Consumers and Markets Group

Civil Aviation Authority

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14 December 2018

Dear Andrew

Thank you for your letter of 1 November 2018, which made a number of observations about the Technical Information Note published by the CAA in August 2018 (the "Note"). The majority of your letter discussed the section of the Note headed "power to modify HAL's licence to faciliate a successful third-party scheme", which you characterised as inter-terminal competition.

Specifically, your letter expressed the concern that the Note disclosed a fundamental error of law on the part of the CAA

> "*insofar as it suggests the Civil Aviation Act 2012 ("the 2012 Act") gives the CAA the power to require Heathrow Airport Limited (HAL) to accommodate an alternative operator, thereby requiring access to HAL's assets or infrastructure.*"

Citing case law and Parliamentary proceedings, your letter argued that the wording of section 21(1)(b)[1] of the 2012 Act did not contemplate granting another operator mandatory access to HAL's property, and that the wording of that section did not support such an implication.

Your letter went on to express the concern that

> "*any attempt to force inter-terminal competition would have serious adverse effects on both passenger interests and on Heathrow's viability as a business*."

Before turning to the specific points raised in your letter, it is important to re-emphasise the point made in the Note that our thnking is at an early stage and that the position in relation to alternative operators will become clearer as and when further information becomes available to the CAA.

[1] Section 21 (1) (b) provides that licence conditions may include "*provision requiring the holder of the licence to enter into a contract or other arrangement for a purpose specified in a condition and on terms specified in, or determined in accordance with, a condition*".

As discussed in our October 2018 consultation (CAP1722), we have facilitated a review of the Arora Group's plans in relation to the development of new capacity at Heathrow, and been clear that the objective of this work is to provide a high level assessment of the Arora Group's capacity expansion plans which may be designed to lead to some form of competition. This work is designed to enable airlines and the CAA to develop a more informed understanding of the key aspects of those plans, including their scope and design, costs, operability, timing and deliverability. Nonetheless, the outcome of this review is not intended to be either substitute for, or sufficient to enable, the CAA to develop the regulatory framework, which, subject to the outcome of that consultation, could involve at least the phases of work described in CAP 1722.

Turning to the points in your letter, having reflected on them, we consider that your comments appear to place an interpretation on the Note that it is not intended to, nor does it, bear. Specifically, the CAA has, in our earlier consultations (CAP 1610 and CAP 1658) expressly stated that it does not consider that it has the ability to force the divestment of HAL's assets. This point was reiterated in the Note.

We agree that there are legal limits on the powers of the CAA under the 2012 Act and any policy we adopt in relation to Heathrow must not exceed those powers. To that end, the Note emphasised the point that any decisions that the CAA makes in the future will be made in accordance with its primary duty under the 2012 Act. Clearly, those decisions will also need to be in accordance with the general public law principles including, but not limited to, those discussed in the cases cited in your letter. The appeal rights of HAL and airlines under the Act provide a mechanism for addressing these issues if they remain outstanding after the completion of the public consultations that we must undertake as part of our policy development and decision making processes.

As the Note makes clear, we are still at a very early stage in the development of new capacity at Heathrow. As it also makes clear, we have limited information on potential alternative proposals at present, but the interaction between any such proposals that might be brought forward and those being developed by HAL could be relatively novel.
Leaving aside the question of whether the Parliamentary sources you cite are of relevance to the interpretation of the 2012 Act in the present case, it should be noted that those sources do not appear to have considered the implications of the Planning Act 2008, which provides in clear words for the possibility of very extensive interference with property rights. Given the potential scope of any Development Consent Order ("DCO") made under that Act, it appears possible that the development of competition could be driven by planning legislation rather than the 2012 Act or Enterprise Act 2002.[2]

We note that you have not explicitly addressed these issues in your letter, which does not mention or discuss the Planning Act 2008 or the fact that this Act explicitly provides for the possibility of extensive interference with property rights. We observe that HAL will also be relying on obtaining such rights to enable its plans for capacity expansion, including potentially requiring compulsory purchases of land holdings from the Arora Group.
As acknowledged by the Note, it is not yet clear how the precise details in any DCO granted by the Secretary of State would interact with the various mechanisms for economic regulation set out in the 2012 Act. Furthermore, we do not, at present, have clear sight of what any third party may be seeking to achieve through any DCO application it might make. As such, it is impossible for us to predict with any certainty what these interactions might be. Further detailed discussion of these issues at this stage is likely to relate to hypothetical circumstances and be largely academic. This is a point acknowledged clearly in the caveats set out in the Note.

[2] We have already referred to the Enterprise Act 2002 in our consultations and made it clear that we do not presently see that there is justification for using the powers under it.

It is clear that any applicant for a DCO must, however, bear full responsibility for developing its own application and consider what rights it would need in order to bring its project to fruition. In doing so, we expect that any such applicant will engage with the CAA to explain its proposals to us. As we stated in CAP 1722, this explanation must address a number of issues, including:

- the commercial and regulatory arrangements that might support its proposals (including in relation to how they will be financed and work with the rest of the airport); and
- how, in principle, these could protect the interests of airlines and consumers.

As such, any such applicant must include its assessment of how it considers that its proposals will interact with any application made by HAL. In this context, any DCO applicant (including HAL) must be mindful of the importance of the requirements of the Airports National Policy Statement and its engagement with the CAA in the context of the CAA's role as a statutory consultee in the planning process.[3]

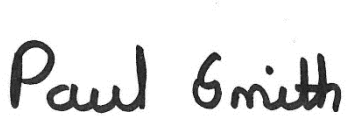
In summary, we agree that there are limits to our powers under the 2012 Act and we have explained on a number of occasions that the 2012 Act does not allow the CAA to force HAL to divest assets. However, we do not agree that the proceedings of the House of Commons Transport Committee determine the interpretation of statute or limit the powers flowing from the Planning Act 2008.

While competing DCO applications raise novel issues, our initial view at this relatively early stage of scheme development is that, if a DCO applicant were to be given consent and such a consent were to include powers for the compulsory acquisition of HAL's assets, we could develop licensing and other arrangements to protect consumers in the circumstances of the scheme provided for by the DCO consent, including bringing forward modifications to HAL's licence to protect the interests of consumers.

While we are at an early stage in relation to these matters, this represents our initial thinking on these important matters. If you have evidence that supports a materially different interpretation of statute you should put this forward now and, if it were to be appropriate, we could take steps to further clarify these matters.

I hope that this clarifies both our position as set out in the Note and the aim of our discussion of these issues in CAP1722. As we have discussed, I shall place a copy of this letter on our website, along with your letter to which it responds.

Yours sincerely



Paul Smith
Director, Consumers and Markets Group

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[3] See paragraph 4.36ff of the Airports National Policy Statement. In the context of information provision, DCO applicants should note the requirement in paragraph 4.40 that "The applicant is expected to provide the CAA with the information it needs to enable it to assist the Examining Authority in considering whether any impediments to the applicant's development proposals, insofar as they relate to the CAA's economic regulatory and other functions, are capable of being properly managed."