had access to sufficient resources to bring a stand-alone claim.

CAA response and final policy

- 2.13 In referring to private action in the Prioritisation Principles, our intended policy was to explain that an aviation consumer or a business can take private action in respect of alleged competition or consumer law infringement but that this is a separate process from any action we might take under our powers.
- 2.14 However, we do consider that there might be circumstances where a

³ See the section on 'Private action and CAA action' in Chapter 5.

party's decision to take private action in respect of a potential competition or consumer law infringement might be relevant to our prioritisation assessment process (for example, whether to open an investigation where the complainant has brought a private action and the case is already being dealt with in the courts).

2.15 We have clarified this in the Prioritisation Principles by adding the following text.

- ***We note that users can take private action in respect of alleged competition or consumer law infringements but that this is a separate process from any action we might take under our powers. However, we do consider there might be circumstances where a party's decision to take private action in respect of a potential competition or consumer law infringement might be relevant to our prioritisation assessment (for example, whether to open an investigation where the complainant has brought a private action and the case is already being dealt with in the courts).***

2.16 We have also clarified this in the Competition Powers Guidance (see the section on 'Private action and CAA action' in the Competition Powers Guidance chapter of this guidance).

Impact on individual regions

Stakeholder comment

2.17 One stakeholder encouraged us to consider the specific impact on individual regions as well as on aviation consumers generally. They referred to Northern Ireland's dependence on air travel to access Great Britain and further afield.

CAA proposed policy

2.18 In our draft Prioritisation Principles, we did not explicitly state that we would consider the specific impact that identified issues might have on individual regions; however, we agree that it is a valid consideration.

CAA response and final policy

2.19 We agree that it is important to take into account the likely impact of CAA action on aviation consumers irrespective of their geographical location in the UK.

- 2.20 We have clarified the Prioritisation Principles to reflect this point by adding text in the second bullet point under 'Likely impact on aviation consumers:'
- *We will therefore consider the degree of harm, or potential harm to aviation consumers (both in the short and long term) that is posed by the issue in question and the likely benefits of our action in improving consumer welfare or mitigating any adverse effects. **In doing this we will consider any specific impact on individual regions in the UK.***

Consistency with CAA duties and better regulation principles

Stakeholder comment

- 2.21 One stakeholder stated that the Principles needed to be amended as they cut across the CAA's duties and the Better Regulation Principles and omit some of these.
- 2.22 In particular, they considered that the Principles could be clarified so as to be better aligned with the CAA's general duties under section 1 of CAA12. They considered that as currently drafted, the principles placed too much focus on specific elements of the duty (the 'consumer impact' element as opposed to other elements including 'promote competition in the provision of airport operation services', 'secure that licensees are able to finance the provision of airport operation services in their licensed area' and 'secure that all reasonable demands for airport operation services are met').

CAA proposed policy

- 2.23 In our draft guidance, we proposed to apply the Principles when choosing which pieces of enforcement work to pursue in the areas of consumer protection, competition law and economic regulation. We stated that in developing the policy, we considered our statutory duties and had regard to the Better Regulation Principles.

CAA response and final policy

- 2.24 The Prioritisation Principles apply to our consumer protection, competition law and economic regulation functions. As these different areas have their own respective statutory duties (for example, under CAA12 and TA00), we will have regard to the relevant duties that apply to the specific issue or power in question on a case by case

basis. For example, when considering CAA12 enforcement action under economic licenses we will consider our section 1 duties.

- 2.25 When pursuing enforcement action, we will also have regard to the Better Regulation Principles, as required under our specific statutory duties (for example under section 1(4) CAA12), and as a matter of policy and best practice. Therefore, the Prioritisation Principles are consistent with the Better Regulation Principles, which we will take into account when prioritising our work.
- 2.26 Regarding our CAA12 duties, we also consider the Principles rightly placed emphasis on the 'consumer impact' element as opposed to other elements as our primary duty is to carry out our functions in a manner which we consider will further the interests of users of air transport services regarding the range, availability, continuity, cost and quality of airport operation services.
- 2.27 In the light of this comment, we have amended chapter 2 of the Prioritisation Principles, under 'Scope of Powers' to provide further clarity on our separate statutory duties and the Better Regulation Principles in respect of our consumer protection, competition law and economic regulation powers. We have not set-out the specific changes to the text in this document as there are minor changes to the text throughout chapter 2.

Focus on CAA resources rather than industry resources

Stakeholder comment

- 2.28 One stakeholder noted that it was appropriate for the CAA to consider the aggregate burden our portfolio of work places on stakeholders who may be party to a matter, in addition to the burden on our own resources.

CAA proposed policy

- 2.29 Our proposed policy stated that in applying the prioritisation principles, we would consider whether the resource implications of doing the work are proportionate by having regard to:
1. how best to allocate our resources in the most efficient way;
 2. the resources required for the project compared to the expected benefits of taking action;

3. the amount and type of resource required;
4. the expected period over which the resource will be required;
5. the possible informal and formal tools that we could use and the relative resource implications for each; and
6. the alternative uses to which resources could be put and the possible impact of taking resources away from other projects.

CAA response and final policy

- 2.30 We agree that in carrying out our functions, we should have regard to our statutory duty not to impose unnecessary burdens on industry, where that is relevant. However, the primary context here is where an organisation is suspected of breaching obligations placed upon it. In these circumstances, it is not appropriate to take into account the resources of that organisation as part of our prioritisation process. Such an approach could produce perverse outcomes. In particular, we do not consider that whether a particular undertaking may be subject to a number of investigations or enforcement actions at the same time, of itself, is a reason for us not to carry on with any of those activities, provided that they individually warrant action by us.
- 2.31 Therefore, we have not made any changes to the Prioritisation Principles in the light of this comment.

How principles work in practice

Stakeholder comment

- 2.32 Stakeholders suggested that more detail on how we will apply the principles in practice would be helpful, for example whether:
- we document our assessment and, will consult on it;
 - our assessment will be used ex-ante for business planning or for ex-post reviews of work;
 - it would be helpful to outline a process by which a de-prioritised or postponed issue can be re-examined in the light of a changed workload, without requiring changes to the evidence.

CAA proposed policy

- 2.33 The Prioritisation Principles did not mention the first two points but they did cover the third point in paragraph 2.26 which said:

- *Issues that do not initially meet our prioritisation principles and are not taken forward might be reassessed at a future date should circumstances change.⁴ In these cases, we will take into account any new information or developments and reassess the issue against our prioritisation principles. Where reassessed issues are considered to be a priority and therefore taken forward, we will notify affected parties.*

CAA response and final policy

- 2.34 Regarding the first point, we have internal processes to document our prioritisation assessments. We do not, however, consider it would be proportionate to consult on our prioritisation decisions, partly so as to avoid undue delay, and partly as these are primarily used for internal resource management.
- 2.35 Regarding the second point, we consider that prioritisation can be a useful tool in managing our portfolio of work when deciding which pieces of work to pursue in the future (ex-ante business planning) and in also reviewing previous enforcement cases (ex-post).
- 2.36 Regarding the third point, our intended policy in paragraph 2.26 of the consultation was to provide examples of possible factors that we might take into account when considering whether to de-prioritise or re-examine issues (for example, new information or developments, recurring conduct or patterns of behaviour that affect consumers). Therefore, there is a non-exhaustive list of factors that we will consider including the 'nature and scale of other issues' that we are pursuing within our overall portfolio of work.
- 2.37 We have amended paragraph 2.26 (now paragraph 2.27) of the Prioritisation Principles by adding the following text:

4 For example, if there are reasonable grounds to investigate recurring conduct or patterns of behaviour that harm aviation consumers.

- *Issues that do not initially meet our prioritisation principles and are not taken forward might be reassessed at a future date should circumstances change. In these cases, we will take into account a **range of factors such as new information or developments as well as other factors that we consider relevant**, and reassess the issues against our prioritisation principles. Where reassessed issues are considered to be a priority, and therefore taken forward, we will notify affected parties.*

Users being kept informed

Stakeholder comment

- 2.38 One stakeholder requested detail on how affected users will be kept informed of and, where possible, involved in, any prioritisation issues which impact them, and not just the stakeholder subject of any investigation.

CAA proposed policy

- 2.39 Paragraph 2.26 of our consultation, we stated that where reassessed issues are considered to be a priority, and therefore taken forward, we would notify affected parties.

CAA response and final policy

- 2.40 We consider that prioritisation is an internal case management tool and is therefore not a process intended for external consultation. However in specific circumstances, such as issues which are re-prioritised at a later date, we will notify affected parties on a case by case basis. Therefore, we have not amended our Prioritisation Principles.
- 2.41 In regard to keeping stakeholders informed about enforcement work that we do undertake (i.e. not prioritisation), we aim to be as transparent as possible and where possible and appropriate we will publish press releases and relevant statutory notices etc. subject to statutory constraints, requirements and procedures including confidentiality, for general information.

CHAPTER 3

Stakeholder comments on Guidance on Consumer Enforcement

Introduction

- 3.1 The chapter outlines stakeholder comments and our final policy related to the Guidance on Consumer Enforcement (Consumer Enforcement Guidance).

Stakeholder comments and our response

General comments

- 3.2 Stakeholders supported our intention to publish compliance reports related to consumer enforcement as a helpful tool for consumers.

Compliance or best practice

Stakeholder comment

- 3.3 Stakeholders asked whether we are looking for 'compliance' or 'best practice' from the industry.

CAA proposed policy

- 3.4 Paragraph 1.14 of the Consumer Enforcement Guidance explains that we will publish advice and guidance to help businesses understand their obligations to comply with the law. It also says that we will clearly distinguish between advice relating to statutory requirements and any guidance aimed at best practice.

CAA response and final policy

- 3.5 Our stated aim is to ensure routine ongoing compliance across the industry, and the purpose of any enforcement action is to achieve compliance. However, in some cases, particularly in the area of access to air travel for disabled passengers, guidance may also include best practice. The Consumer Enforcement Guidance has therefore been amended to clarify the reference to best practice and now says:

- ***Advice and guidance – we will provide general information and guidance to make it easier for businesses to understand their obligations and to comply with the law. Wherever possible we will involve industry in developing the content and style of guidance. We may publish guidance that includes best practice. Where we do, we will set out clearly the legal obligation and any enforcement action would be based on achieving compliance with that legal obligation.***

3.6 However, there are some areas where we have published guidance that also outlines best practice, for example in the provision of assistance to disabled passengers. This has been done in consultation with industry.

Stakeholder responses

Impact of proposed ADR scheme

Stakeholder comment

3.7 One stakeholder was keen to understand how our enforcement role may change in relation to the proposed Alternative Dispute Resolution (ADR) scheme.

CAA proposed policy

3.8 We do not expect our enforcement role to change. The ADR Directive provides for ADR schemes to provide data on complaints to the relevant competent authority. As the Competent Authority, we will, therefore, continue to be able to assess trends and identify issues for investigation.

CAA response and final policy

3.9 We do not propose to make any changes to the Consumer Enforcement Guidance at this stage, but will review this when an ADR body is appointed.

When a point of law is being considered at EU level

Stakeholder comment

3.10 One stakeholder considered it would be helpful to indicate how we expect to deal with issues when a point of law is being considered at the EU level.

CAA proposed policy

- 3.11 Our Consumer Enforcement Guidance does not specifically refer to this point. It does however confirm that we will provide guidance on changes to the law following European court cases.

CAA response and final policy

- 3.12 We will take into account all relevant factors when considering possible enforcement action, including any decided cases in the UK and the EU. Decisions will continue to be made on a case by case basis. We have not made any changes to the draft Consumer Enforcement Guidance as a result of this comment.

CHAPTER 4**Stakeholder comments on Licence Enforcement Guidance**

Introduction

- 4.1 The chapter outlines stakeholder comments and our final policy related to the Economic Licensing Enforcement Guidance (Licence Enforcement Guidance).

Stakeholder comments and our response

General comments

- 4.2 Stakeholders general comments included that they:
- Endorsed our escalating stages of licence enforcement, and that we will measure outcomes so we can demonstrate the effectiveness of our actions;
 - Welcomed that while we will seek to resolve any issues through an escalating process of formality and severity, we will take urgent and immediate action to address a serious licence breach.
 - Emphasised the crucial role that economic regulation plays in providing ex ante protection for consumers of services from companies which have already been demonstrated to have substantial market power.
 - Welcomed recognition that we will seek dialogue with the parties where appropriate as licence compliance issues may not be intentional or malicious.
 - Cautioned that the use of licence- based regulation for Heathrow and Gatwick airports is a new innovation, as yet untested.
 - Considered that there is an unequal relationship between a monopoly supplier and a constrained user of its services, which means an individual airlines' ability to manage disputes to ensure expedient and open market-based outcomes, remains limited.

- Welcomed our commitment to exercise our regulatory role through monitoring and enforcing licence conditions.

Independent review

Stakeholder comment

- 4.3 Stakeholders asked whether the Licence Enforcement Guidance could cover when we might ask for independent reviews as we had recently asked for one.

CAA proposed policy

- 4.4 The draft Licence Enforcement Guidance was silent on the issue of independent reviews.

CAA response and final policy

- 4.5 We would often expect to carry out investigations ourselves, possibly calling on external expert advice if necessary. However, in some cases we may ask the licence holder to carry out their own independent review of the circumstances prior to our own investigation into compliance. There may also be cases where we set up our own independent review; in such cases we would consult on the terms of reference of that review and may seek the involvement of the licence holder and other relevant stakeholder. Decisions on whether to hold an independent inquiry will be made on a case by case basis.
- 4.6 The Licence Enforcement Guidance has been updated to reflect this policy, by adding a new paragraph 25:
- ***In some cases we may require the licence holder to carry out their own internal investigation headed either by a non-executive Director or by an independent expert. We may also decide to appoint an independent lead for our own investigations. Decisions on how the investigation will be managed will be made on a case by case basis in consultation with the licence holder and, where appropriate, with relevant stakeholders.***

Process post declaration of breach

Stakeholder comment

- 4.7 Stakeholders asked whether we could say more about the process

after a declaration of breach, for example, in relation to when hearings would be conducted and how.

CAA proposed policy

- 4.8 The draft Licence Enforcement Guidance stated that we would normally hold hearings before making a decision on a licence breach.

CAA response and final policy

- 4.9 The nature and timings of any hearing will need to be decided on a case by case basis. We have a duty to be transparent so some cases may be held in public or redacted transcripts may be published. However, there may be cases where it is right that the hearings remain confidential to protect individuals or to deal with confidential issues. Hearings may involve the licence holder only, or we may invite relevant stakeholders to put their case.
- 4.10 Details of any hearings will be published as soon as possible after we have formally notified the licence holder of our intention to investigate a possible licence breach using our statutory powers, along with calls for written evidence. We have added the following bullet to paragraph 62 of the Licence Enforcement Guidance to clarify this point.
- ***details of how we intend to gather both written and oral evidence from both licence holders and relevant stakeholders, including details of when any Hearings will be held, how they will be conducted and who is likely to be invited to give evidence.***

Information powers

Stakeholder comment

- 4.11 One stakeholder noted that the Licence Enforcement Guidance covers our information powers but omits to cross-refer to our earlier policy statement on how we apply our information powers. It would be helpful to clarify how this guidance interacts with the earlier guidance.

CAA proposed policy

- 4.12 Our draft Licence Enforcement Guidance only refers to the information powers set out in Chapter 1 of the Civil Aviation Act 2012 (CAA12) and Chapter 1 of the Transport Act 2000 (TA00) and not to information powers under Part 2 'Other aviation matters' of the CAA12. These are set out in our publication 'The Civil Aviation

Authority's policy for carrying out its information duties under the Civil Aviation Act 2012' which was published in January 2014.⁵

CAA response and final policy

4.13 We have added a new paragraph 7 to the draft Licence Enforcement Guidance to clarify that:

- ***Our enforcement policy for our information powers under Part 2 'Other aviation matters' of the CAA12 are set out in our publication 'The Civil Aviation Authority's policy for carrying out its information duties under the Civil Aviation Act 2012'.⁶***

4.14 We are content that we have taken a consistent approach in both documents.

Use of stakeholder terminology

Stakeholder comment

4.15 One stakeholder stated that the use of 'stakeholder' appears, for the most part, to refer to the Licence holders, and not industry or consumer stakeholders of the services being provided. There should be a similar commitment to transparency of process and information towards other stakeholders, which should be made explicit. This should include a statement on how we will involve complainants and other relevant parties in any formal or informal action.

CAA proposed policy

4.16 The draft enforcement policy used the term 'stakeholder' to refer to any relevant interested party. Where the policy refers only to the licence holder this is explicitly stated. There may be some cases where it is right to discuss the issue only with the licence holder, at least in the first instance, but normally we would engage with a wider range of stakeholders in any formal investigation into a suspected licence breach. The way in which we engage with a party will depend

5 CAP 1143 'The Civil Aviation Authority's policy for carrying out its information duties under the Civil Aviation Act 2012' (Jan 2014) can be found at <http://www.caa.co.uk/docs/33/CAP%201143%20Jan%2014.pdf>

6 CAP 1143 'The Civil Aviation Authority's policy for carrying out its information duties under the Civil Aviation Act 2012' (Jan 2014) can be found at <http://www.caa.co.uk/docs/33/CAP%201143%20Jan%2014.pdf>

on the circumstances of the case such as the interests of the party and the nature of the particular issue.

CAA response and final policy

- 4.17 As a matter of principle, the CAA accepts that it is important to hear from those potentially affected by a licence issue as well as those responsible for compliance. We have reviewed the Licence Enforcement Guidance to ensure that the correct terminology is used throughout. The presumption is that cases will be carried out with the involvement and participation of relevant stakeholders at least from the time that we issue a notice that we are considering formal action. Where a complaint has been raised by a stakeholder, we will keep that stakeholder informed of progress and will usually include them in relevant correspondence. However, we remain of the view that we should allow for the possibility that there may be some cases or parts of the discussions that should remain confidential to the licence holder, in particular before formal action is started.

CHAPTER 5

Stakeholder comments on Competition Powers Guidance

Introduction

- 5.1 The chapter outlines stakeholder comments and our final policy related to the Guidance on the Application of the CAA's Competition Powers (Competition Powers Guidance).

Stakeholder comments and our response

General comments

- 5.2 Stakeholders welcomed our preference that stakeholders seek to resolve any competition issues with AOS and ATS providers through discussions in the first instance.

Degree of proof

Stakeholder comment

- 5.3 Stakeholders asked us to consider what degree of proof is required to make a decision in a competition law infringement investigation.

CAA proposed policy

- 5.4 In the draft Competition Powers Guidance we did not discuss the burden of proof required for a competition law infringement investigation, instead we stated that the CMA's guidance explained how we would apply our powers of enforcement. Paragraph 5.75 of the draft Competition Powers Guidance stated:
- *The CMA's guidance 'Guidance on the CMA's investigation procedures in Competition Act 1998 cases' (CMA8), and the CMA's website set out more details of how the CMA and Concurrent Regulators, including the CAA, will apply their powers of enforcement.⁷*

7 This is available from: <https://www.gov.uk/government/organisations/competition-and-markets-authority>

CAA response and final policy

- 5.5 In making a decision in a competition law infringement investigation, we must satisfy ourselves as to the relevant criteria in accordance with the normal civil standard of proof (i.e. on the balance of probabilities). In other words, we must be satisfied on the basis of strong and compelling evidence that the infringement is proved or not proved.⁸
- 5.6 We have not amended the Competition Powers Guidance as this is covered in the CMA guidance referred in the chapter 5 of the Competition Powers Guidance.

Short form opinions**Stakeholder comment**

- 5.7 Stakeholders asked whether we would give short form opinions.

CAA proposed policy

- 5.8 The Competition Powers Guidance did not comment on whether we would give short form opinions.

CAA response and final policy

- 5.9 We have decided to adopt the CMA's approach to short-form opinions, which is set out in its guidance document.⁹
- 5.10 We have included in our Competition Powers Guidance a new section in chapter 5:
- ***Short-form Opinions***

8 Napp Pharmaceutical Holdings Limited v Director General of Fair Trading [2002] CAT1 at paragraph 109

9 'CMA's approach to short-form opinions' CMA27, which is available from: <https://www.gov.uk/government/publications/guidance-on-the-cmas-approach-to-short-form-opinions>

- ***The Short-form Opinion (SfO) process is designed to provide guidance, within a prompt timetable, to businesses and their advisers on the application of competition law to prospective agreements between competitors raising novel or unresolved questions, the clarification of which would benefit a wider audience.¹⁰ This process covers not only prospective horizontal agreements between competitors but also prospective vertical agreements between parties operating at different levels of the supply chain for the purposes of the agreement.***
- ***The SfO process is only available for a limited number of cases per year in order to maintain the principle that businesses should self-assess the compliance of their agreements with competition law, rather than notify them for clearance or exemption by competition authorities.***
- ***When determining whether to issue a SfO, we will have regard to our prioritisation principles¹¹, as well as the criteria detailed in the relevant CMA guidance.¹²***

Private action and CAA action

Stakeholder comment

5.11 One stakeholder considered that private actions in competition law

10 On 1 May 2004, EC Regulation 1/2003 (the Modernisation Regulation) came into force requiring national competition authorities and national courts of the European Union Member States to apply Article 101 and Article 102 of the Treaty on the Functioning of the European Union (TFEU) when national competition law is applied to agreements, decisions by associations of undertakings or concerted practices which may affect trade between Member States or to abuse prohibited by Article 102. Furthermore, as a result of the Modernisation Regulation and consequent changes to the Act, businesses now self-assess whether an agreement or any behaviour is compatible with Article 101 and Article 102 of the TFEU and Chapter I and Chapter II of the Competition Act 1998 rather than notify the agreement or behaviour for clearance or exemption by the relevant competition authority.

11 'Prioritisation Principles for the CAA's Consumer Protection, Competition Law and Economic Regulation work', April 2015, which is available from:

<http://www.caa.co.uk/default.aspx?catid=5&pagetype=90&pageid=14523>

12 'CMA's approach to short-form opinions' CMA27, which is available from:

<https://www.gov.uk/government/publications/guidance-on-the-cmas-approach-to-short-form-opinions>

should be seen as a last resort. They requested further clarity on assessing whether a harmed party has sufficient resources to bring a stand-alone action and how the CAA can support the claimant.

- 5.12 This has also been discussed in regard to the Prioritisation Principles - see the section on 'Private action and CAA action' in the Prioritisation Principles chapter of this guidance.

CAA proposed policy

- 5.13 The section in the Competition Powers Guidance on Private Actions explained the circumstances in which private action can be taken. It did not say whether we considered private action to be an alternative to opening a competition law investigation.

CAA response and final policy

- 5.14 In prioritisation decisions, we will not take into account whether the matter could potentially be pursued as a private action. Amongst the matters we will consider in assessing a matter's 'strategic and regulatory importance' is whether another authority (e.g. another concurrent competition authority) is better placed to consider the issue.
- 5.15 We have clarified this in the Prioritisation Principles - see the section on 'Private action and CAA action' in the Prioritisation Principles chapter of this guidance.
- 5.16 We have added the following text to the Private Action section in chapter 5 of the Competition Powers Guidance:
- ***This section explains that businesses can take private action in respect of alleged competition law infringements. This is a separate to any action we might take under our powers.***

Private actions and when we would ask for a stay

Stakeholder comment

- 5.17 Stakeholders asked us to consider adding more about private actions and when we would ask for a stay of proceedings by the court.

CAA proposed policy

- 5.18 The section in chapter 5 of the Competition Powers Guidance on Private Actions (paragraphs 5.103 to 5.113) explained the circumstances in which private action can be taken. It did not say

whether or if we might ask for a private action to be stayed.

CAA response and final policy

5.19 We have added to the Private Action section in chapter 5 of the Competition Powers Guidance:

- ***On a case by case basis, when we consider that there might be greater benefit in us taking forward an investigation into a suspected competition law infringement, we would consider whether to ask the court which was hearing a private action into the same set of facts to stay that action while we carried out our investigation.***

How competition powers relate to work requested by DfT

Stakeholder comment

5.20 One stakeholder was keen to gain more understanding of how competition powers relate to the EU market conditions test for terminal air navigation services (TANS).

CAA proposed policy

5.21 The Competition Powers Guidance did not cover other work we might undertake that may address similar issues but which do not form part of our competition powers.

CAA response and final policy

5.22 The work on the EU market conditions test for TANS is to consider whether TANS are provided under market conditions in the UK. This study has been conducted against the test set out in Annex 1 of Commission Implementing Regulation 391/2013 of 3 May 2013.

5.23 The work has been conducted in line with our duty under section 16 of the Civil Aviation Act 1982. Under this section we are obliged to provide advice to the Secretary of State to aid in their decision making. This is separate from our duties under the TA00 to maintain oversight of the provision of ATS, although it is complimentary to that aim.

5.24 For clarity we have added to the Competition Powers Guidance in chapter 6 that:

- ***In addition:***

- *the Secretary of State can ask us to undertake a variety of work under sections 16 and 17 of the Civil Aviation Act 1982.*
- *the Secretary of State and the CMA can ask us to undertake a variety of work under section 91 of TA00 and section 64 of CAA12.*
- *The work undertaken is specific to the request made and as such it is not covered in this guidance. However, it may encompass competition issues that we may have otherwise covered in a sector review or market study.*

APPENDIX A**Respondents to the Consultations**

Comments from workshop

- A1 We held a consultation workshop on 19 December 2014 with a range of industry stakeholders. Attendees included representatives from:
- Manchester Airports Group
 - TUI Travel PLC
 - Ryanair
 - British Airways
 - easyJet
 - ABTA travel
 - Department for Transport
 - Flybe
 - Heathrow Airport Limited
 - Heathrow Airport Consultative Committee (HACC)
 - United Airlines
 - BBGA - trade body representing companies operating and trading in the General and Business Aviation Industry
 - London City Airport Limited
 - British Air Transport Association (BATA)
 - NATS
 - Vueling Airlines S.A.

Respondents to the consultation documents

- A2 We received responses from six organisations to the consultation documents:

- Consumer Council Northern Ireland (CCNI).
- Heathrow Airline Operating Committee (AOC Heathrow).
- NATS Ltd (NATS).
- Heathrow Airport Limited (HAL).
- Gatwick Airport Limited (GAL).
- British Airways (BA).

A3 Non confidential versions of these responses are available on the Regulatory Enforcement page of our website at:
<http://www.caa.co.uk/default.aspx?catid=2516&pagetype=90>