

Informal Consultation Document:

**Proposal to remove the reference to
the Competition Commission for the
next price review (Q6)**

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Proposal

1. The Government wishes to seek your views on whether to exercise its power under section 40(9), Airports Act 1986 to direct that there should be no reference from the CAA to the Competition Commission for the next regulatory period (beginning 1 April 2014). We propose that any direction would be made towards the end of the first quarter of 2012, after the Civil Aviation Bill has entered Parliament. This is the point when CAA would otherwise begin its preparations for the referral to the Competition Commission.

Background

2. The Civil Aviation Bill has been introduced into Parliament on the 19th January 2012 and will repeal and replace the airport economic regulatory framework under the 1986 Act. It is the Secretary of State's intention that the Q6 price reviews, which are due to come into force in April 2014, should be addressed under the reformed regime so that passenger benefits can be realised as soon as possible.
3. Under the current regime, the CAA is required to make a reference to the Competition Commission before imposing or modifying any mandatory airport charges conditions on a designated airport. The Competition Commission is then required to make recommendations to the CAA. As part of the reference, the Competition Commission can specify how the airport operator has operated, or might be expected to operate, against the public interest and how any adverse effects could be remedied or prevented. CAA then needs to give effect to public interest findings but has discretion as to how. The intention of the reference is to provide CAA with an independent expert opinion so as to improve the decision taking process and to introduce some degree of accountability, particularly as the only route for industry to challenge is through the courts by way of judicial review. The reference itself can take around 6 to 12 months.
4. Under the proposals within the Bill, the Competition Commission reference would be removed as the five year price review process would be replaced by a licensing regime that will give the CAA powers to regulate more effectively. The Bill also proposes introducing a system of appeals to improve accountability. The Competition Commission will act as the appeal body against CAA decisions to impose or exclude conditions in the licences and subsequently against CAA's decisions to modify those licence conditions. This will apply from the date the licences are granted. Appeals may be brought by the licence holder, or any person whose interests are materially affected.

5. The CAA has advised the Government that making the reference to the Competition Commission could have undesirable consequences. CAA's advice was reflected in a letter sent from the previous Secretary of State to the Chair of the CAA in March 2011, and the Government has since confirmed that its position remains that it is presently minded to remove the reference subject to stakeholder views.
6. Reasons provided by the CAA were that "such a reference and eventual settlement would need to be framed under the present Act – and may prove to be otiose if the new legislation is enacted in the intended timeframe." The CAA believe it would not be in users' interests to start preparations for the next price reviews for designated airports (known as "Q6" which would come into force on 1 April 2014) under the current legislative framework and then switch to another framework (as proposed in the Bill) part way through as it could impose unnecessary burdens on the sector and frustrate constructive engagement and discussions about capital investment.¹ The CAA also indicated in the letter that making the reference "could also make it more difficult for the sector to plan its capital investment for the next round of price controls. The mandatory reference could introduce unnecessary costs and uncertainty into the process, for [the CAA], the Competition Commission and the sector, in a manner that would undermine the Government's policy objective of reducing unnecessary regulation."²

Rationale for Proposal

7. Although the Government will seek to ensure the new regime envisaged in the Bill can be enacted for Q6, this is a matter for Parliament. If the Bill becomes law then the reference to the Competition Commission will have been unnecessary incurring a significant expense for industry in the process. Alternatively, there is a risk that the new regime may not be enacted in time and therefore price controls would be imposed under the Airports Act 1986, and if there was no reference the process would not have the benefit of the Competition Commission's expert advice.
8. To mitigate the above risks and subject to considering consultees' responses we are presently minded to disapply the reference after the Bill has received second reading in Parliament (see para 2 above). In making her decision, the Secretary of State will have regard to all relevant matters, including the progress of the Bill.
9. Arguments for the proposal are that removing the Competition Commission reference under the context of the current regime would reduce burdens on industry in the current economic climate, which are

¹ Definition of users' are set out in section 82(1) Airports Act 1986.

² <http://www.caa.co.uk/docs/5/ergdocs/20110314HammondHuttonAviationBill.pdf>

not in the interests of airport users. The cost of a reference to the Competition Commission is approximately £1.2m plus resource burdens. Our best estimate assumes the avoided cost to the airport to be around £1.25m³. There are likely to be costs on airlines and the CAA, which include management time and administrative burdens. In addition, it has been argued that the Competition Commission's recommendations for the price control are non-binding anyway and that the CAA consults stakeholders in reaching its final decision. We also note the views of CAA set out in paragraphs 5 & 6

10. Arguments against the proposal are that the reference balances and constrains CAA's powers and provides an independent expert view in parallel to the CAA. Also, as the CAA can only be enabled by the Competition Commission to impose new public interest conditions through the reference, its removal would mean that the CAA would not be able to impose new public interest conditions but only change or remove existing ones. We are seeking your views on the extent to which this is an issue.
11. An alternative to removing the automatic reference would be to have the reference for Q6 and introduce the new regime to coincide with the timing of Q7 (i.e. around 2019). However, we do not consider this attractive because it would not achieve a key objective which is for Q6 to be made under the new regime if this has become law. We invite views on other options that would achieve our objective.
12. On balance, we are inclined to think that it is in users' interests to disapply the reference at an appropriate point during the passage of the Bill through Parliament as it facilitates the current regime by reducing processes and burdens given a new regime is on the horizon. We believe that on the current timing for the Bill this offers some assurance to users on the risk of Q6 not being in place under the new regime.
13. Your views are invited on the proposal that the Secretary of State directs that there should be no reference to the Competition Commission for the next price review under current legislation as set out in the above paragraphs.
14. In particular your views are sought on how disapplying a reference may (or may not):
 - (a) further advance or inhibit the reasonable interests of users of airports;
 - (b) promote or undermine the efficient, economic and profitable operation of such airports;
 - (c) encourage or discourage investment in new facilities at airports in time to satisfy anticipated demands by the users of such airports; and

³ Source:

Draft Civil Aviation Bill: Impact Assessment for Reforming the Framework for the Economic Regulation of Airports, published November 2011.

(d) impose the minimum restrictions that are consistent with the performance by the CAA of its functions under those sections, or have the opposite effect;

(see S.39(2), Airports Act 1986).

How to respond

15. This informal consultation begins on 19th January 2012 and will run until 29th February 2012. Please ensure your response reaches us by that date.

Please send responses to:

16. A Soo
Department for Transport
Great Minster House
33 Horseferry Road
London, SW1P 4DR

Email: civilaviationbill@dft.gsi.gov.uk
Tel: 0207 944 4326

17. When responding, please state whether you are responding as an individual or representing the views of an organisation. If responding on behalf of a larger organisation please make it clear who the organisation represents, and where applicable, how the views of the members were assembled.
18. If you have any suggestions of others who may wish to be involved in this process please contact us.

Freedom of Information

19. Information provided in response to this informal consultation, including personal information, may be subject to publication or disclosure in accordance with the access to information regimes (these are primarily the Freedom of Information Act 2000 (FOIA), the Data Protection Act 1998 (DPA) and the Environmental Information Regulations 2004).
20. 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.
21. 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.

22. The Department will process your personal data in accordance with the DPA and in the majority of circumstances this will mean that your personal data will not be disclosed to third parties.