

Granting CAA Concurrent Competition Powers: Analysis of Consultation Responses and Government's Decision

Introduction

Government wants to improve service at airports to benefit the passenger in the absence of new runways at Heathrow, Gatwick and Stansted. As part of reforms to the economic regulation of airports, the Civil Aviation Authority (CAA) will be granted powers to apply competition law in respect of airport operators and providers of airport services. This will support the Government's desire to secure improvements to airports through the development of competition both between airports and between those parties that provide airport services.

Granting the CAA concurrent competition powers and the scope of such powers were the subject of two separate consultations by the previous administration: *Reforming the Framework for the Economic Regulation UK Airport¹s*, which ran from 9th March to 5th June 2009; and *Regulating Air Transport: Consultation on Proposals to update the Regulatory Framework for Aviation²*, which ran from 10th December 2009 to 18th March 2010. The responses to this consultation are summarised below. The Government has considered them and intends to give the CAA concurrent competition law powers with respect to services provided by airport operators and "third party" airport service providers. Under these proposals, the CAA would have powers to investigate infringements of UK and EU competition law and to conduct market studies in the sectors it regulates, as well as to make Market Investigation References (MIRs) direct to the Competition Commission (CC).

CAA concurrent competition powers would be symmetric to powers already applied, in respect to all markets, by the Office of Fair Trading (OFT) and will give the CAA additional powers to investigate and remedy anti-competitive behaviour across the complex market environment of an airport. It is intended that these powers will be applied concurrently with the OFT and jurisdiction will be underpinned by a Memorandum of Understanding (MoU) between the OFT and the CAA.

¹ DfT (March 2009) *Reforming the framework for the economic regulation of airports in the UK*, available at <http://www.dft.gov.uk/consultations/archive/2009/ukairports/>

² DfT (Dec 2009) *Regulating Air Transport: Consultation on proposals to update the regulatory framework for aviation*, available at <http://www.dft.gov.uk/consultations/closed/regulatingairtransport/>

Background

In March 2009, the previous Government consulted on giving the CAA concurrent competition powers over airport operators as part of reforming the framework for the economic regulation of UK airports consultation³.

In December 2009, the previous Government also consulted on proposals to update the regulatory framework for aviation. One of the proposals of the consultation was to extend the scope of the concurrent powers envisaged for the CAA to include “third party” airport service providers, i.e. providers of services at airports other than airport operators. Wider CAA powers were intended to capture all other services and facilities provided at an airport in connection with the handling and processing of passengers, baggage and cargo while on airport premises and the landing (and taking off), taxiing and servicing of aircraft whilst on the ground⁴.

Consultation Responses

Respondents to the March 2009 consultation represented a wide spectrum of bodies with aviation interests. Airport operators were generally in favour of the proposals although one major airport operator suggested that two particular criteria be met: first, that the CAA be reformed in line with the Pilling Review and second that the CAA issue guidance concerning the implementation of these new powers and agree suitable application along with the OFT. Other supporters included a number of major UK airlines.

Some organisations objected to the proposals and thought that too many powers should not reside with one organisation and that the clear separation of powers between the OFT, CAA and CC should be maintained.

The majority of respondents to the December 2009 consultation, favoured the proposal of extending the scope of concurrency powers to cover third party providers of airport services. The supporters included a wide range of organisations including airport operators, airlines, travel agents and consumer bodies. Objectors were mainly confined to the General Aviation community. Their objections had three common themes:

- Existing competition law arrangements and the CAA’s existing economic regulation powers were adequate to address consumer protection concerns;
- Further extending the scope of concurrency duplicated the consumer protection role of the OFT and the CC – increasing costs to industry; and

³ DfT (March 2009) *Reforming the framework for the economic regulation of airports in the UK*, Question 7.7, Page 93, available at <http://www.dft.gov.uk/consultations/archive/2009/ukairports/>

⁴ DfT (Dec 2009) *Regulating Air Transport: Consultation on proposals to update the regulatory framework for aviation*, Question 5.5, Page 43, available at <http://www.dft.gov.uk/consultations/closed/regulatingairtransport/>

- The CAA's remit should be confined to safety and operations at airports.

Government Response

The Government recognizes that there are a number of benefits associated with granting the CAA concurrent competition law powers in the sector it regulates. The granting of these powers is designed to support the development of competition both between airport operators and between suppliers of airport services, driving service improvements at airports, ultimately to the benefit of the passenger.

The sectoral regulator has detailed knowledge of the airports sector and the Government believes that the CAA will often be better placed than the OFT to identify competition concerns in the relevant markets for airport services, even in the absence of specific complaints. If the CAA took a more active approach to enforcing competition law at airports than the OFT, this could result in some additional, albeit marginal, resource costs associated with the proposals. However, a more active approach should further deter relevant firms from engaging in anti-competitive practices, which would benefit passengers.

In relation to services provided by regulated airport operators, the CAA will have the discretion to decide whether it is more appropriate to use concurrent competition powers or sector specific powers under the conditions of the license. The CAA will be prohibited from pursuing action under both regimes in respect of the same issue.

Extending the scope of the CAA's concurrency powers to include airport services provided by third parties would enable the CAA to conduct a market study covering the full range of services provided at an individual airport. Where appropriate, the CAA could make an MIR to the CC, which would be able to remedy market features found to have an adverse effect on competition. The CAA have pointed to internal work conducted by their Consumer Protection Group on the through-airport passenger experience and the co-ordination between different service providers at airports as an example of the kind of issue that could have been addressed by wider concurrency powers. Absent the power to make an MIR to the CC, the CAA currently has no mechanism for remedying such competition concerns. The threat of an MIR should in many cases be sufficient incentive on service providers to voluntarily change behaviour deemed detrimental to the interests of passengers or other service providers operating in the same market.

One of the main concerns of objectors was that of duplication between the CAA and the OFT in how they exercise their concurrent competition powers. However, concurrency between the CAA and the OFT simply means that the exercise of these powers may be carried out by the sectoral regulator rather than the OFT. The Government agrees that there should be close consultation between the CAA and OFT in deciding how the new CAA powers should be applied. It is our intention that jurisdiction will be underpinned by a

MoU between the two organisations outlining how new CAA powers will be implemented and the scope of such powers, which should prevent duplication of effort and resource. The purpose is to ensure that regulation on the same issue by two separate authorities is avoided. The particular powers proposed do not (as some objectors appeared to think) give the CAA any overlap with the responsibilities of the CC.

In relation to the objection that suggests the CAA's remit should be consigned to safety and operations of airports, the CAA already has a statutory obligation to carry out the economic regulation of airports as part of provisions of the Airports Act 1986. Therefore, economic regulation has been a feature at designated airports (Heathrow, Gatwick and Stansted and until recently Manchester) and reforms will fundamentally affect the way in which the CAA discharges its economic regulatory functions in respect to airports deemed to have substantial market power. These functions will sit alongside (and not replace) other CAA duties on safety and operations.

After careful consideration of all consultation responses received, the Government intends to grant the CAA concurrent competition powers with respect to services provided by airport operators and "third party" airport service providers.