

Summary of responses to the informal consultation on whether the Secretary of State should remove references to the Competition Commission

The Department for Transport (DfT) conducted an informal consultation with aviation industry stakeholders on whether to remove the Competition Commission references in respect of mandatory airport charges conditions for Heathrow, Gatwick and Stansted airports¹. The consultation was held between 19th January and 29th February 2012. This document provides a summary of stakeholder responses to that consultation.

Background

The Civil Aviation Bill ("the Bill") was introduced into Parliament on the 19th January 2012 and received Royal Assent on the 19th December 2012 to become the Civil Aviation Act 2012 ("the 2012 Act"). The 2012 Act will repeal and replace the airport economic regulatory framework under the Airports Act 1986 ("the 1986 Act"). It is the Secretary of State's intention that the next price control reviews (known as "Q6"), which are due to come into force in April 2014, should be set under the reformed regime so that passenger and cargo owners benefits can be realised as soon as possible.

Under the 1986 Act regime, the CAA is required to make a reference to the Competition Commission before imposing or modifying any mandatory airport charges conditions in relation to a designated airport. The Competition Commission is then required to make recommendations to the CAA.

The 2012 Act removes the Competition Commission reference as the five year price review process is replaced by a licensing regime that will give the CAA powers to regulate more effectively. The 2012 Act also introduces a system of appeals for key CAA decisions regarding its airport economic regulation functions. The Competition Commission will act as the appeal body against CAA decisions to include or exclude conditions in the licences and subsequently against CAA's decisions to modify those licence conditions.

Responses

The DfT received a total of 11 written response from the following stakeholders. A summary of the respondents' views is presented below in anonymised form².

¹ Heathrow, Gatwick and Stansted airports have been designated by the Secretary of State under section 40 of the Airports Act 1986. The consequence of this designation is that the CAA must impose five-year price controls on each airport operator.

² With the exception of the Competition Commission who were the sole competition authority to respond to this consultation.

The respondents were:

Gatwick Airport Ltd.
BAA Airports Ltd.
The Manchester Airports Group Plc
British Airways Plc
United Air Lines, Inc.
Ryanair Ltd.
easyJet Plc
The International Air Transport Association (IATA)
London (Heathrow) Airline Consultative Committee
British Air Transport Association (BATA)
Competition Commission

Summary of Consultations Responses

Airport operators

The proposal was generally well received by airport operators and all broadly supported the removal of the references. The specific concerns raised and comments made by one airport operator were:

- Failure to disapply the Competition Commission references may compromise the Competition Commission's independence if it subsequently had to hear an appeal on a previously referred matter.
- The possible adverse effect of disapplying the references would be mitigated by airlines devoting additional resources to the earlier stages of the process.
- The Competition Commission merely provides non-binding advice/recommendations. So switching off the references should not cause a material impact either way on users' interests, the efficient economic and profitable operation of airports or the provision of investment in new facilities.
- DfT has created a clear expectation with investors that the references will be disappplied. The market has factored this in. A change of position would create uncertainty and would not promote the efficient, economic and profitable operation of airports.
- Maintaining the references would undermine constructive engagement between airlines and airport operators.
- Retaining the references would affect operators' business, financial and regulatory planning. It will not have the capacity to adopt a "dual track" approach (i.e. progressing work under the 1986 Act and under the Bill).

Another airport operator supported removing the references for the reasons set out in DfT's consultation document, which were based on CAA advice. In particular these were:

- The Competition Commission references may prove otiose if a new Bill is enacted.

- It is not in users' interests to start preparations for the next price controls under the 1986 Act regime and then switch part way through to another framework.
- Making the Competition Commission references could make it more difficult for the sector to plan its capital investment for the next round of price controls.
- The mandatory Competition Commission references 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.

This respondent also stated its belief that the risk the Bill will not be enacted in time for Q6 to be "minimal".

A third airport operator was also supportive.

- This airport operator believes it is in all parties' interests for the early stages of the current Q6 price reviews to be carried out so far as possible under the new Bill regime and removing the Competition Commission references will be help in this regard.
- This airport operator shared the concern that to do otherwise would entail the risk of the Competition Commission being involved twice: under the 1986 Act reference and as an appeal body under the Bill regime. This would be contrary to imposing the minimum restrictions towards achieving efficient regulatory outcomes.
- Any prejudice to airlines will be compensated for through the new appellate role for the Competition Commission.
- The cost to airport operators of the Competition Commission references is higher than that suggested in the consultation document.
- Continuing with the Competition Commission references would provide a significant distraction to both airlines and airport management.
- Retaining the references does little to further the interests of users, creates a more tortuous process and does not promote efficient, economic and profitable operation of airports.

Airlines

Airlines were broadly positive although most held some concerns and one airline was opposed to the proposals. One airline's response contained the following points:

- There is a small risk that Q6 will need to be decided under the 1986 Act. That risk, if real, needs to be addressed properly.
- There are risks of significant additional costs to passengers if the references are removed and the direct financial benefits of doing so are smaller than suggested in the consultation document.

- Accordingly, it was suggested to either defer any decision to switch off the references or to ask the CAA and the Competition Commission to commit to a voluntary appeals process based on the Bill's provisions.

One airline stated that it opposed the measures for the following reasons:

- The CAA's arguments to switch off the references are not compelling.
- Even if an increased regulatory burden may result from retaining the references and then switching to the Bill process, this is justified where the alternative is a regulatory process deprived of the references to the Competition Commission and any right of appeal to the Competition Commission.
- It is unclear what negative impact the Competition Commission references could have on discussions about capital investment or how it could frustrate constructive engagement.
- The Competition Commission, in the past, has illuminated flaws in capital plans.
- DfT's estimate of £1.2m plus resources for the references is a relatively small sum compared to the £billions in capital and operational expenditure plans which the Competition Commission covers in its reviews.
- The Competition Commission recommendations are a necessary and important step in the regulatory process: as evidenced by the resources allocated by airport operators and airlines to this process.

One airline supported removing the references because:

- It will streamline decision making and reduce costs for airlines, airport operators and the CAA.
- As the Bill will remove the references, doing so in advance will ensure that a single regime applies throughout the CAA's current deliberations on airport charges.
- There will be a right of appeal to the Competition Commission ensuring accountability of the CAA's decisions.

One airline stated that it adopted the position of its industry body. This airline's support was stated to be conditional on new legislation providing other safeguards, specifically airline rights of appeal to the Competition Commission. However, this airline's position would change if the Bill was altered so airlines could not directly appeal to the Competition Commission.

Industry bodies

One industry body supported the proposals. It wrote that the basis of this support is that the new legislation will give better tailored safeguards. However, this group's position would change if the Bill was altered so airlines could not directly appeal to the Competition Commission.

Another industry representative group expressed the following views:

- Airlines highly value the Competition Commission involvement in the price review process. Its independent, expert and automatic involvement has added accountability and necessary checks and balances to the process.
- The expenditure on independent Competition Commission reviews is cost effective and value for money. It is a vital and efficient part of the process.
- If the Bill is not passed in time for Q6, there should be continued Competition Commission involvement.
 - Preferred Approach: CAA should commit to a voluntary appeal.
 - Otherwise: Defer the decision until late 2012, when the Bill's progress is more certain but still allows time for the Competition Commission reviews without disrupting the CAA's timetable.

A third industry body wrote that it supported the Secretary of State's proposals provided the Competition Commission had some involvement in the process and it had the following additional comments:

- If the Bill did not become law in time for Q6, the impact could be very large and adverse if there was no involvement of the Competition Commission.
- It would like the Competition Commission and the CAA, if the Bill is not enacted in time, to hear requests to review Q6 decisions on the same basis as provided for under the Bill.

Competition Commission

The Competition Commission did not in principle object to removing the references and had the following comments:

- The Competition Commission would be very concerned and believed there would be undesirable consequences if it had no opportunity for involvement in Q6 (either by way of a reference or an appeal).
- Historically, the Competition Commission has provided an expert, independent review of the regulator's decision. Stakeholders recognise that this improves accountability.
- Without the Competition Commission, the only recourse for those affected by the decisions is judicial review. This would create greater uncertainty for all involved than the routine involvement of the Competition Commission in the price control process.
- DfT should delay exercising its powers of direction for "as long as possible consistent with the need for the CAA to discharge its responsibilities in a timely fashion". This minimises the risk of the Competition Commission being inadvertently cut out of the process.