

**FIFTH CONSULTATION BY AIRPORT COORDINATION LIMITED
ON THE
MISUSE OF SLOTS ENFORCEMENT CODE**

26 July 2017

1 INTRODUCTION

- 1.1 Article 14.5 of EU Regulation 95/93, as amended by Regulation 793/2004, (the **Council Regulation**) requires Member States to ensure that effective, proportionate and dissuasive sanctions, or equivalent measures, are available to deal with repeated and intentional misuse of allocated slots.
- 1.2 Following consultation with stakeholders in the aviation industry, the Secretary of State for Transport adopted the Airports Slot Allocation Regulations 2006 (the **UK Regulations**), which took effect from 1 January 2007.
- 1.3 UK Regulation 18.1 requires the Coordinator to adopt an enforcement code to make provision for the manner in which the Coordinator will enforce UK Regulations 7, 15 and 16 (which relate to the imposition of financial penalties and to the issuance of Directions). That Enforcement Code (the **Code**) took effect on 1 January 2007.
- 1.4 The objective of the Code is to give effect to the Council Regulation and the UK Regulation, in preventing the repeated and intentional misuse of slots at the coordinated airports in the United Kingdom (currently Heathrow, Gatwick, Stansted, London City, Luton, Birmingham and Manchester). The efficient working of a coordinated airport, and the integrity of the slot allocation system, requires all operations (at any time of the day or night) to be planned to operate at the allocated slot time and to operate in a way which meets all the terms of the slot allocation.
- 1.5 A copy of the Code is available from the ACL website at <https://www.acl-uk.org/slotsanctions/>.
- 1.6 ACL produces annual reports on the working of the Code, which are available on the ACL website, at the above link.

2 THE PURPOSE OF THIS CONSULTATION

UK Regulation 18 requires the Coordinator to undertake, and consult on, reviews of the Code. Previous consultations have been carried out in 2008, 2010, 2011 and 2013.

The continuing application of the Code since the last consultation has brought to light some areas of the Code which ACL believes could benefit from clarification. These are intended to ensure that the sanctions regime continues to be effective and dissuasive in its application so as to help ensure the continued fair access to, and the effective use of, airport facilities, whilst ensuring that the sanctions regime remains fair and proportionate.

ACL's proposed changes to the Code are the subject of this consultation. In this document, text from the Code is shown in *italics*, with our proposed deletions shown in ~~strikethrough~~ format and newly added text shown in underlined format.

3 HOW TO RESPOND TO THIS CONSULTATION

Please submit your response to the consultation by **Monday 18 September 2017** to consultation@acl-uk.org or by post to the address listed in section 5 below.

When submitting your comments, please give reasons and evidence to support your views where appropriate.

Please ensure that we receive one consolidated response from your organisation, rather than several separate responses from various contacts within your organisation. Please include the name and position of the person submitting the response.

As a non-government organisation, ACL is not subject to the Freedom of Information Act 2000 (**FOIA**) and therefore is not obliged to disclose or make public any responses provided as part of this consultation. However, the Secretary of State for Transport may need sight of the consultation responses in order to exercise his functions in connection with any proposed amendment to the Code and under the Council Regulation. In this regard, because the Department for Transport is a public authority it is bound by the FOIA, and consultation responses made available to the Department may, therefore, be subject to publication or disclosure under that Act.

If you would prefer part or all of the information/comments you provide in your consultation response to be treated as confidential, please identify that information, with reasons why you regard it to be confidential and we will try to take that into account if any FOIA request is made.

4 THE PROPOSED AMENDMENTS TO THE CODE

4.1 Updating of the Code's Recitals

It is proposed that Paragraph 1.4 of the Code is updated to reflect the fact of the consultation carried out by ACL in 2013 and the current consultation:

*1.4 In June 2008, ~~and June 2010,~~ November 2011, June 2013 and [xx] 2017 Airport Coordination Limited (ACL or the **Coordinator**) proposed a number of clarifications and improvements to the Code and consulted the industry. The Code was updated in September 2008, ~~and then again on 17 September 2010,~~ November 2011, August 2013 and [xx] 2017 taking into account the views expressed by the respondents to the consultation. The updated version of the Code takes effect from the ~~later~~ date written at the top of this Code.*

We will fill in the missing date at the time the Code is updated.

Question 1

Do you have any comments on the proposed amendments to paragraph 1.4 of the Code?

4.2 Amendment to Paragraph 2 (Objectives) of the Code

Paragraph 2 of the Code sets out the general purpose of the sanctions regime. ACL believes that this section could be clarified to better take in the spirit and wording of the Council Regulation. In addition, paragraph 2.2 needs updating to reflect the addition of Birmingham as a coordinated airport.

ACL therefore proposes the following amendments to paragraph 2 of the Code:

2.2 The objective of UK Regulation 14 and this Code is to give effect to Article 14.5 of the Council Regulation. They aim to prevent the repeated and intentional misuse of slots, which includes operating without an allocated slot, at the coordinated airports in the United Kingdom – currently Heathrow, Gatwick, ~~Manchester,~~ Stansted, London City, ~~and Luton,~~ Birmingham and Manchester - and such other airports as may be designated from time to time as coordinated pursuant to Article 3 of the Council Regulation.

2.3 ~~The operation of a single additional flight on a single day, off slot operation or the operation of a slot in a manner inconsistent with the manner indicated when the slot was allocated (for example, the use of a larger aircraft) can have a significant impact on the level of delays, and access to airport facilities, for all other air carriers, the majority of which are trying to operate to their allocated slots. The purpose of UK Regulation 14 and this Code is to encourage ensure that, in a proportionate and fair way,; the use of all slots are used at the allocated slot time and in the manner indicated when the slots were allocated. The efficient working of a coordinated airport and the integrity of the slot allocation system requires all operations, at any time of the day or night, to be planned to operate at the allocated slot time and operate in a way which meets all the terms of the slot allocation.~~

Question 2

Do you have any comments on the proposed amendments to paragraph 2 of the Code?

4.3 Amendments to paragraph 3 (Other Concurrent Administrative Sanctions) of the Code

Paragraph 3 of the Code deals with sanctions which can be levied by ACL as an alternative, or in addition, to financial penalties; namely the loss of a carrier's entitlement to claim the same series of slots in the next scheduling period, the withdrawal of slots from a carrier and the issuance of directions to secure compliance.

ACL considers that the Code could be better worded here to reflect the Council Regulation and should contain wording to reassure carriers that these sanctions would not be imposed before the issuance of a formal warning and after a process for dialogue between the carrier and ACL has been followed.

As such, ACL proposes to amend paragraph 3 of the Code as follows:

3. UK Regulations 14-19 and this Code are in addition to the Coordinator's administrative powers to enforce compliance with allocated slots, contained both in Article 14.4 of the Council Regulation and in Local Rules applicable to a particular coordinated airport.

3.1 Articles 14.4 and 14.5 of the Council Regulation provide two distinct sanctions for the types of slot misuse covered by both provisions. Article 14.4 provides that:

"Air carriers that repeatedly and intentionally operate air services at a time significantly different from the allocated slot as part of a series of slots or uses slots in a significantly different way from that indicated at the time of allocation and thereby cause prejudice to airport or air traffic operations shall lose their status as referred to in Article 8(2). [ie entitlement to claim the same series of slots in the next equivalent scheduling period]. The Coordinator may [also] decide to withdraw from that air carrier the series of slots in question for the remainder of the scheduling period and place them in the pool after having heard the air carrier concerned and after issuing a single warning."

If the breach persists to the end of a series of slots and the air carrier continues to operate intentionally "off slot", after a single warning has been issued then, in accordance with Article 14.4 of the Council Regulation, the carrier will lose its

entitlement to claim the equivalent slots in the next scheduling period. *The coordinator may also withdraw from a carrier who has repeatedly and intentionally operated off-slot the series of slots in question for the remainder of the scheduling period.*

In the case of either withdrawal of slots part way through the scheduling period, or loss of slots at the end of the period, the Coordinator would not take these steps without first issuing a warning and hearing the carrier either orally or in writing.

Article 11.1 of the Council Regulation provides for appeals concerning the application of Article 14.4 to be made to the Coordination Committee.

3.2 The Coordinator can apply Article 14.4 relying on the Council Regulation directly. By contrast Article 14.5 is implemented by UK Regulations 14-19 and by this Code. Although they dealing with the same types of misuse, UK Regulations 14-19 they provide for separate sanctions - financial penalties and the issuance of directions to secure compliance. The Coordinator may wish to use both, either concurrently or sequentially (e.g. withdrawing slots where misuse continues, despite financial penalties having been imposed or directions having been made, or where urgent action is required).

Question 3

Do you have any comments on the proposed amendments to paragraph 3 of the Code?

4.4 Providing clarity over use of the defence that a breach of UK Regulation 14 was beyond the reasonable control of a carrier

Paragraph 6.5 of the Code sets out the available defence to slot misuse. That defence is enshrined in UK Regulation 16.4.

The UK Regulation makes clear that a carrier seeking to rely upon the defence must *demonstrate* that its failure to comply with its duty under UK Regulation 14 was beyond its *reasonable* control.

As currently drafted, paragraph 2.4 of the Code is not wholly consistent with the wording in the UK Regulation, e.g. it does not include the words “demonstrate” and “reasonable”.

It is apparent from recent sanctions cases that further guidance on what evidence ACL would require for this defence to be satisfied would be desirable.

The available defence, and a carrier's ability to reply upon it, is an important part of the sanctions regime. However, it should not be open to abuse by carriers.

ACL therefore proposes the following changes to the Code:

2.4 This Code is designed to ensure that the UK Regulations deal firmly with repeated and intentional slot misuse but and do not penalise carriers to the extent they can demonstrate that the breach of UK Regulation 14 was caused ~~normal, day to day, variations in scheduled landing and take-off times affected~~ by factors beyond its reasonable the control of air carriers. The Coordinator is not obliged to give any advance notice of a breach of Regulation 14 before imposing a penalty; however sanctions will ordinarily only be applied when the normal coordination process and dialogue between the Coordinator and the air carrier to find a solution to the air carrier's scheduling problems has failed to prevent the misuse of slots.

*5.3 **Beyond his reasonable control** – This ~~would~~ include exceptional weather conditions or third party industrial action, air traffic control regulations/CTOTs and exceptional/unexpected technical issues which could not reasonably have been foreseen or mitigated and (in all cases) which are demonstrated to have caused the breach of UK Regulation 14. delays, on the day operational disruptions or other factors preventing safe operation of the flight Note that: (i) the examples given will not automatically be valid reasons just by virtue of being listed in this definition; and (ii) the burden of proof is on the carrier to where these are demonstrate that its failure to comply with its duty under UK Regulation 14 was beyond its not within the reasonable control of the airline. For the avoidance of doubt an air carrier's reliance on incorrect information (about slots allocated by the Coordinator) which is given by an agent of the air carrier is not a matter beyond its reasonable control.*

6.5 It is a defence if the air carrier demonstrates that the breach of Regulation 14 was beyond its reasonable control. (Regulation 16(4)).

For the avoidance of doubt: (i) pursuant to UK Regulation 16.4, the burden of proof is on the carrier to demonstrate that a failure was beyond its reasonable control. Exactly what evidence is required will depend on the circumstances, but a mere assertion that a particular issue arose will, in most circumstances, not be enough. The carrier will need to explain to the Coordinator what the issue was, where and when on route it arose, how that issue caused the carrier to fail in its duty under UK Regulation 14 and why the carrier could not reasonably have prevented the issue from causing the failure. The carrier will be expected to adduce satisfactory evidence to back up its explanations (for example official weather warnings issued by the affected airport or ATC and/or airport/ATC imposed weather regulation, flight logs and tech reports); (ii) the individual causes of each slot misuse may be

relevant to demonstrating that the failure not to repeatedly misuse slots was beyond the carrier's control. But, depending on the wider evidence available to ACL, this may not be sufficient, for example, where the evidence available to ACL points to a carrier's operational set up (e.g. flight schedules or planned turnaround times) not being sufficiently robust to cope with normal and foreseeable operational challenges; and (iii) a carrier will not normally be entitled to rely upon this defence where the coordinator has proposed a reasonable scheduling solution under paragraph 7.5 of the Code or a direction under paragraph 8 of the Code (reflecting UK Regulation 15) and this has been ignored by the carrier or the carrier has (without lawful reason) refused to comply with it.

Question 4

Do you have any comments on the proposed amendments to paragraphs 2.4, 5.3 and 6.5 of the Code?

4.5 Amendment to paragraph 6 (Sanctions for Slot Misuse: Financial Penalties) of the Code

In setting financial penalties, ACL assesses each slots misuse on its individual facts to ensure that any penalty imposed is in the spirit of the Council Regulation; namely that the penalty is sufficiently effective, proportionate and dissuasive. This is vital in helping to ensure the continued fair access to limited airport facilities by carriers.

The Code stipulates a minimum level of penalty of £1,000. That minimum level has not changed since 2007 and ACL's view is that stating a minimum level perhaps sets an unreasonable expectation that fines for first offences will always start at £1,000. In fact, ACL will assess what the appropriate fine is, based on the circumstances of each case.

ACL feels that reference to a minimum level of fine in the Code is unnecessary given the above and given that no minimum level is required to be set by the Council Regulation or by the UK Regulation.

As such, ACL proposes the following amendments to paragraph 6 of the Code:

~~6.3 Where a financial penalty is applied then the starting point will be that each failure by an air carrier to comply with Regulation 14 will have a value of at least £1,000. Multiple infringements could trigger several financial penalties and could result in, for example, the doubling of the significantly increased financial penalties could be imposed for each further breach misuse and, in accordance with UK Regulation 16, can be any amount up to £20,000. In determining the amount of the penalty to be levied, ACL will look to ensure that any penalty is an effective, dissuasive and proportionate deterrent to future misuse.~~

6.4 Some examples of slot misuse and possible penalties are in the Annex to this Code. These are provided by way of example only; the amount of the financial penalty will always be assessed by ACL on a case by case basis, according to the specific facts.

In addition, ACL feels that paragraph 6.2 of the Code could be improved by adding/clarifying the type of factors that ACL may take into account in levying a financial penalty. As such, ACL proposes to amend paragraph 6.2 of the Code as follows:

6.2 Penalties will vary depending on the nature of the breach, the aim being to set a penalty which is effective, dissuasive and proportionate to the type of misuse committed. The Coordinator will aim to take into account all the relevant circumstances in each case such as:

- *whether the misuse is blatant;*
- *the extent to which the coordination parameters were broken, including over a particular scheduling period in respect of a series of slots;*
- *the extent to which airport or air traffic operations and/or other air carriers or passengers were or were likely to have been prejudiced by the misuse taking into account all technical, operational and environmental constraints e.g. use of a noisier aircraft or operating without a night quota;*
- *previous and current slot performance; other behaviour and misuse by the same air carrier will be taken into account, i.e. whether this is this a first case of misuse or a “second offence”;*
- *whether sanctions have been imposed on the air carrier for previous breaches and whether the carrier paid those sanctions by the due date;*
- *the carrier’s conduct following the misuse or earlier sanction for similar off slot operations, including action taken to correct the misuse and degree of cooperation of the carrier during the investigation;*
- *the possible benefits to the carrier from the misuse;*
- *the size of aircraft used and the number of passengers generally carried on it;*
- *whether the air carrier demonstrates the same behaviour at other UK coordinated airports; and*
- *at which UK coordinated airport the misuse was committed. Whilst the Coordinator will seek to apply consistent judgments as to what is a misuse across the*

coordinated airports in the UK, the impact of the misuse and the level of dissuasive sanctions may vary from airport to airport.

Question 5

Do you have any comments on the proposed amendments to paragraphs 6.2, 6.3 and 6.4 of the Code?

4.6 Amendments to paragraph 7 (Process for Imposition of Financial Penalties) of the Code

ACL considers that paragraph 7 of the Code should be amended to remove some ambiguity of wording, as follows:

7.3 The Coordinator will consider an appropriate sanction, taking into account the ~~guidelines and criteria set out under paragraph 6 above.~~

The Coordinator will issue a notice to advise the air carrier of its proposed decision both on breach and proposed sanctions and invite the carrier to make written comments (normally within at least 5 working days, but less in urgent cases). (Regulation 17(2)(a)). A notice may include a proposed sanction (and the sanction may then be imposed) for the period of misuse of slots even though subsequently a scheduling solution to the problem may be found. The air carrier on whom a penalty is proposed, or the person to whom a direction is proposed to be issued, may ask in writing for a formal oral hearing~~to be heard orally~~ (Regulation 17(3)). The coordinator will also inform the managing body of the airport concerned, and the Slot Performance Committee.

The Coordinator will consider any such comments or carry out any further investigation it considers necessary. The Coordinator will then take its decision, and send it to the air carrier. The Coordinator will give reasons which explain why any penalty has been imposed and the amount of the penalty. (Regulation 17(1)). It is incumbent on the carrier to ensure that its points are conveyed in writing, or at such a hearing, and not simply by way of informal dialogue as information disclosed by the latter may not be taken into account. The air carrier will be given a reasonable time, normally 21 days, in which to take the action required by the Coordinator, including payment of any financial penalties.

..... As an alternative to, or in addition to, imposing financial penalties the Coordinator may decide to take administrative steps, for example as set out at para 3 above, or by issuing directions as at paragraph 8 below or by withdrawing slots.

Question 6.1

Do you have any comments on the proposed amendments to paragraph 7 of the Code?

Question 6.2

Paragraph 7 of the Code sets out the process for the imposition of financial penalties. This includes timelines for carriers to respond to requests for information (responses being required normally within at least 5 working days).

Do you think that the timelines stipulated in paragraph 7 are reasonable?

4.7 Amendments to paragraph 8 (Directions) of the Code

Article 8 of the Code deals with the issuance of Directions by the coordinator. Paragraph 8.3 of the Code provides examples of situations in which a Direction may be issued. ACL proposes to supplement the list of examples as follows:

8.3 The purpose of issuing a direction will generally be to require something specific, such as:

- an air carrier to alter the advertised times of its flights on its website, if inconsistent with the allocated slots;*
- an air carrier to plan to land or take-off at the allocated slot time and not at any other time;*
- an airport managing body or the air traffic services provider to refuse the air carrier the use of certain airport facilities;*
- a corrective measure to address repeated slots misuse (for example a schedule solution or a change to a carrier's operational parameters).*

Question 7

Do you have any comments on the proposed amendments to paragraph 8.3 of the Code?

4.8 Amendments to the process for an Independent Review

UK Regulation 17 provides that decisions to impose a financial sanction by the Coordinator may, in certain circumstances, be subject to review by an Independent Reviewer.

Pursuant to UK Regulation 17, representations to the Independent Reviewer should be made in writing, unless an oral hearing has been requested by the carrier.

Since the last review, it has become apparent that clarification is required about the need for air carriers to request those oral hearings in writing. In addition, the Code needs to clarify that information disclosed by a carrier informally may not be admissible in an independent review, unless that information is also disclosed formally under the procedure set out in the Code.

ACL proposes the following changes:

14.3 (b) set out in full the specific grounds under UK Regulation 17(4) being relied upon as grounds for the review, with any supporting evidence (and in the case of new evidence, explain why that evidence could not reasonably have been made available to the co-ordinator earlier and before the decision was made). Any evidence must be submitted within the 14 day period referred to in para 14.3(d) below.

Paragraph 14.3(a) of the Code states where a request for a review should be sent. ACL proposes that this paragraph should be amended to include submission by email as follows:

14.3(a) be in writing (setting out the information required under paragraph 14.3 above), addressed to the Independent Reviewer of the Coordinator's decisions at: Attention Independent Reviewer, c/o Airport Coordination Limited, Viewpoint, 240 London Road, Staines-Upon-Thames, TW18 4JT, UK; with a copy of the request for review sent to the Coordinator. The submission may be sent by email to sanctions@acl-uk.org, marked for the attention of the Independent Reviewer. In the case of an airline the request must be signed by the IATA Head of Delegation for the airline. For General and Business Aviation operators the request for a review must be signed by a Director of the Company.

Paragraph 14.4 of the Code states that an Independent Review will not stay the effect of a decision of the Coordinator.

ACL believes that this provision could be better clarified in relation to payment deadlines as follows:

14.4 Application for a review will not stay the effect of a decision of the Coordinator. The carrier must therefore ensure that any financial penalty is paid by the due date specified in the notice of final decision issued by the Coordinator, notwithstanding

that it has requested an Independent Review. Payment of penalties and compliance with directions will only be suspended at the discretion of the Coordinator in exceptional circumstances during this process.

Question 8

Do you have any comments on the proposed amendments to paragraph 14 of the Code?

4.9 Publication of the results of Independent Reviews

Paragraph 13 of the Code states that the Coordinator shall publish, in an annual report, its decision to impose financial sanctions or issue directions in such a manner as it considers appropriate. This is in support of the requirement under Article 17.10 of the Council Regulation. It is not however made clear in the Code whether this includes publishing the results of any Independent Reviews. It is ACL's practice to include a summary of any Independent Reviews in its annual reports as it believes this is necessary to ensure adequate and transparent reporting under the Council Regulation.

ACL proposes to change paragraph 13 of the Code as follows:

13. The Coordinator shall publish its decisions to impose such financial sanctions or issue directions in such manner as it considers appropriate, except to the extent that material which is genuinely commercially confidential is concerned. Such reporting may include the results of Independent Reviews which have been concluded in the relevant period (which may be redacted where ACL considers there to be commercially sensitive material which should not be disclosed). Decisions to impose financial sanctions will be published on the Coordinator's website. (Regulation 17(7)).

Question 9

Do you have any comments on the proposed amendments to paragraph 13 of the Code?

4.10 Amendment to paragraph 17 (Coming into Effect and Amendment) of the Code

ACL proposes the following amendment to paragraph 17 of the Code:

17 The Coordinator will publish an annual report on the operation of the UK Regulations to the Secretary of State, the managing bodies of the airports and the members of the Coordination Committee of each airport. The effectiveness, scope

and application of this Code will normally be reviewed in April 2008 and every two years thereafter until April 2010. Thereafter the effectiveness, scope and application of the Code will be reviewed every three years unless changes in the Regulatory framework or other factors issues surrounding the 2012 Olympics require urgent amendments to the Code outside of the normal timetable for consultations and revisions to the Code. The review will include any proposed changes to deal, if necessary, with other forms of slot misuse or to improve the administration of the UK Regulations. (Regulation 17(10))

Question 10

Do you have any comments on the proposed amendments to paragraph 17 of the Code?

5 CONSULTATION PERIOD

The deadline for responses to this consultation is Monday 18 September 2017.

If you wish to submit your response to this consultation before the above deadline, you may:

- Write to ACL at the following address

Lee Campbell
Airport Coordination Limited
Viewpoint
240 London Road
Staines-Upon-Thames
TW18 4JT
United Kingdom

- Write to ACL by email to: consultation@acl-uk.org

Taking into account all the comments received as part of this consultation, ACL will publish an updated version of the Code.

6 FURTHER INFORMATION

You can contact ACL for more detailed information on any of the issues in this consultation document by email at consultation@acl-uk.org or by telephone +44 (0) 208 564 0610.