



Department  
for Transport

# Consultation on civil sanctions for the Civil Aviation Authority

Sept 2015

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# Foreword

Transport is an engine for the growth of the UK economy. The effective regulation of transport is an essential lubricant in that engine. It ensures that the components of transport function together, competing fairly in order to meet the needs of passengers and owners of freight and in compliance with legal requirements.

As the UK's specialist aviation regulator the Civil Aviation Authority ("the CAA") exemplifies this by developing, communicating, championing and enforcing standards of safety, airspace management, and consumer protection, since April 2014, security. The CAA regulates almost 88,000 pilots, professionals, aircraft, airports, airlines, travel agents and other organisations.

This consultation is about giving the CAA access to the civil sanction powers in the Regulatory Enforcement and Sanctions Act 2008 ("RESA 2008"), which will give it a greater range of enforcement options across the UK, thus enabling it to regulate more flexibly, proportionately, and cost-effectively.

In the Civil Aviation Act 2012, we laid the foundations for a power for the CAA to impose "civil sanctions" - penalties that can be imposed without going to court - as an alternative to taking action in the criminal courts or to warning letters. Court action can sometimes be slow, cumbersome and expensive, and a criminal sanction may be a disproportionate way of enforcing aviation related offences. Civil sanctions are intended as a more flexible and proportionate alternative.

We are seeking your views now on which offences it is appropriate to have civil sanctions available for, and which of the possible civil sanctions should be made available to the CAA for each offence. Your participation will help us to create a properly balanced regime that allows the CAA to swiftly return offenders back into compliance. This will help to meet the interests of passengers, support a competitive aviation industry, safe private flying, and contribute to economic growth.

Robert Goodwill MP

# Executive summary

1. In this consultation the government seeks evidence, views and comments from those who may be affected by the introduction of civil sanctions for use by the Civil Aviation Authority (“the CAA”) as an alternative to existing enforcement measures, which currently range from warning letters to criminal prosecution.
2. At present, the CAA does not have access to a sufficiently wide regulatory enforcement toolkit to allow it always to respond flexibly and proportionately to breaches of aviation regulations
3. Warning letters for breaches of aviation regulation are inexpensive to issue, but carry no requirement to take action, and cannot be enforced. At the other end of the scale, criminal prosecution is time-consuming, costly, and sometimes disproportionate. This limited range of enforcement options can result in the lack of proportionate and cost-effective enforcement action.
4. The policy objective of this programme is to address the gap in the CAA’s enforcement toolkit. If the government provides the CAA with access to a suite of civil sanctions, this will allow the CAA to address the lack of proportionate and cost-effective enforcement action by using the new powers for appropriate enforcement. This could be appropriate for the minority of cases where a warning letter is inadequate, yet criminal prosecution is, at present, not pursued as it is not in the public interest.
5. In the longer term, it is intended that these measures will lead to higher standards of aviation safety, by helping to bring offenders back into compliance sooner, discouraging non-offenders from offending at all, and enabling to the CAA to act swiftly and flexibly to prevent breaches in regulation that may lead to serious harm.
6. The purpose of this consultation package is to:
  - explain the background and purpose of the proposal to introduce civil sanctions;
  - set out how provision will be made in secondary legislation for the enforcement of civil sanctions;

- list relevant civil sanctions for every offence for which they are proposed;
- provide an assessment of the balance of costs, benefits and impacts of the proposals for scrutiny and comment by those that may be affected; and
- provide an opportunity for those that may be affected to put their views and comments to the Department for Transport so that they can be considered before any decision is made on the form in which to bring legislation before Parliament.

# How to respond

The consultation period began on 03 September 2015 and will run until 12 November 2015. Please ensure that your response reaches us before the closing date. Completing the questionnaire at Annex E and online via Survey Monkey are the simplest ways to respond.

If you would like further copies of this consultation document, it can be found at <https://www.gov.uk/dft#consultations>. We can be contacted at the details below, you can contact us for copies and if you need the documents to be available in alternative formats (Braille, audio CD, etc).

Please send consultation responses to

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You can also reply online here:

<https://www.surveymonkey.com/r/B58PGLL>

When responding, please state whether you are responding as an individual or representing the views of an organisation. If responding on behalf of an organisation, please make it clear who the organisation represents and, where applicable, how the views of members were assembled.

A non-exhaustive list of those to whom this consultation package were directed is attached at Annex D. If you have any suggestions of others who may wish to be involved in this process please contact us.



## **Freedom of information**

Information provided in response to this consultation, including personal information, may be subject to publication or disclosure in accordance with the Freedom of Information Act 2000 (“the FOIA”) or the Environmental Information Regulations 2004.

If you want information that you provide to be treated as confidential, please be aware that, under the FOIA, there is a statutory Code of Practice with which public authorities must comply and which deals, amongst other things, with obligations of confidence.

In view of this it would be helpful if you could explain to us why you regard the information you have provided as confidential. If we receive a request for disclosure of the information, we will take full account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstances. An automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded as binding on the department.

The department will process your personal data in accordance with the Data Protection Act 1998 and in the majority of circumstances this will mean that your personal data will not be disclosed to third parties.

# The proposals

## Introduction

1. The Civil Aviation Authority (CAA) is the UK's specialist aviation regulator. The Department for Transport supports the CAA's objective that compliance with civil aviation regulations should be normal practice.
2. High levels of compliance have several advantages to both users and providers of aviation services:
  - Firstly levels of safety should increase as there are fewer dangerous and risky practices and omissions of necessary safety actions.
  - Secondly this should lead to increased confidence in the safety and reliability of aviation services by passengers and freight owners.
  - Thirdly it should lead to fairer regulation. More effective enforcement is likely to reduce any commercial advantages of non-compliance to service providers or financial savings to leisure flyers. At present it may be the case that regulated parties with a less consistent approach to remaining compliant can, over time, reduce their costs through non-compliance (e.g. reduced monitoring costs, reduced investment in correct equipment).
3. As long as breaches of civil aviation regulations continue to occur, the Department for Transport is determined to provide the CAA with the capabilities that it needs to identify and respond to them in a proportionate manner.

## The primary legislative power

4. In order to provide the CAA with access to a sufficiently wide regulatory toolkit to allow it to respond proportionately and flexibly, section 103 of the Civil Aviation Act 2012 made amendments to the Regulatory Enforcement and Sanctions Act (RESA 2008). These amendments were intended to enable the CAA to make use of "civil sanctions" as an alternative to existing enforcement options such as warning letters or criminal penalties. Civil

sanctions are penalties that can be imposed for the breach of a regulation without first going to court. The amendments failed to have the intended effect because section 103 provides that civil sanctions may only be prescribed in relation to civil aviation offences contained in secondary legislation made by Ministers of the Crown. In fact the greater part of secondary legislation covering aviation safety is contained in secondary legislation made by Her Majesty by Order in Council. In order for the CAA to be able to impose these penalties in relation to an offence, the civil sanctions would need to be provided for in an Order in Council specifying both the offence and the civil sanctions available in relation to it. We will seek the approval of Parliament to an amendment to the RESA 2008 which would enable civil sanctions to be prescribed in relation to civil aviation offences contained in secondary legislation made by Her Majesty by Order in Council.

## Existing sanctions

5. At present, criminal sanctions exist for the majority of the offences for which the CAA has an enforcement function. In carrying out its regulatory functions, the CAA relies partially on criminal penalties to secure compliance with civil aviation legislation and to enforce breaches of the law where other methods such as warning letters are not effective. In the year April 2012 to March 2013 the CAA prosecuted 19 cases (17 successfully), and in the year April 2013 to March 2014 it prosecuted 12 cases (11 successfully). In addition to court action, the CAA has a number of other enforcement actions it uses to drive organisations and individuals back into compliance when it detects a breach of a regulatory requirement. These other measures include, alone or in combination, but are not restricted to:
  - requiring organisations to address findings that have been identified during audits;
  - varying or suspending permissions to carry out a regulated activity (for example providing flight instruction or flying particular categories of aircraft in particular areas);
  - varying or suspending licence approval;
  - imposing or varying licence conditions;
  - issuing no fly directions;
  - issuing letters before undertaking formal enforcement action;
  - and

- warning letters that place regulated parties on notice that they are at risk of future enforcement action if suitable remedial action is not taken.

The CAA also uses the tools of engagement, interaction, guidance, publicity and verbal warnings

6. The CAA has powers under article 228 of the Air Navigation Order 2009<sup>1</sup> (“the ANO”) to revoke, suspend or vary any certificate, licence, approval, permission, exemption, authorisation or other document on sufficient ground being shown to its satisfaction after due inquiry.
7. In October 2012, the CAA set out a framework for the use of its enforcement powers in its first Regulatory Enforcement Policy. The CAA’s current system of regulatory enforcement relies on taking regulatory actions (such as licensing actions), issuing warning letters, or undertaking criminal prosecutions. The proportion in which these are currently used is set out in the impact assessment at Annex B. The current system does not allow the CAA easy access to proportionate intermediate sanctions, which can focus on bringing those who infringe requirements back into compliance. In the case of criminal proceedings, the CAA has little influence over the level of any penalty, which is a matter for the courts to determine.
8. The limited flexibility of the existing enforcement system may mean that some offences are enforced with a heavier regime than is required, because that is the tool that the regulator has been given. On the other hand it may mean that some offences may be rarely enforced, and as a consequence compliance is harder to achieve. Adding a range of flexible, intermediate sanctions to the CAA’s toolkit would help ensure it had the right tools to proportionately enforce aviation regulation. Furthermore in some cases it would enable the CAA to act so as to prevent breaches of regulation, for example, by issuing a Stop Notice, before serious harm occurs and puts anyone at risk. Offenders who at present face only warning letters may face civil sanctions more in line with the seriousness of their offences. Offenders currently dealt with through criminal prosecution or cautions in some cases could be

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<sup>1</sup> <http://www.legislation.gov.uk/ukxi/2009/3015/introduction/made>

dealt with more appropriately and cost-effectively through civil sanctions.

9. The specifics of the civil sanctions regime will be explained in more detail further on in this consultation document, but one important difference between civil sanctions and the current options open to the CAA for enforcement is that they can be applied in different ways and in varying combinations. This makes their application potentially very flexible and responsive to the specific nature of a regulatory breach and the situation of the regulated party. One option is for the party that is subject to enforcement to volunteer a binding course of action. This is likely to lead to a dialogue between them and the regulator, which encourages a much more constructive relationship than that which may have previously existed between regulator and those it regulates.

## Legislative context of criminal sanctions

10. The CAA is responsible for the enforcement of over 500 offences. These range across the activities that it regulates, principally safety, airspace management, economic regulation, consumer protection and aviation security. Some of the offences for which the CAA is responsible for enforcement are set out in Acts of Parliament, specifically the Civil Aviation Act 1982, the Airports Act 1986 and the Transport Act 2000.

The remainder are contained in domestic secondary legislation made under sections 7, 61, 71, 71A and 86 of the Civil Aviation Act 1982. The largest category is offences contained in or made under the ANO. This consultation covers civil sanctions in relation to matters both in the ANO and Regulations made under the ANO. The Regulations which are relevant to this consultation are The Air Navigation (Dangerous Goods) Regulations 2002<sup>2</sup> (SI 2002/2786) and The Rules of the Air Regulations 2015<sup>3</sup> (SI 2015/840).

11. This consultation also covers civil sanctions in relation to matters contained in the Air Navigation (Single European Sky) (Penalties) Order 2009<sup>4</sup> (S.I 2009/1735).

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<sup>2</sup> <http://www.legislation.gov.uk/uksi/2002/2786/made>

<sup>3</sup> <http://www.legislation.gov.uk/uksi/2015/840/introduction/made>

<sup>4</sup> <http://www.legislation.gov.uk/uksi/2009/1735/made>

12. A significant number of these offences derive from European legislation where (mainly criminal) sanctions have been put in place by means of secondary legislation to provide an enforcement mechanism.
13. Section 66 of the RESA 2008 requires that Ministers introducing an Order must be satisfied that the regulator in question will act in accordance with the principles set out in section 5(2) namely that: (a) regulatory activities should be carried out in a way which is transparent, accountable, proportionate and consistent; and (b) regulatory activities should be targeted only at cases in which action is needed. Ministers are satisfied that these conditions have been met.
14. The imposition of civil sanctions may engage rights under the European Convention on Human Rights. These rights include (but are not necessarily limited to):
  - Protocol 1 Article 1 – the imposition of civil sanctions is likely to engage proprietary rights of the person subject to the sanctions, but any interference with these rights is likely to be justified on public interest grounds given the necessity for proper regulation to ensure aviation safety;
  - Article 6 – this requires the civil sanctions framework to include provision for the making of objections by affected persons and an appeal mechanism (these matters are addressed in detail below, including in the section on the ‘Appeals Process’ on page 27);
  - Article 8 – this might arise in cases where the imposition of a sanction is accompanied by some constraint on a person’s freedom, but any such interference with these rights is likely to be justified on public interest grounds given the necessity for proper regulation to ensure aviation safety.

## Where civil may be more appropriate than criminal sanctions

15. In reviewing offences, we have worked with the CAA to place each one into one of three categories.
  - Category 1: the most serious offences for which a civil sanction is rarely likely to be an appropriate alternative. We do not intend

to make civil sanctions available to enforce the 10% of offences that are in this category;

- Category 2: offences where either criminal or civil sanctions could be appropriate depending on the circumstances of the case. This category is by far the largest category comprising 61% of different offences. For category 2 offences, offenders would face, if appropriate, civil sanctions, whereas at present they could only face a warning letter or a criminal sanction; and
  - Category 3: offences where civil sanctions would be of particular value as the existing criminal sanctions have, to date, rarely been applied because prosecution would be disproportionate. These offences (29% of the whole) are a key area where challenges to ensuring effective enforcement currently exist. The CAA would consult regulated bodies before publishing final guidance on its use of civil sanctions powers. We do not propose, in any instance, to remove the existing criminal offence because civil sanctions can only be provided for where a relevant criminal offence exists. It follows that the removal of the criminal offence would result in the civil sanction to which it relates becoming unavailable. Furthermore the criminal offence would remain an important tool for the regulator, for example in instances of reckless or repeated offending.
16. Annex A sets out for each aviation offence in relation to which civil sanctions are proposed. The following are examples of offences from the ANO where we consider the use of civil sanctions provides more proportionate and effective enforcement than criminal penalties. The examples cover the regulation of civil and general aviation, air traffic control and members of the public.
- Article 156 (Production of documents and records) contains a requirement to produce specified documents such as licences for flight crew in reasonable time when requested by an authorised person. A person who contravenes this provision is guilty of an offence and liable on summary conviction to a fine.
  - Article 171(b) (Manual of air traffic services) contains a requirement for providers of air traffic control services to be able to produce for the CAA a Manual of Air Traffic Services. A person who contravenes that provision is guilty of an offence and liable on summary conviction to a fine.
  - Article 164(2)(c) (Gliders, kites and parascending parachutes) contains a requirement to obtain the permission of the CAA to fly

a kite at a height of more than 60 metres above ground level. A person who contravenes that provision is guilty of an offence and liable on summary conviction to a fine. This is an instance where the CAA's regulatory role extends to members of the public as well as aviation professionals and leisure flyers.

17. Please note that during the period in which these penalties are introduced changes will continue to be made to the ANO and may be the subject of separate consultation and secondary legislation. Furthermore, the CAA has recently consulted on the implementation of Commission Implementing Regulation (EU) No 923/2012 of 26 September 2012 in the United Kingdom. This will amend the ANO and parts of the Rules of the Air and these changes have been taken into account for the purposes of this consultation. The Department for Transport will take account of any changes to the ANO between the carrying out of this consultation and the drafting of any consequent Order to introduce civil sanctions.
18. In summary, the offences in Annex A break down as follows:
  - There are 36 offences contained in the Air Navigation (Dangerous Goods) Regulations 2002<sup>5</sup>. These relate to such matters as failing to: meet notification requirements, secure approvals needed, advise or warn as to what is carried, report accidents and carry out training. They are all considered suitable for civil sanctions as an alternative to criminal prosecution. Annex A shows the proportion considered to be suitable for discretionary penalties (variable monetary penalty, compliance notice or restoration notice), voluntary undertakings and stop notices.
  - There are 25 offences contained in the Rules of the Air Regulations 2015<sup>6</sup>. These relate to such matters as failing to: signal, respond to the signals of others and communicate appropriately; fly in the correct airspace at the right altitude; give way and alter course; display lights secure permission to manoeuvre and move. All but one of these 25 offences (and that is Rule 18) are considered suitable for civil sanctions as an alternative to criminal prosecution. Annex A shows the proportion considered to be suitable for discretionary penalties

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<sup>5</sup> <http://www.legislation.gov.uk/ukxi/2002/2786/contents/made>

<sup>6</sup> [http://www.legislation.gov.uk/ukxi/2015/840/pdfs/ukxi\\_20150840\\_en.pdf](http://www.legislation.gov.uk/ukxi/2015/840/pdfs/ukxi_20150840_en.pdf)



(variable monetary penalty, compliance notice or restoration notice), voluntary undertakings and stop notices.

- Rule 18 concerns making a signal, which a person knows or ought reasonably to know to be a signal in use for signalling to or from any of Her Majesty's military or air force aircraft. This is considered to be so important that, were a breach to occur, the CAA would expect to always consider a criminal penalty to be appropriate.
- The ANO is a substantial piece of secondary legislation by which aviation safety standards are implemented and air navigation is regulated. The ANO is wide-ranging, covering aircraft (airworthiness, operation and certification), air crew, passengers, cargo, air traffic services and aerodromes, and the flying of kites and model aircraft. The ANO contains 481 offences<sup>7</sup>. These relate to such matters as failures in: certification, informing the CAA and the maintenance and retention of documents, logs and manuals, possession, maintenance and use of specified equipment; being licenced when acting as a flight crew member; and smoking in a compartment where smoking is prohibited. 425 of the 481 offences in the ANO are considered suitable for civil sanctions as an alternative to criminal prosecution. The 56 offences for which civil sanctions are not being sought cover such matters as offering flights without an operating licence, flying an unregistered aircraft over the UK; failing to remain at the controls during take-off and landing; and being in part of an aircraft not designed for the accommodation of a person. These are considered to be so important that, were a breach to occur, the CAA would expect to always consider a criminal penalty to be appropriate. Annex A shows the proportion considered to be suitable for discretionary penalties (variable monetary penalty, compliance notice or restoration notice), voluntary undertakings and stop notices
- The Air Navigation (Single European Sky) (Penalties) Order 2009<sup>8</sup> contains 33 offences. All of these are considered suitable for all civil sanctions apart from fixed monetary penalties as an alternative to criminal prosecution, including discretionary penalties (variable monetary penalty, compliance notice or restoration notice), voluntary undertakings, and stop notices.

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<sup>7</sup> This number is based on the ANO as it currently stands, if any amendments to the legislation come into force that change this number we will correct it to ensure an accurate figure is presented to Parliament.

<sup>8</sup> <http://www.legislation.gov.uk/uksi/2009/1735/made>

## Where civil sanctions would and would not be introduced

19. We propose to grant the CAA civil sanctions powers for a range of safety and airspace offences, where the Government believes that civil sanctions may be an appropriate alternative to criminal action.
20. From 1 April 2014, the CAA assumed new responsibilities for the regulation of aviation security. It is now responsible for the regulation of certain offences under sections 18C, 20, 20A, 20B, and 21E to 21G of the Aviation Security Act 1982. We do not propose to introduce any civil sanctions for the CAA in relation to offences covered by these new responsibilities. We wish to assess first how effective the existing enforcement regime proves to be for the CAA as it takes on these responsibilities.
21. This consultation does not cover offences relating to the protection of consumers such as passenger rights including those of persons of reduced mobility, denied boarding and fare transparency. That legislation raises different issues and where secondary legislation is being proposed then it is separate to this consultation. Moreover, such offences will need to have provision for civil sanctions made in relation to them by virtue of section 2(2) of the European Communities Act 1972 rather than the RESA 2008.

***Question 1: Do you agree with the principle of introducing civil sanctions at this time only for safety and airspace regulation and related matters; and not (as part of this consultation) for consumer or for aviation security matters? What evidence do you have for your conclusions?***

22. We have reviewed all the offences in primary legislation and do not consider that civil sanctions would be appropriate for use by the CAA in relation to offences set out on the face of any of the Acts of Parliament mentioned in paragraphs 10 and 19. These offences are relatively obscure and rarely used. For example the Civil Aviation Act 1982 contains offences in relation to a power to obtain rights over land (section 44), a power to restrict use of land for purpose of securing safety at aerodromes (section 45), and a power of entry for purposes of survey (section 50). Civil sanctions are only proposed in respect of offences contained in secondary legislation (which in some cases relate to EU regulation).

**Question 2: Do you agree with the principle of introducing civil sanctions only in relation to secondary and for EU legislation and not for offences on the face of UK Acts of Parliament? What evidence do you have for your conclusions?**

23. In the case of some offences, criminal sanctions will continue to be appropriate. For example, criminal penalties are particularly likely to be pursued in cases where one or more of the following criteria are met, though these criteria are for consultation only and are not intended to be final or exhaustive:

- the offence involves behaviour which seriously threatens safety;
- the offence involves fraud, forgery or other forms of wilful dishonesty;
- there is evidence of previous illegal behaviour of a similar nature which has not been rectified despite earlier CAA intervention; or
- There is evidence of intent to break the law.

**Question 3: Paragraph 22 suggests some factors which the government believes would make it particularly appropriate for the CAA to be able to apply criminal penalties in respect of certain offences. Are there any factors you think should be added to or removed from or modified in this list? What evidence do you have for your conclusions?**

24. Civil sanctions could be used in the enforcement of a range of offences under secondary legislation where the CAA already has an enforcement function. Annex A sets what civil sanctions are proposed for each regulatory offence. The impact assessment is based on the totality of the CAA's current enforcement activity for safety and airspace offences, and so should be read as covering both of these.

## Types of civil sanction

25. The RESA 2008 provides for six civil sanctions to give a regulator flexible and proportionate enforcement powers. These are:

26. **Fixed monetary penalties:** Under a fixed penalty notice a regulator would be able to impose a monetary penalty of a fixed

amount. Provision may be made for early payment discounts and for the payment of interest or a financial penalty for late payment of the original penalty. The total amount of any late payment penalty must not exceed the total amount of the original penalty imposed.

27. *We do not intend to create a power to allow the CAA to impose fixed monetary penalties.* We consider that the other five civil sanctions offer an appropriate range of remedies that, taken together, will meet the requirements for proportionate enforcement in civil aviation, considering the circumstances of the offender and the case. We are also mindful of the fact that much of the unease expressed in Parliament about civil sanctions during the passage of the Civil Aviation Act 2012, and expressed to us subsequently in meetings with aviation stakeholders, relates to the possibility of fixed penalties being applied in an automatic and inflexible manner. By not creating a power for the CAA to impose fixed monetary penalties we hope to dispel these anxieties.

***Question 4: In this consultation the government does not intend to create a power to allow the CAA to impose the civil sanction of a fixed monetary penalty for any safety or airspace offence. Do you agree with this? What evidence do you have for your conclusions?***

28. **Discretionary requirements:** Discretionary requirements are a package of sanctions that may be imposed either alone or in combination with one another. They would enable a regulator to impose by notice one or more of the following:
- a **variable monetary penalty:** This penalty will not apply to business with fewer than 250 employees. The level of a variable monetary penalty would be determined by the regulator, taking into account mitigating and aggravating factors. Where a variable monetary penalty is imposed in relation to an offence which is triable summarily only and punishable on summary conviction by a fine, the amount of the variable monetary penalty may not exceed the maximum amount of that fine<sup>9</sup>. Provision may be made for early payment discounts and for the payment of interest or a financial penalty for late payment of the original penalty. The total amount of any late payment penalty must not exceed the total amount of the original penalty imposed. No

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<sup>9</sup> A summary conviction is a conviction in the magistrates' court (or Sheriff or justice of the peace courts in Scotland); a conviction on indictment is a conviction in the Crown Court (or Sheriff Court sitting with a jury in Scotland) which may carry a longer custodial sentence.

monies received in this way are kept by the CAA, they instead go to the Consolidated Fund (in broad terms, the Government's general bank account at the Bank of England).

- a **compliance notice**: a compliance notice is a requirement to take specified steps to secure that an offence does not continue or happen again (for example, to make good an unsafe piece of equipment or provide training). Once proposed, the recipient has 28 days to make representations.
  - a **restoration notice**: This penalty will not apply to small business with fewer than 251 employees. A restoration notice is a requirement to take specified steps to secure that the position is, so far as possible, restored to what it would have been had the offence not been committed. Once proposed the recipient has 28 days to make representations.
29. The time limit for making representations following a notice of intent is proposed to be 28 days (this is the minimum prescribed period in the RESA 2008). The CAA will have arrangements in place for the hearing of any such representations and will consult on these, once any Order to make provision for civil sanctions is drafted and before making use of these powers.
30. We propose conferring on the CAA powers in relation to these three discretionary requirements as a package in relation to particular offences, as they are intended to be available for use solely in combination. In other words, where we grant the CAA powers to impose one kind of discretionary requirement, we grant the CAA powers to impose the other two discretionary requirements in any combination of two or three. However in practice we do not envisage that there will be many occasions in which it will be appropriate for the CAA to require restoration. In some other civil sanctions regimes, such as those for environmental regulation, the restoration measures are determined by a clearly defined state of affairs that has been changed by the commission of an offence. However, in aviation safety and airspace regulation, the consequence of an offence being committed is usually an increase in the risk of an incident that could damage persons, goods or infrastructure, and restoration will be less relevant.

***Question 5: In this consultation the government intends to make available to the CAA discretionary requirements powers as a package in relation to any particular offence, as they are intended***

***to be available for use in combination. Do you agree with this? If you think certain discretionary requirements should not be available for certain penalties please give details and explain why.***

31. **Stop notices:** A notice prohibiting a person from carrying on an activity specified in the notice until the person has taken the steps specified in the notice is called a stop notice. If a person does not comply with a stop notice they will be guilty of a criminal offence, but they have a right of appeal against the service of a stop notice. The recipient of a stop notice may apply for a certificate to confirm their compliance and has the right of appeal against a failure by the regulator to give such a certificate. A stop notice may only be served if the person is carrying on or is likely to carry on the activity and the regulator has the reasonable belief that in carrying it on the person presents, or would be likely to present, a significant risk of harm to:

- human health;
- the environment (including the health of animals and plants); or
- the financial interests of consumers; and
- that in carrying on the activity the person is, or is likely to be, committing an offence.

32. **Enforcement undertakings:** An enforcement undertaking is an undertaking by a person to take certain actions. It is for the regulator to decide whether to offer the person in breach of the regulation an enforcement undertaking, but the regulator can only offer enforcement undertakings where the regulator has reasonable grounds to suspect that the person has committed an offence. The regulator may certify that there has been compliance with the undertaking. The person who gave the undertaking has a right of appeal against a failure to give such a certificate of compliance. The action that the regulator can offer a person to undertake must be:

- action to secure that the offence does not continue or recur;
- action, to secure that the position is, so far as possible, restored to what it would have been if the offence had not been committed;
- action (including the payment of a sum of money) to benefit any person affected by the offence; or

- other action that may be prescribed by the Minister in the Order (for example, promotional and educational activities). We are inviting consultees to expand on this or suggest other activities that could be included.
33. In cases of other civil sanctions regimes, notably for environmental regulation, it has proved to be the case that, when faced with other civil sanctions, the overwhelming majority of offenders offer an enforcement undertaking. This is a positive outcome, indicating that they are prepared to admit wrongdoing and to take positive steps to move back into compliance, rather than challenge and appeal the regulator's decision, with the associated costs and delays for all parties that would follow. While safety regulation differ from environmental regulations in a number of important respects, it may well prove to be the case that this is often the outcome for civil sanctions proposed by the CAA.
  34. Certain combinations of civil sanctions are not permitted by the legislation. These combinations all combine a fixed monetary penalty with either a discretionary requirement (variable monetary penalty, compliance notice or restoration notice) or with a stop notice, in relation to the same offence. Since we do not propose to make fixed monetary penalties available to the CAA, these combinations do not require further consideration.
  35. The intention is that these sanctions will sit alongside existing sanctions available to the CAA, and will provide it with an alternative to relying on criminal prosecutions. It would be for the CAA to determine when to apply civil sanctions and when to commence criminal proceedings. In paragraph 22 we set out an initial view of the circumstances in which we envisage criminal as opposed to civil action being taken.
  36. Section 63 of the RESA 2008 requires the CAA to publish guidance on its use of each kind of civil sanction before these sanctions are made available for use. The guidance will cover matters including the circumstances in which the sanction will be applied, the appeal process, and matters to be taken into account in determining the size of a variable monetary penalty. The CAA will consult on this guidance before making use of these powers, and when making significant changes to the guidance.

## Constraints on criminal action where civil sanctions are applied

37. There are a number of constraints on the availability of criminal sanctions where civil sanctions have been imposed. These are as follows;
- A person who is the subject of a proposal to impose a non-monetary discretionary requirement or a voluntary undertaking and who has complied, or a person who is the subject of a proposal to impose a variable monetary penalty, cannot be convicted of the criminal offence in respect of the same act or omission. A person in breach of an enforcement undertaking may be convicted of the offence in respect of the act or omission to which the undertaking relates. A person who is the subject of a stop notice may be convicted of an offence for failure to comply with it.
  - There is no similar provision for a stop notice as this is intended to be able to precede the commission of an offence (the conditions for a stop notice include that the regulator reasonably believes that the activity as carried on by that person involves *or is likely to involve* the commission of a relevant offence by that person).

## Impact assessment

38. A detailed draft impact assessment is at Annex B to this consultation document.
39. It has proved challenging to estimate the use that could be made of civil sanctions with respect to some 574 offences. Precedents, such as from civil sanctions in relation to environmental regulation, have been of only limited use because they have been in place for a relatively short time and, as mentioned in paragraph 33 above, the overwhelming majority of offenders offer an enforcement undertaking. Because of this uncertainty we have considered three different scenarios in the impact assessment, corresponding to low, medium and high use of civil sanctions. Readers are invited to comment and to suggest ways that the consultation impact assessment might be improved.
40. The impact assessment annexed to this document systematically reviews a range of impacts. We are summarising several key



impacts in this consultation document to ensure that they are brought to the attention of readers who decide not to read the Impact Assessment.

## Impact on small businesses

41. The Coalition Government announced on 8 November 2012 that, when considering whether to make orders under the RESA to provide a regulator with civil sanctions powers, the government would, in general, observe two principles. Firstly, the principle that powers for enforcement undertakings, stop notices or compliance notices could be granted without restriction as to the size of undertaking against whom they might be used. Secondly, the principle that, powers for fixed or variable monetary penalties or restoration notices would, as a general rule, only be granted where their use was restricted to businesses with more than 250 employees.
42. This remains government policy and will be applied in full to the proposals in this consultation document. Variable monetary penalties and restoration notices will not be applied to businesses with fewer than 251 employees while fixed monetary penalties will not be applied at all. However businesses with fewer than 251 employees may still be liable to fines in the event of non-compliance with enforcement undertakings, stop notices or compliance notices. All other businesses, and individuals, will be subject to all civil sanctions except fixed monetary penalties
43. We have considered the alternative of excluding both businesses of fewer than 251 employees and recreational flyers (private pilots) from the scope of variable monetary penalties or restoration notices for breaches of aviation regulations. However this would remove the 60% (30,000) of pilots licensed by the CAA who are private pilots from the scope of two civil sanctions, as well as the 17000 aircraft for which they are responsible. Excluding these individuals would put the majority of UK pilots and aviation organisations outside the scope of two of the five civil sanctions that we would otherwise wish the CAA to be able to use.
44. The reason that the government wishes to provide for civil sanctions for the overwhelming majority of aviation safety and airspace offences is, because we believe that in appropriate circumstances something additional is now needed as an alternative to criminal prosecution. Our policy intentions are that offenders, who previously faced either criminal prosecution or a

warning letter that could not be enforced, would now face a more proportionate civil sanction in appropriate circumstances; and that sanctions could be applied which focus on bringing the offender back into compliance rather than simply punishing past wrongdoing.

45. However, if private pilots were excluded from the scope of certain civil sanctions, offenders in these categories would be more likely to continue to face (in some cases disproportionate) criminal prosecution and, if convicted, a criminal record if they committed an offence. We conclude that excluding private pilots in this way would place them at a disadvantage as they would continue to face potentially disproportionate and costly criminal prosecution as well as a criminal record for what in some cases might be a relatively minor offence.
46. The CAA will also be able to take account of the size of a business in determining the contents of a restoration notice. The CAA may state in the guidance that legislation requires it to both produce and consult on under sections 63 and 64 of the RESA 2008 that ability to pay will be a factor that the CAA will take account of in the determination of a restoration notice. This would allow it to take into account factors relating to small businesses.

## Benefits of civil sanctions

47. The Department for Transport considers that civil sanctions offer a number of benefits:
  - **Greater levels of compliance:** We have assumed for the impact assessment that compliance levels remain the same. However, if the CAA has access to more effective enforcement mechanisms, this could deter those who might have otherwise offended, leading to greater levels of compliance. This would in turn reduce the CAA's enforcement costs, savings that would accrue to the regulated community.
  - **Proportionality:** The availability of civil sanctions would enable the CAA to make use of such sanctions when appropriate, reserving criminal prosecution for more serious cases. This would make enforcement more proportionate, as well as avoiding costly and time consuming court cases where the costs of prosecution fall to the regulated industry more widely.
  - **Flexibility and scope for negotiation:** The use of enforcement undertakings would allow the CAA to work constructively with a

person to move them back into compliance. We have seen this happen already in the field of environmental regulation, where almost every attempt to apply a civil sanction has resulted in the offender offering a voluntary undertaking.

- **Early payment discounts:** An order may, amongst other things, provide for discounts for early payment of a monetary penalty.
- **Stop notice:** This type of sanction is likely to be particularly valuable where there is an immediate risk, to the safety of consumers or the general public, which needs immediate action. A criminal trial after the event would only punish behaviour that had already occurred, but would not reduce the immediate risk.

***Question 6: Paragraph 52 sets out suggested advantages of civil sanctions. What advantages do you think should be added to or removed from or modified in this list? Can you identify any disadvantages? What evidence do you have for your conclusions?***

## Who would civil sanctions apply to?

48. Civil sanctions would apply to certain organisations, companies and individuals in sectors currently regulated by the CAA. For a very small number of offences that could include members of the public (there is an example at paragraph 15). Only the small number of persons that commit regulatory offences would ever actually face the prospect of civil sanctions. Those organisations and individuals who remain in compliance would be unaffected.

## Appeals process

49. The Department for Transport's intends to introduce a framework for appeals against a stop notice, a notice of intent to impose a discretionary requirement and a refusal to certify compliance with an enforcement undertaking. The RESA 2008 sets out minimum grounds for appeal in relation to each civil sanction. These grounds will differ in detail from sanction to sanction as follows:
50. As set out in the RESA 2008, grounds for appealing against the decision to impose a discretionary requirement are as follows:
  - that the decision was based on an error of fact;
  - that the decision was wrong in law;

- in the case of a variable monetary penalty, that the amount of the penalty is unreasonable;
  - in the case of a non-monetary discretionary requirement, that the nature of the requirement is unreasonable;
  - that the decision was unreasonable for any other reason.
51. As set out in the RESA 2008, grounds for appealing against the decision to impose a stop notice are as follows:
- that the decision was based on an error of fact;
  - that the decision was wrong in law;
  - that the decision was unreasonable;
  - that any step specified in the notice is unreasonable;
  - that the person has not committed the relevant offence and would not have committed it had the stop notice not been served;
  - that the person would not, by reason of any defence, have been liable to be convicted of the relevant offence had the stop notice not been served.
52. The Environmental Civil Sanctions (England) Order 2010<sup>10</sup> makes provision for civil sanctions under the RESA 2008, and includes the grounds of appeal described above and also introduces a new ground for appeal – “[was wrong for] any other reason”. We propose to include this residual wide ground so as to not unreasonably limit the basis on which an appeal can be made.
53. We propose that a requirement or notice, other than a stop notice, should not be suspended in the event that a person appeals against it. This is because the CAA already has powers under article 15 of the ANO to direct an aircraft operator in the interests of safety and this power will suffice to address any urgent safety issues.
54. We propose that appeals will be made to the First-tier Tribunal, which is part of the court system of the United Kingdom. It was created in 2008 as part of a programme, set out in the Tribunals,

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<sup>10</sup> <http://www.legislation.gov.uk/ukdsi/2010/9780111492512>

Courts and Enforcement Act 2007, to rationalise the tribunal system. It is administered by [Her Majesty's Courts and Tribunals Service](#), and wholly independent from both the Department for Transport and the CAA.

### *The First-tier Tribunal (FtT)*

55. The FtT is empowered to deal with a wide range of issues, which might form the substance of appeals, and to ensure the cases are dealt with in the interest of justice and minimising parties' costs. The composition of a Tribunal is a matter for the Senior President of Tribunals to decide and may include non-legal members with suitable expertise or experience in an appeal in addition to Tribunal judiciary.
56. If the FtT is selected as the appropriate body to hear appeals in these matters, then it would operate under the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 which provide flexibility for dealing with individual cases. The General Regulatory Chamber rules can be found at: <http://www.justice.gov.uk/downloads/guidance/courts-and-tribunals/tribunals/tribunals-rules-2009-at010411.pdf>. Rule 2 of the General Regulatory Chamber Rules states its overriding objective as being to deal with a case fairly and justly. This includes dealing with a case in ways which are proportionate to the importance of the case, the complexity of the issues and the anticipated costs and resources of the parties. The Rules give the Tribunal judge wide case management powers in order to achieve these objectives.
57. The Tribunal may also hear an appeal either orally in a court room or determined on the papers only. This latter written procedure is used if both parties agree that the Tribunal may determine the appeal on the papers without holding a full hearing and the Tribunal is satisfied that it can determine the issues without one. Any party to a case has a right to appeal to the Upper Tribunal on points of law arising from a decision of the FtT. The right may only be exercised with the permission of the FtT or the Upper Tribunal. Where permission is given, the further appeal would be made to the Upper Tribunal. There is an onwards appeal right from the Upper Tribunal to the Court of Appeal but only on a point of law (and with the permission of the Upper Tribunal). Presently in Scotland the onwards appeal from the Upper Tribunal is to the Court of Session (again by seeking permission from the Upper

Tribunal). Such onwards appeals can only be made on a point of law. When permission to appeal is refused by the Upper Tribunal, permission can be sought from the Court of Session itself (as provided by section 13(4) and (5) of the Tribunals, Courts and Enforcement Act 2007).

58. Under the Rules the FtT has the power to award costs against a party where it considers that a party has acted unreasonably in bringing, defending, or conducting the proceedings.
59. As enforcement undertakings are not imposed on a person by the CAA and also represent a legally binding mutual agreement, once agreed they cannot be appealed.
60. The Lord Chancellor has the ability to charge fees for appeals to the First-tier Tribunal, for example an application fee. Where he is proposing to introduce fees he is required to consult the Senior President of Tribunals. The Ministry of Justice would also carry out public consultation prior to the introduction of any new fees. Following this, any such proposal would be subject to secondary legislation that would need to be debated and agreed by both Houses of Parliament before it would take effect. Should such a proposal be introduced, the consultation would be run by the Ministry of Justice independently from this consultation. For these reasons the impact assessment is based on the current situation of no fees being charged to an offender to bring an appeal.
61. The RESA 2008 states that an Order giving a regulator civil sanctions powers may make provision as to how any sum payable in pursuance of a decision of a tribunal is to be recoverable. We propose that interest shall be carried on sums payable in pursuance of a decision of a tribunal, and that the CAA shall be able to recover unpaid balances and interest as a debt due to the CAA.
62. The RESA 2008 provides that an Order giving a regulator civil sanctions powers may empower the appeal tribunal
  - (a) to withdraw the requirement or notice;
  - (b) to confirm the requirement or notice;
  - (c) to take such steps as the regulator could take in relation to the act or omission giving rise to the requirement or notice;

(d) to remit the decision whether to confirm the requirement or notice back to the regulator;

(e) to award costs.

63. We propose to allow the tribunal to determine the ground of appeal 'on any ground' in order to make all the above powers available to the First-tier Tribunal in respect of the CAA's civil sanctions powers.

**Question 7: Do you consider that the FtT is an appropriate destination for appeals in relation to the civil sanctions powers proposed for the CAA?**

**Question 8: Do you consider that the General Regulatory Chamber Rules will suit the handling of these appeals? If not, why not?**

**Question 9: Do you agree that sums payable in pursuance of a decision of a tribunal should carry interest, and that the CAA shall be able to recover unpaid balances and interest as a debt due to the CAA? If not, why not?**

**Question 10: Do you agree that, with regards to CAA requirements and notices, the tribunal should be able to determine the ground of appeal on any ground? Please give you reasons.**

**How would the CAA decide what enforcement action to take?**

64. When deciding what enforcement action to take the CAA would have to have regard to the guidance that it must publish after consultation, on action it would take, and the circumstances in which it expects to take it. The examples below illustrate the factors that might lead the CAA to conclude that an offence was of a more or a less serious nature. They are not listed in order of priority and this list is not intended to be exhaustive.

65. Examples of aggravating factors include:

- the offender's state of mind and level of culpability: deliberate, reckless, negligent or accidental;
- awareness of the offence and the risk of harm likely to arise from the offence;

- disregard of warnings from the CAA, another regulator, or from within the workforce;
- poor co-operation with the CAA; and
- the prevalence of the offence such that deterrence is a priority.

66. Examples of mitigating factors include:

- prompt and full remedial action taken by the offender;
- immediate and voluntary reporting of the offence;
- admission of responsibility;
- previous good compliance record;
- preparedness to co-operate with the CAA; and
- personal circumstances or case-specific factors.

***Question 11: Paragraphs 71 and 72 set out suggested aggravating and mitigating factors that the CAA could take into account in deciding what enforcement action to take. Do you agree these are the only aggravating mitigating factors to be taken into account? Please give reasons.***

***Question 12: Annex A sets out for UK and EU legislation, the government's view of which of the six possible civil sanctions should be made available in respect of which offences. Do you agree with the proposed allocation of civil sanctions to offences? Please give reasons.***

***Question 13: Annex B sets out an assessment by the government of the impact of granting the CAA these civil sanctions powers. Do you agree with this assessment? If you do not agree then please provide further or corrected information or indicate where you believe that it can be obtained. (In Annex B more detailed questions are set out relating to specific parts of the data and the analysis).***

## Other features of the application of civil sanctions

67. There are various other provisions which the RESA 2008 states may or may not be provided for in an Order relating to a scheme of civil sanctions. In this section we explain where we propose to make such provision and where not, with reasons.



## Powers of entry, search and seizure

68. The CAA does have powers of entry (onto aerodromes and aircraft in the UK under the ANO), but no search and only limited seizure powers (under the Air Navigation (Dangerous Goods) Regulations). Article 15 of the Environmental Civil Sanctions (England) Order 2010 limits these supplementary powers to just power of entry by Natural England to ascertain if civil sanctions are being fulfilled. We do not propose granting the CAA any further powers of entry, search or seizure or expanding the existing powers already conferred on it.

***Question 14: Do you agree that the CAA does not require additional powers of entry, search and seizure in connection with civil sanctions? Please give reasons***

## Requirement to pay costs

69. The RESA 2008 provides that a regulator may recover its costs associated with imposing a discretionary requirement or a stop notice, in particular costs associated with investigation, administration and payment for expert advice. It also provides for costs associated with a monetary penalty to be recovered, in particular costs associated with loss of interest and enforcement action of the penalty. As is the case in the Environmental Civil Sanctions (England) Order 2010, we propose to provide for the CAA to be able to recover costs associated with the imposition of variable monetary penalties, compliance notices, restoration notices or stop notices in all parts of the UK. The Impact Assessment attached to this consultation document includes an element of cost recovery to offset the CAA's costs of using Civil Sanctions.

***Question 15: Do you agree that the CAA should be given the power to recover costs? Please give reasons***

## Discretionary requirements – time limit for making representations

70. Section 43 of the RESA 2008 requires that a scheme for the civil sanction of discretionary requirements must provide for a person to be able to make a representation in respect of a notice of intent to impose a discretionary requirement. The RESA 2008 also provides that the period in which representations may be made should not be less than 28 days, or such longer period as the secondary legislation provides for. We propose that this period should in all cases be 28 days from the date of the service of the notice.

**Question 16: Do you agree with the proposed time limit for making representations on civil sanctions? Please give reasons**

## Discretionary requirements – consideration of representations

71. The RESA 2008 requires that the CAA has in place a process for the consideration of representations in relation to discretionary requirements. We do not propose to require that such representations should be processed by individuals not involved in the original decision to issue the notice of intent. We do not consider that this would be appropriate as reviewing representations is part of the decision making process to impose a civil sanction and is not an appeal process. Appeals would be made at a later stage to the First-tier tribunal.

**Question 17: Do you agree with the proposed process for the CAA to handle representations in respect of civil sanctions? Please give reasons**

## Non-imposition of a discretionary requirement

72. Section 43 of the RESA 2008 requires that a scheme for the civil sanction of discretionary requirements must provide that a regulator may decide not impose the discretionary requirement.

The regulator must do this if satisfied that the person would not, by reason of any defence raised by that person, be liable to be convicted of the relevant offence. The regulator may also do this for other reasons and these may be set out in the statutory instrument. We do not propose to add other reasons to the secondary legislation. However we do propose to require that the CAA specifies in the notice of intention any reasons why it may decide not impose the discretionary requirement in that instance. We would wish to hear of any suggestions as to other reasons when it would be appropriate for the CAA not to impose the discretionary requirement.

**Question 18: What other circumstances can you suggest as offering additional reasons why the CAA might not impose a discretionary requirement? Please give reasons**

### Discretionary requirements – capping of variable monetary penalties

73. Where an offence is punishable by a fine and only triable summarily (see footnote 6 page 22), the penalty is capped at the level of this fine. In relation to more serious offences, which may or must be tried in the Crown Court, or Sheriff Court in Scotland, the Order may provide that penalties are capped or uncapped. In line with previous civil sanction regimes, we propose to cap variable monetary penalties at the level of £250,000.

**Question 19: Do you have any comments on the circumstances proposed as to when variable monetary penalties should be uncapped? Please give reasons**

### Discretionary requirements – penalties for non-compliance with a discretionary requirement

74. Where there is provision for discretionary requirements, the Order may include provision for a person to pay a monetary penalty (a “non-compliance penalty”) to a regulator if the person fails to comply with either the non-monetary discretionary requirement imposed on them or a voluntary undertaking. We propose to provide that a non-compliance penalty may be payable in these circumstances, and that it should be determined by the regulator.

We propose that the CAA be empowered to impose, and set the amount of, monetary non-compliance penalties and that the penalty must be a percentage (up to 100%) of the costs of fulfilling the remaining requirements of the notice or third party undertaking. This approach provides a significant disincentive for those who would prefer to pay a financial penalty rather than comply with a discretionary requirement.

75. We propose that the imposition of a non-compliance penalty should not remove the compliance requirement, restoration requirement, or undertaking to which it relates.

**Question 20: Do you have any comments on the provision for non-compliance penalties or the amounts proposed? Please give reasons**

**Discretionary requirements – early payment discounts and late payment penalties**

76. The order may make provision for early payment discounts or for the payment of interest or other financial penalties for late payment of the penalty (such interest or other financial penalties not in total to exceed the amount of the penalty). The Environmental Civil Sanctions (England) Order 2010 does not make such provision and we do not intend to do so in relation to the CAA. We do, however, propose to confer on the CAA power to take steps to recover unpaid balances and interest as a debt due to the CAA.

**Question 21: Do you have any comments on the proposal not to provide for early payment discounts and late payment penalties but to provide for the recovery of unpaid balances through the court? Please give reasons**

**Stop notices – compensation**

77. Where there is provision for stop notices, the Order must include provision for compensation where persons have suffered loss as a result of the service of a stop notice. We propose that compensation may be payable if:

- a. a stop notice is subsequently withdrawn or amended by the regulator because the decision to serve it was unreasonable or any step specified in the notice was unreasonable;
  - b. the operator successfully appeals against the stop notice and the First-tier Tribunal finds that the service of the notice was unreasonable; or
  - c. the operator successfully appeals against the refusal of a completion certificate and the Tribunal finds that the refusal was unreasonable.
78. The Order should contain a definition of the loss in respect of which compensation is payable. The circumstances described in paragraph 80 reflect the provision made in the Environmental Civil Sanctions (England) Order 2010. We invite views of this as to whether similar provision is appropriate, which in the context of civil aviation could result in large claims for compensation.

**Question 22: Do you have any comments on the proposed coverage of compensation for those on whom stop notices are served wrongly, including the suggested definition of the loss that compensation is intended to address? Please give reasons**

### Enforcement undertakings – actions specified

79. Where there is provision for enforcement undertakings, the Order must include in the action that a person may undertake; action to secure that the event does not occur or recur, action to restore the position to what it would have been if the offence had not been committed and action to benefit any person affected by the offence. The Order may also provide for other action of a prescribed description. In this respect, we propose making provision to the effect that *where restoration of the position to what it would have been had the offence not been committed is not possible, action may be specified that is intended to provide a general improvement to safety for the aviation sector*. An example would be to set up and resource a working group to explore and make recommendations on how others could learn from the circumstances that led to the offence being committed.

**Question 23: Do you have any comments on the actions that may be specified in respect of enforcement undertakings and in particular the proposal to add one further action? Please give reasons**

## Enforcement undertakings – procedures

80. Where there is provision for enforcement undertakings, section 50(5) of the RESA 2008 enables the Order to include provision:
- a. as to the procedure for entering into an undertaking;
  - b. as to the terms of an undertaking;
  - c. as to publication of an undertaking by a regulator;
  - d. as to variation of an undertaking;
  - e. as to circumstances in which a person may be regarded as having complied with an undertaking;
  - f. as to monitoring by a regulator of compliance with an undertaking;
  - g. as to certification by a regulator that an undertaking has been complied with;
  - h. for appeals against refusal to give such certification;
  - i. in a case where a person has given inaccurate, misleading or incomplete information in relation to the undertaking, for that person to be regarded as not having complied with it;
  - j. in a case where a person has complied partly but not fully with an undertaking, for that part-compliance to be taken into account in the imposition of any criminal or other sanction on the person;
  - k. for the purpose of enabling criminal proceedings to be instituted against a person in respect of the relevant offence in the event of breach of an undertaking or any part of it, to extend any period within which those proceedings may be instituted.
81. In relation to extending the time period for bringing criminal proceedings where an undertaking or part of an undertaking has been breached, criminal proceedings for offences triable summarily can be instituted any time up to six months from the date when the regulator notifies the person that they have failed to comply with the discretionary requirement. This in line with other civil sanctions regimes.
82. We propose to add to this a provision that confers on the regulator a power to obtain sufficient information to determine if a compliance undertaking has been completed.

83. Otherwise we consider that the CAA is best placed to propose and determine the procedures related to an enforcement undertaking and that the CAA should consult on the details of these procedures once it has the relevant civil sanction powers.

**Question 24: Do you have any comments on the actions that may be specified in respect of enforcement undertakings and the scope for the CAA to determine certain procedures, after consultation? Please give reasons**

## Enforcement undertakings - certificates of completion

84. We propose, in line with other civil sanctions regimes, to provide in the Order for the CAA to issue a certificate of completion in respect of enforcement undertaking, to be issued when it is satisfied that the person has carries out all of the activities that are set out in the undertaking. There will also be an appeals procedure for a person who considers that the CAA has unreasonably withheld a certificate of completion.

**Question 25: Do you have any comments on the proposed certificate of completion and the proposed appeals process? Please give reasons**

# Consultation questions

## Questions from the consultation document

**Question 1: Do you agree with the principle of introducing civil sanctions at this time only for safety and airspace regulation and related matters; and not (as part of this consultation) for consumer or for aviation security matters? What evidence do you have for your conclusions?**

**Question 2: Do you agree with the principle of introducing civil sanctions only in relation to secondary and for EU legislation and not for offences on the face of UK Acts of Parliament? What evidence do you have for your conclusions?**

**Question 3: Paragraph 22 suggests some factors which the government believes would make it particularly appropriate for the CAA to be able to apply criminal penalties in respect of certain offences. Are there any factors you think should be added to or removed from or modified in this list? What evidence do you have for your conclusions?**

**Question 4: In this consultation the government does not intend to create a power to allow the CAA to impose the civil sanction of a fixed monetary penalty for any safety or airspace offence. Do you agree with this? What evidence do you have for your conclusions?**

**Question 5: In this consultation the government intends to make available to the CAA discretionary requirements powers as a package in relation to any particular offence, as they are intended to be available for use in combination. Do you agree with this? If you think certain discretionary requirements should not be available for certain penalties please give details and explain why.**

**Question 6: Paragraph 52 sets out suggested advantages of civil sanctions. What advantages do you think should be added to or removed from or modified in this list? Can you identify any disadvantages? What evidence do you have for your conclusions?**

**Question 7: Do you consider that the FtT is an appropriate destination for appeals in relation to the civil sanctions powers proposed for the CAA?**

**Question 8: Do you consider that the General Regulatory Chamber Rules will suit the handling of these appeals? If not, why not?**

**Question 9: Do you agree that sums payable in pursuance of a decision of a tribunal should carry interest, and that the CAA shall be able to recover unpaid balances and interest as a debt due to the CAA? If not, why not?**

**Question 10: Do you agree that, with regards to CAA requirements and notices, the tribunal should be able to determine the ground of appeal on any ground? Please give you reasons.**

**Question 11: Paragraphs 71 and 72 set out suggested aggravating and mitigating factors that the CAA could take into account in**



**deciding what enforcement action to take. Do you agree these are the only aggravating mitigating factors to be taken into account? Please give reasons.**

**Question 12: Annex A sets out for UK and EU legislation, the government's view of which of the six possible civil sanctions should be made available in respect of which offences. Do you agree with the proposed allocation of civil sanctions to offences? Please give reasons.**

**Question 13: Annex B sets out an assessment by the government of the impact of granting the CAA these civil sanctions powers. Do you agree with this assessment? If you do not agree then please provide further or corrected information or indicate where you believe that it can be obtained. (In Annex B more detailed questions are set out relating to specific parts of the data and the analysis)**

**Question 14: Do you agree that the CAA does not require additional powers of entry, search and seizure in connection with civil sanctions? Please give reasons**

**Question 15: Do you agree that the CAA should be given the power to recover costs? Please give reasons**

**Question 16: Do you agree with the proposed time limit for making representations on civil sanctions? Please give reasons**

**Question 17: Do you agree with the proposed process for the CAA to handle representations in respect of civil sanctions? Please give reasons**

**Question 18: What other circumstances can you suggest as offering additional reasons why the CAA might not impose a discretionary requirement? Please give reasons**

**Question 19: Do you have any comments on the circumstances proposed as to when variable monetary penalties should be uncapped? Please give reasons**

**Question 20: Do you have any comments on the provision for non-compliance penalties or the amounts proposed? Please give reasons**

**Question 21: Do you have any comments on the proposal not to provide for early payment discounts and late payment penalties but to provide for the recovery of unpaid balances through the court? Please give reasons**

**Question 22: Do you have any comments on the proposed coverage of compensation for those on whom stop notices are served wrongly, including the suggested definition of the loss that compensation is intended to address? Please give reasons**

**Question 23: Do you have any comments on the actions that may be specified in respect of enforcement undertakings and in particular the proposal to add one further action? Please give reasons**

**Question 24: Do you have any comments on the actions that may be specified in respect of enforcement undertakings and the scope for the CAA to determine certain procedures, after consultation? Please give reasons**

**Question 25: Do you have any comments on the proposed certificate of completion and the proposed appeals process? Please give reasons**

## **Questions from the Impact Assessment (Annex B)**

**Q1: Do you agree with assessment of the costs and benefits of Option 0?**

**Q2: Is there any extra information on Option 0 you feel should have been included? Are you able to provide extra information or do you know where it can be found?**

**Q3: Do you agree with assessment of the costs and benefits of Option 1?**

**Q4: Is there any extra information on Option 1 you feel should have been included? Are you able to provide extra information or do you know where it can be found?**

**Q5: Do you agree with the assumption made around civil sanctions costs' recovery?**

**Q6: Do you agree with the assumption made about how the enforcement of aviation regulations will change following the introduction of civil sanctions?**

**Q7: Do you agree with the assumptions made in estimating the volume of appeals against civil sanctions and the cost to HMCTS?**

**Q8: Do you agree that the costs of learning about the new sanctions will be low? Are you able to provide any extra information on these costs or do you know where it can be found?**

**Q9: Is there any extra information on Option 2 you feel should have been included? Are you able to provide extra information or do you know where it can be found?**

**Q10: Is there any extra information on the impacts of the Options considered that you feel should have been included? Are you able to provide extra information or do you know where it can be found?**

# What will happen next?

A summary of responses, including the next steps, will be published within three months of the consultation closing on [www.gov.uk/df#consultations](http://www.gov.uk/df#consultations). Paper copies will be available on request.

# Frequently asked questions

Below is a list of frequently asked questions about these proposals. If you still have questions after you have read this section please contact:

Aviation Strategy and Legislation Team  
Department for Transport  
Great Minster House  
33 Horseferry Road  
London SW1P 4DR  
Telephone 0300 330 3000  
Website [www.gov.uk/dft](http://www.gov.uk/dft)  
E-mail: [AviationCivilSanctions@dft.gsi.gov.uk](mailto:AviationCivilSanctions@dft.gsi.gov.uk)

Telephone: Andy Kirby: 020 7944 5894 or Tom Camps: 020 7944 2942

## FAQs

### **What checks will the CAA make before issuing civil sanctions?**

Before issuing a civil sanction, the CAA must conduct appropriate enquiries and, where required, be satisfied that an offence has been committed by the person. The CAA is required to issue guidance under section 63 of RESA 2008, and is required to have regard to it in the exercise of its functions in relation to decisions about civil sanctions. We expect that this guidance will contain a description of the matters which the CAA will consider when making such decisions.

Moreover, the CAA must apply where relevant the standard of proof varies which applies in respect of the respective civil sanctions. In relation to a fixed monetary penalty or a discretionary requirement (variable monetary penalty, compliance notice or restoration notice) it is the higher standard of "beyond reasonable doubt" (see sections 39(2) and 42(2) of the RESA 2008). In relation to a stop notice, it is "reasonable belief" in relation to the possibility of three sorts of damage set out in paragraph 32 (see section 46(4) of the RESA 2008), while in relation to an enforcement undertaking (which cannot be issued without the agreement of the offender) it is "reasonable grounds to suspect" (see section 50(1) of the RESA 2008).

### **What will happen if a financial penalty is not paid?**

Unpaid penalties become civil debts and as such may become subject of the order of a court. This means the CAA may also pursue such cases through the civil court as debts.

### **What if other types of civil sanctions are not complied with?**

In such cases the person may in certain circumstances be prosecuted in relation to the underlying behaviour to which the notice or undertaking relates

### **Will the CAA name those issued with civil sanctions?**

Under the RESA 2008, the CAA will be required to publish the details of any civil sanctions that they use unless they consider it inappropriate to do so in a specific case. The CAA will also be required to publish details of any enforcement undertaking it accepts. This is in line with the CAA's published Enforcement Policy.

### **Who will fund the CAA's costs?**

The CAA will be able to recover certain costs of legal and other expert advice, investigation, and administration from the offender by means of an enforcement costs recovery notice. Costs not met in this way will be met through the CAA's scheme of charges to the industry. The CAA has stated that it expects to be able to absorb all the additional costs identified in the impact assessment through increased efficiency rather than any increases in fees.

### **Who receives the money from financial penalties?**

All money raised in financial penalties will be paid into the government's Consolidated Fund and not to the CAA.

### **How will the CAA maintain the culture of open reporting that exists around aviation safety issues?**

The government considers that a civil sanctions regime is compatible with open reporting and specifically with the 'Just Culture'. This is defined by the CAA as a culture in which individuals are not punished for actions, omissions or decisions taken by them that are commensurate with their experience and training; but in which gross negligence, wilful violations and destructive acts are not tolerated.

Open reporting is also supported by the Confidential Human Factors Incident Reporting Programme (CHIRP) which aims to enhance aviation safety in the UK by providing an independent confidential reporting system for all individuals employed the industry. It is also supported by the CAA's Mandatory Occurrence Reporting scheme and by the status

of the CAA as a “prescribed person” under the Public Interest Disclosure Act 1998 for the purpose of receiving “protected disclosures” (whistleblowing) from the civil aviation industry.

Civil sanctions are a flexible tool. They can allow for aggravating factors that suggest greater culpability as well as mitigating factors such as where an offender immediately notifies the CAA of a breach, or where they voluntarily put things right. Applying these principles to civil sanctions can maintain and even increase the Just Culture and open reporting generally.

### **What safeguards will be available to ensure proportionate and fair use of civil sanctions by the CAA?**

The following safeguards will be in place to ensure the new sanctions will be used fairly and in accordance with good enforcement principles:

- (i) The CAA would not be able to impose a variable monetary penalty, compliance notice or restoration notice unless satisfied to criminal standard (“beyond reasonable doubt”) that the offence has been committed. The standard of proof for a stop notice or for the CAA to agree to an enforcement undertaking is the lower one of suspicion or belief.
- (ii) Before exercising any civil sanctioning powers, the CAA must consult on and publish detailed guidance on its use of civil sanctions and enforcement of relevant offences. In preparing guidance on the use of the sanctions, the regulator must consult the persons specified in the order, and in the case of guidance on enforcement of relevant offences, such persons as the regulator considers appropriate.
- (iii) Anyone on whom a civil sanction is imposed must have a right of appeal to the independent and impartial First-tier Tribunal, except for enforcement undertakings, which are voluntary. The CAA will also be required to publish details of any enforcement undertakings it accepts
- (iv) The government must publish high level “government guidance” to regulators on the way civil sanctions would be applied, building in proportionality, and transparency, and ensuring broad consistency of approach. The CAA will have regard to this in developing and consulting on its guidance.
- (v) All monetary penalties will be paid into the Consolidated Fund Consolidated Fund (the Government's general bank account at the Bank of England), so there will be no financial incentive for the CAA to impose monetary penalties.

(vi) The Secretary of State is required by section 67 of the RESA 2008 to review the operation of the CAA's civil sanctions powers. Moreover, section 68 enables the Secretary of State to suspend a civil sanction if s/he considers that the CAA has failed to: comply with a duty in the RESA 2008, or to act in accordance with its guidance or with certain principles of good practice.



# Annex A Proposed penalties for offences

separate document

# Annex B Impact assessment

Separate document

# Annex C Consultation principles

The consultation is being conducted in line with the government's consultation principles. Further information is available on the gov.uk website <https://www.gov.uk/government/publications/consultation-principles-guidance>

If you have any comments about the consultation process please contact:

Consultation Co-ordinator  
Department for Transport  
Zone 29 Great Minster House  
London SW1P 4DR  
Email [consultation@dft.gsi.gov.uk](mailto:consultation@dft.gsi.gov.uk)

## Consultation principles

- departments will follow a range of timescales rather than defaulting to a 12-week period, particularly where extensive engagement has occurred before;
- departments will need to give more thought to how they engage with and consult with those who are affected;
- consultation should be 'digital by default', but other forms should be used where these are needed to reach the groups affected by a policy; and
- the principles of the Compact between government and the voluntary and community sector will continue to be respected.
- departments should explain what responses they have received and how these have been used in formulating policy

# Annex D List of those consulted

This consultation document has been disseminated widely including to the following:

Aberdeen Airport	British Gliding Association
Air Canada	British Hang Gliding Association
Aer Lingus	British Helicopter Association
The Airline Group	British International Freight Association
Aircraft Owners and Pilots Association	British Microlight Aircraft Association
Air France	CAA
Airport Operators Association	Cardiff Airport
Airport Consultative Committees Liaison Group	Civil Air Navigation Service Association
Airport Watch	Competition Commission
American Airlines	Committees Liaison Group
Association of British Insurers	Consumer Focus
Association of International Courier and Express Services	CBI
Aviation Environment Federation	Consumers Association
BALPA	Delta Airlines
Birmingham Airport	East Midlands International Airport
BMI - Lufthansa Bristol Airport	Easyjet
Board of Airline Representatives in the UK	Edinburgh Airport
British Air Transport Association	Environment Agency
British Airways	European Commission
British Balloon and Airship Club	Federation of Small Businesses
British Business and General Aviation Association	Flybe
	Food Standards Agency

Gatwick Airport  
General Aviation Alliance  
Glasgow Airport  
Guild of Air Traffic Control  
Guild of Air Pilots and Navigators  
Heathrow Airport  
Health and Safety Executive  
KLM  
Leeds Bradford Airport  
Light Aircraft Association  
Liverpool (John Lennon) Airport  
London City Airport  
London Travel Watch  
Luton Airport  
Manchester Airport  
Monarch  
NATS  
Natural England

Newcastle Airport  
Office of Communications  
Office of Fair Trading  
Office of Rail Regulation  
Prestwick Airport Prospect  
Royal Aeronautical Society  
Ryanair  
Security Industry Authority  
Stansted Airport  
Southampton Airport  
Trade Union Congress  
Thomas Cook  
Thomson Airways  
TUC  
Travelwatch Northwest  
United Airlines  
Virgin Atlantic  
We complain 4 you

# Annex E proforma for responses

Separate document