

H7 HEATHROW AIRPORT LICENCE MODIFICATION APPEALS

Final Determination on Costs

7 February 2024

© Crown copyright 2024

You may reuse this information (not including logos) free of charge in any format or medium, under the terms of the Open Government Licence.

To view this licence, visit www.nationalarchives.gov.uk/doc/open-government-licence/ or write to the Information Policy Team, The National Archives, Kew, London TW9 4DU, or email: psi@nationalarchives.gov.uk.

Website: www.gov.uk/cma

**Members of the Competition and Markets Authority
who conducted these appeals**

Kirstin Baker (*Chair of the Group*)

Juliet Lazarus

Paul Muysert

Chief Executive of the Competition and Markets Authority

Sarah Cardell

The Competition and Markets Authority has identified information which the group considers should be excluded from any published version of the final document, having regard to section 29 of the Civil Aviation Act 2012.

The Competition and Markets Authority has excluded from this document information which the group considers should be excluded having regard to section 29 of the Civil Aviation Act 2012. The omissions are indicated by [✂].

Contents

Final Determination	6
1. Introduction.....	6
2. The appeals.....	6
3. Legal framework in relation to costs	8
CMA's duties and powers in relation to costs	8
Payment of CMA's costs	9
Discretion to order inter partes costs	11
4. Payment of the CMA's costs	13
Relevant context.....	13
Parties' submissions.....	15
Apportionment of CMA's costs between the Appellants and the CAA.....	15
Apportionment of CMA costs as between HAL and the Airlines.....	19
Our assessment	20
General matters	20
Ground A.....	21
Ground B	22
Ground C	23
Ground D	24
Ground E.....	25
Summary	26
Final determination on the CMA's costs	27
5. Inter partes costs.....	27
Requests for inter partes costs.....	27
HAL's submissions.....	28
The CAA's submissions	29
The Airlines' submissions.....	31
Our assessment	31
Introduction	31
Whether to award inter partes costs.....	31
Approach to apportioning the CAA's costs.....	33
HAL's costs	34
Reasonableness of the CAA's claimed costs	39
Summary of conclusions	40
Final determination of inter partes costs.....	40
6. Interest	41
7. Final costs determination.....	41
Appendix A: Statement of the CMA's costs	43
Overview	43
CMA's costs	43
Overheads.....	43

Staff costs	44
Panel member costs	45
Non-staff costs	45
Total CMA costs to recover	46
Attribution of the CMA's costs to 'general', grounds and 'costs'	46

Appendix B: Calculation of the CAA's awarded costs49

Tables

Table 2.1 : Grounds heard together in determining the appeals	7
Table 4.1 : Apportionment of CMA's costs to each party by ground (percentage)	26
Table 4.2 : Apportionment of CMA's costs to each party (amount (£))	26
Table 5.1 : Illustration of successful party and apportionment in principle of inter partes costs per ground (based on CMA costs analysis)	32
Table 1 : Staff costs for the substantive determination	44
Table 2 : Staff costs for this determination on costs	45
Table 3 : Panel member costs for the substantive determination	45
Table 4 : Group costs for this determination on costs	45
Table 5 : Non-staff costs	46
Table 6 : Total CMA costs to recover	46
Table 7 : Allocation of CMA costs to general, grounds and costs (£)	47
Table 8 : Allocation of CMA costs to grounds (£)	47

Final Determination

1. Introduction

- 1.1 This document is the Competition and Markets Authority (the **CMA**)’s final determination on costs (**FDC**). These costs are those arising from the appeals by British Airways plc (**BA**), Delta Air Lines Inc (**Delta**), Heathrow Airport Ltd (**HAL**) and Virgin Atlantic Airways Ltd (**VAA**) (together, the **Appellants**) against the Civil Aviation Authority (**CAA**)’s decision of 8 March 2023 under section 22 of the Civil Aviation Act 2012 (**the Act**) which set the price control and associated regulatory framework that applies to HAL during the H7 price control period (1 January 2022 until 31 December 2026) ‘Economic regulation of Heathrow Airport: H7 Final Decision’, CAP2524, March 2023 (**Final Decision**).

2. The appeals

- 2.1 The CMA conducted these appeals in accordance with provisions contained in sections 24 to 30 and Schedule 2 of the Act and Airport Licence Condition Appeal rules and guidance produced pursuant to the Act:
- (a) the Airport Licence Condition Appeal Rules (CMA172) (the **Rules**);¹ and
 - (b) the Airport Licence Condition Appeal Guide (CMA173) (the **Guide**).²
- 2.2 On 17 April 2023, HAL applied for permission to appeal against the Final Decision pursuant to section 25 of the Act on five grounds.
- 2.3 On 18 April 2023, BA, Delta and VAA (together, the **Airlines**) each applied for permission to appeal against the Final Decision pursuant to section 25 of the Act on three grounds.
- 2.4 On 11 May 2023, the CMA granted permission to appeal to all appellants, on all the grounds requested, on condition that certain of the grounds raised in each application be considered together with related grounds raised by other applicants. The various grounds were grouped for the purpose of determining the appeals as set out in Table 2.1.

¹ [The ALCA Rules](#) (CMA172).

² [The ALCA Guide](#) (CMA173).

Table 2.1: Grounds heard together in determining the appeals

	<i>HAL ground</i>	<i>BA ground</i>	<i>Delta ground</i>	<i>VAA ground</i>	<i>Allocation for this determination</i>
RAB adjustment	Ground 1	Ground 2	Ground 3	Ground 3	Ground A
Cost of Capital	Ground 2 (Cost of equity – Equity beta) Ground 3 (Cost of debt - embedded debt)	Ground 3 (WACC)	Ground 2 (WACC)	Ground 2 (WACC)	Ground B
Passenger forecast / forecasting	-N/A-	Ground 1	Ground 1	Ground 1	Ground C

Source: *Permission decisions by the CMA.*³

- 2.5 The two additional grounds raised only by HAL related to an element of the Final Decision known as the ‘AK factor’ and to an element involving capex incentives. The former was HAL Ground 4 in its appeal and is referred to as Ground D for the purposes of determining the appeals and costs. The latter was HAL Ground 5 and is Ground E in the determination of the appeals and costs.
- 2.6 On 22 May 2023, the CMA received applications for permission to intervene in the appeals from BA, Delta, and HAL. On 5 June 2023, the CMA granted permission to all interveners to intervene on grounds raised by other parties’ appeals.
- 2.7 On 8 September 2023, we issued our provisional determinations (**Provisional Determination**) of the appeals to the CAA and the Appellants (together, the **Parties**) and invited comment. On 22 September 2023, the Parties submitted their responses to the Provisional Determination.
- 2.8 On 17 October 2023, we notified our final determinations of the appeals, together with the Order, (**Final Determination**) to the Parties, dismissing two grounds of appeal in full (Ground A: RAB Adjustment and Ground E: Capex incentives) and partially dismissing three grounds of appeal (Grounds B: Cost of capital, C: Passenger forecast/Passenger Forecasting and D: AK factor).
- 2.9 The CMA is required by Schedule 2, paragraph 32(2) of the Act to make an order for the recovery from the Parties of the costs it incurred in connection with the appeals. The CMA may also, pursuant to Schedule 2, paragraph 32(5) of the Act, require a party to the appeals to make payments to another party in respect of costs reasonably incurred by that other party in connection with the appeals. These are known as inter partes costs.
- 2.10 On 18 October 2023, we invited any party seeking an award of costs in its favour to provide a statement of costs.

³ See case page: <https://www.gov.uk/cma-cases/h7-heathrow-airport-licence-modification-appeals>

- 2.11 On 17 November 2023, we received representations as to the approach to the recovery of the CMA's costs and inter partes costs from the Parties, together with statements of costs from the CAA and HAL.
- 2.12 On 19 December 2023, having taken the Parties' submissions into account, we issued our provisional determination on costs (**PDC**).
- 2.13 On 11 January 2024, we received representations from the Parties on our PDC.⁴
- 2.14 Having taken into account the Parties' submissions dated 11 and 18 January 2024, we therefore issue this final determination on costs (**FDC**).

3. Legal framework in relation to costs

CMA's duties and powers in relation to costs

- 3.1 Paragraph 32 of Part 6 to Schedule 2 of the Act sets out the CMA's duties and powers in relation to costs in determining an appeal brought under section 25 of the Act. So far as relevant, it provides:
- (2) A group that determines an appeal must make an order requiring the payment to the Competition and Markets Authority of the costs incurred by the Competition and Markets Authority in connection with the appeal.
 - (3) An order under sub-paragraph (2) must require those costs to be paid—
 - (a) where the appeal is allowed in full, by the CAA,
 - (b) where the appeal is dismissed in full, by the appellant, and
 - (c) where the appeal is allowed in part, by the appellant and the CAA in such proportions as the group considers appropriate, subject to sub-paragraph (4).
 - (4) The order may require an intervener in the appeal to pay such proportion of those costs (if any) as the group considers appropriate.
 - (5) A group that determines an appeal may make such order as it thinks fit requiring one party to the appeal to make payments to

⁴ On 11 and 18 January 2024, we received representations as to confidentiality from the Parties in relation to the information contained in the PDC with respect to the publication of the FDC.

another in respect of costs reasonably incurred by the other party in connection with the appeal.

(6) A person who is required to make a payment by an order under this paragraph must comply with the order before the end of the period of 28 days beginning with the day after the making of the order.

(7) If that person does not do so, the unpaid balance carries interest at a rate specified in the order or determined in accordance with the order.

(8) In this paragraph, references to an intervener in an appeal, and to a party to an appeal, include a person who was granted permission to intervene in the appeal and subsequently withdrew from the appeal.

3.2 Paragraph 35(3) of Part 6 to Schedule 2 of the Act provides that references in Schedule 2 of the Act to a ‘party’ are references to (a) the appellant; (b) an intervener; or (c) the CAA.

3.3 The Rules⁵ and the Guide⁶ make further provisions in relation to costs.

3.4 Before making any order for costs, the CMA will provide the parties with a provisional determination on costs and a draft of the costs order and give them a reasonable opportunity to make representations on each.⁷

3.5 In the following paragraphs, we address in more detail the considerations that are relevant to determinations of the CMA’s costs and inter partes costs.

Payment of CMA’s costs

3.6 Paragraph 32(2) of Part 6 to Schedule 2 of the Act provides that the CMA’s costs in connection with an appeal must be recovered.

3.7 In addition to the factors for consideration at paragraphs 32(3) and (4) of Part 6 to Schedule 2 of the Act, the Rules and the Guide make further provisions in relation to the payment of the CMA’s costs.

3.8 Rule 19.1 of the Rules provides that:

When considering the appropriate proportions of the CMA’s costs to be paid by one of more of the parties where an appeal is partially allowed, the CMA will ordinarily follow the principle that

⁵ See Rule 19 of [the Rules](#).

⁶ See Chapter 6 of [the Guide](#).

⁷ Rules 19.2 and 19.6 of [the Rules](#) and paragraphs 6.3 and 6.5 of [the Guide](#).

costs follow the outcome of the appeal. This means that the CAA should normally pay the proportion of the CMA's costs incurred in connection with any appeal grounds allowed, and that the appellant should normally pay the proportion of the CMA's costs incurred in connection with the dismissed appeal grounds. The CMA will, however, also consider whether for each ground there are any good reasons to depart from this approach. The CMA might, for example, consider that good reasons exist for these purposes where a relevant ground of appeal is dismissed, but the CMA considers the ground of appeal was reasonably made in view of a relevant error made by the CAA in its decision and that error had a material impact on the time and expense of the CMA in addressing the ground of appeal to which it relates. In such a situation, the CMA might consider it appropriate for the CAA to pay the proportion of the CMA's costs incurred in connection with the relevant ground of appeal, notwithstanding that the ground of appeal was dismissed. This is likely to depend upon the magnitude of the error and whether the CAA had a reasonable opportunity to correct it prior to making its decision and whether the appellant could have reasonably raised the error with the CAA prior to initiating an appeal.

3.9 In its judgment in *British Telecommunications plc v CMA*⁸ (**BT v CMA**), the Competition Appeal Tribunal (**CAT**) set out some general observations on the recovery of CMA costs following the CMA's determination of a regulatory appeal. Although these observations were made in the context of an appeal brought under the Communications Act 2003, we consider the principles set out are applicable to the recovery of the CMA's costs in regulatory appeals generally. They include the following:

- (a) the purpose of a costs order is to enable the CMA to recover for the public purse costs incurred by it in connection with the appeal and is significantly different from that of the cost regimes in Civil Procedure Rules 44 or CAT Rule 104;⁹
- (b) the CMA will recover all its costs incurred in connection with the appeal, not just its direct costs;¹⁰

⁸ [British Telecommunications Plc v Competition and Markets Authority](#) [2017] CAT 11 (**BT v CMA**).

⁹ **BT v CMA** at [25].

¹⁰ In **BT v CMA** at [32], the CAT set out the level of detail the CMA should disclose of its costs to the parties at consultation stage, and this makes it clear that it is not just the CMA's direct costs which can be recovered. In addition, the broad language of paragraph 12(1) of the Schedule ('costs incurred by the CMA in connection with the appeal') implies that the CMA must recover not only direct costs such as staff costs, but also its other costs (including any external fees incurred).

(c) the CMA must make a broad, soundly based judgement as to its costs and as to the proportion of those costs for which the paying party is to be made liable;¹¹ and

(d) the CMA is not entitled to make an order in relation to costs incurred unreasonably or unnecessarily.¹²

3.10 The CMA will ensure that the costs order reflects the time and effort expended in the appeal by reference to each ground for the purposes of the apportionment bearing in mind each party's relative success.¹³

3.11 Where an appeal is partially allowed, an order for the CMA's costs:

should seek to reflect the substance of the appeal, and the time and effort expended by the [CMA] in connection with the substance of the appeal.¹⁴

Discretion to order inter partes costs

3.12 Paragraph 32(5) of Part 6 to Schedule 2 of the Act provides that the group determining an appeal may make an order for the payment of inter partes costs, including against an intervener (by virtue of paragraph 35(3) of Part 6 to Schedule 2 of the Act).

3.13 The Rules and the Guide set out further considerations the CMA will take into account when deciding whether and what order to make as regards inter partes costs.

3.14 Rule 19.3 of the Rules provides that:

The CMA Group that determines an appeal may also make such order as it thinks fit requiring one party to the appeal to make payments to another in respect of costs reasonably incurred by the other party in connection with the appeal.

3.15 Rule 19.5 of the Rules then provides that:

In deciding what order to make under Rule 19.3, the CMA may have regard to all the circumstances, including but not limited to:

(a) the conduct of the parties, including:

¹¹ [BT v CMA](#) at [24].

¹² [BT v CMA](#) at [29].

¹³ [British Gas Trading Limited v The Gas and Electricity Markets Authority](#) (BGT), at paragraph 9.7.

¹⁴ [BGT](#), at paragraph 9.4.

(i) the extent to which each party has assisted the CMA to meet the overriding objective;

(ii) whether it was reasonable for a party to raise, pursue or contest a particular issue; and

(iii) the manner in which a party has pursued its case or a particular aspect of its case;

(b) whether a party has succeeded wholly or in part;

(c) the proportionality and reasonableness of the costs claimed;

(d) whether any chilling effects would result from a costs order on the CAA.

3.16 As regards the apportionment of costs, paragraph 6.4 of the Guide provides that:

The CMA has discretion to make an order requiring a party to the appeal to make payments to another party in respect of costs reasonably incurred by the other party in connection with the appeal.¹⁵ The CMA may have regard to all the circumstances, including (as set out in Rule 19.5) the conduct of the parties, a party's degree of success and the reasonableness and proportionality of the costs claimed. [...]

3.17 In terms of the types of costs covered, paragraph 6.6 of the Guide provides that:

Where the CMA makes an order for costs in favour of one or more of the parties to the appeal under Rule 19.3, the costs recoverable may include all those fees, charges, disbursements, expenses and remuneration incurred by a party in the preparation and conduct of the appeal. However, the CMA will not normally allow any amount in respect of costs incurred before the CAA first published its decision.

3.18 As regards the proportionality and reasonableness of the costs claimed, the CMA will have regard to the following general principles:

(a) In deciding whether the costs claimed by a party are proportionate, the CMA will balance the costs claimed against the significance of the appeal on the overall level of the price control if the appeal had succeeded.¹⁶

¹⁵ Paragraph 32(5) of Part 6 to Schedule 2 of the Act.

¹⁶ [BGT](#), paragraph 9.21(c).

- (b) In deciding on what costs are reasonable, the exercise is one of standing back and seeking to arrive at an approach which does justice in all the circumstances of the case.¹⁷

4. Payment of the CMA's costs

Relevant context

4.1 Our assessment of the CMA's costs takes account of the following:

- (a) There were four appeals, which overlapped to differing degrees.
 - (i) All four appellants challenged the Final Decision in relation to the RAB adjustment (these grounds of appeal were heard together as Ground A) and in relation to aspects of the Final Decision concerning HAL's Cost of Capital (these became Ground B, under which there were three sub-grounds B1, B2 and B3).
 - (ii) All three Airlines (but not HAL) challenged the Final Decision in relation to the passenger forecast/passenger forecasting (these became Ground C).
 - (iii) HAL (but not the Airlines) challenged the Final Decision in relation to the AK factor (Ground D) and capex incentives (Ground E).
- (b) In general terms, the content of the Airlines' grounds of appeal and supporting evidence was very similar. The Airlines coordinated their appeals and in places used identical arguments and relied on jointly commissioned expert witness evidence. In other areas, they made similar – but not identical – arguments and relied on similar, but different, evidence. In contrast, HAL's grounds of appeal and the evidence it relied upon were unique to it (and opposed to that of the Airlines).
- (c) The appeals were complex and substantial (in terms of value, complexity and volume of evidence), although the individual appeal grounds were not all equally substantial in terms of the costs incurred in their determination:
 - (i) Combined, the Airlines submitted four individual and two joint witness statements with their Notices of Appeal (NoAs). HAL submitted 16 witness statements with its NoA.
 - (ii) Ground B was the most substantial ground. Grounds A and C were also substantial, though not as substantial as Ground B. Grounds D and E,

¹⁷ [BGT](#), paragraph 9.30, and [EDF Energy \(Thermal Generation\) Limited/SSE Generation Limited v Gas and Electricity Markets Authority and National Grid \(Electricity Transmission Plc \(Intervener\), Determination on costs](#), paragraph 30.

whilst still complex, were less substantial grounds, with a smaller volume of evidence and lower overall value.

- (d) The CAA filed a single Response supported by 12 witness statements. HAL intervened in support of the CAA in resisting the Airlines' appeals. Similarly, BA and Delta (but not Virgin) intervened in support of the CAA in resisting HAL's appeals. As with their NoAs, BA and Delta's notices of intervention had been coordinated and were similar (but not identical) in content. HAL also filed a short Reply to the CAA's Response (after applying for and receiving permission from the CMA).
- (e) In addition to the written statements of case, the appeals entailed substantial further written and oral submissions on the part of the Parties and substantial work on the part of the CMA. A teach-in took place in person at Heathrow Airport early in the proceedings. Hearings took place over four days during July 2023. In addition, the CMA issued 15 requests for further information to assist it in determining the appeals and issued five process notes to the Parties to provide additional guidance to them reflecting the particular circumstances of these appeals. The CMA produced a Provisional Determination of around 450 pages (excluding appendices). The Parties submitted written submissions on the Provisional Determination, which were taken into account by the CMA when producing its Final Determination, which was over 500 pages in length (excluding appendices).
- (f) The CMA's Final Determination was produced within the statutory deadline which applied to the appeals, namely 32 weeks beginning with the date of the Final Decision.¹⁸
- (g) In order to determine the substantial number of complex issues raised by the Parties in their appeals within the strict, and relatively short, statutory deadline, it was necessary for the CMA to employ a large, multi-disciplinary staff team and, as required by the Act, to appoint the appeal group. The staff team comprised delivery professionals, economists, financial experts and lawyers.

4.2 The total CMA costs of the appeals were £1,208,000¹⁹ (see Appendix A for a detailed statement of costs). These costs include:

- (a) CMA staff, contractors', and panel members' costs;
- (b) external advisers' costs (Counsel);

¹⁸ On 16 May 2023 the CMA decided to extend the 24 week period for the determination of the appeals by eight weeks to 17 October 2023. The statutory period for determining the appeal, and rules regarding extending this period, are found within section 28 of the Act.

¹⁹ Rounded to the nearest £100. The unrounded amount to be recovered within the Order is order is £1,208,014.

(c) CMA overhead allowance (defined as a standard percentage uplift of relevant staff and panel member costs); and

(d) non-staff costs and disbursements (for example, transcription costs).

4.3 Where possible, the CMA recorded the time spent on the appeals by the staff team and appeal group by ground. However, a portion of this time, and the CMA's consequent costs of the appeals, is not attributable to specific grounds. These non-specific costs include those of the work involved in:

(a) drafting sections of the Provisional Determination and Final Determination which were common to the appeals (eg the Legal Framework chapter);

(b) certain internal meetings concerning the general management of the appeals, rather than specific grounds;

(c) correspondence, communication and publication throughout and at the end of the appeals; and

(d) the determination of the relevant costs matters.

4.4 Although the CAA was the clear overall successful party, each of the appeals was allowed in part. The CMA therefore must require those costs to be paid 'in such proportions as the group considers appropriate'.²⁰ The Guide notes that the CMA's costs ordinarily follow the principle that costs follow the outcome of the appeal but that the CMA will consider whether there are good grounds to depart from that approach.²¹

Parties' submissions

4.5 The Parties made submissions in relation to costs on 17 November 2023 and, following our PDC, on 11 January 2024. We summarise the Parties' submissions by topic.

Apportionment of CMA's costs between the Appellants and the CAA

Submissions on Parties' success

4.6 The Parties' submissions on success focused on Grounds B, C and D, as HAL and the Airlines accepted that the CAA had wholly succeeded in defending the appeals on Grounds A and E.

²⁰ Schedule 2, paragraph 32(3)(c) of the Act.

²¹ Guide, paragraph 6.2.

- 4.7 Prior to the PDC, the CAA submitted that it was broadly not wrong in the decision it took to set the H7 Price Control in the way and at the level that it did. Further, the matters remitted to the CAA for reconsideration were insubstantial, both individually and collectively. These narrow points had also taken up very little of the time and effort spent by the CMA in determining the appeals overall. Moreover, while the CAA had been required to reconsider the matters remitted to it, there was no finding that the substance of the CAA's decision was wrong. Given this context, the CAA submitted, the Appellants' successes were only technical in nature and it would be appropriate to order that between them the Appellants should bear all of the CMA's costs.²²
- 4.8 Following the PDC, the CAA modified its position. The CAA accepted that the Appellants had had some degree of success in relation to each of Grounds B, C and D. The CAA also accepted that it should bear a portion of the CMA's costs, albeit it submitted that the CAA should bear no more than 10% of the CMA's costs (as opposed to it bearing 14% of the CMA's costs as we had proposed in the PDC). A figure not greater than 10%, the CAA submitted, would reflect the CMA's overall conclusion that the CAA was not wrong in most of the decisions that had been appealed to us.²³ More specifically, in relation to Ground B, the CAA did not dispute our provisional assessment that it would be appropriate for it to bear 5% of the CMA's costs (in line with the 5% (CAA), 47.5% (HAL) and 47.5% (Airlines) split which we had proposed in our PDC).²⁴ However, the CAA made further submissions in relation to Grounds C and D:
- (a) In relation to Ground C, the CAA submitted that it should bear 2% of the CMA's costs (rather than 5% of the CMA's costs, which we had proposed in the PDC). The CAA submitted that the error that had been found – regarding the level of the Shock Factor – had little significance. The Shock Factor made up only a small element (less than 1%) of the total passenger forecast. Further, there had been important elements of the CAA's approach to the Shock Factor which had been upheld by the CMA (both points of principle and specific alleged errors such as double counting).²⁵
 - (b) In relation to Ground D, the CAA accepted that HAL had succeeded in part. However, the CAA submitted that it would be more appropriate for the CMA's costs of Ground D to be split 50:50 between itself and HAL (as opposed to the 95:5 split proposed in our PDC). A 50:50 apportionment of costs, the CAA submitted, would reflect the fact that it had succeeded on the principle that an adjustment based on the AK factor was appropriate; it would also help avoid incentivising 'scattergun' appeals; and would reflect the clear

²² CAA's costs submission dated 17 November 2023 (**CAA costs submission**), paragraphs 20-25.

²³ CAA's response to the PDC dated 11 January 2024 (**CAA response to PDC**), paragraphs 22-24.

²⁴ CAA response to PDC, paragraph 7.

²⁵ CAA response to PDC, paragraphs 7-15.

language and substance of the CMA's Final Determination on Ground D. The CAA submitted that the 95:5 split of costs that we had proposed in our PDC did not reflect appropriately the level or importance of the issues contained within Ground D that the CAA was successful in defending.²⁶

- 4.9 In their submissions prior to the PDC, the Airlines accepted that the CAA had largely succeeded in defending the appeals on Grounds B and C. However, they submitted that the CAA should bear a proportion of the CMA's costs to reflect the Airlines' success in a small part of their appeals under Ground B (in relation to the index linked premium) and under Ground C (in relation to the level of the Shock Factor). In relation to Ground C, the Airlines proposed that this proportion might be in the region of 5-10%. They did not make a similar proposal in relation to Ground B.²⁷ Following the PDC, the Airlines submitted that they were 'content with the provisional conclusions and consider that the CMA has approached apportioning the relevant costs in a sensible and proportionate way'.²⁸
- 4.10 Prior to the PDC, HAL submitted that it had achieved real success in its appeal under Ground D with regards to the mechanistic application of the AK factor adjustment in respect of 2020 and 2021 and that, as such, the CAA should bear 100% of the CMA's costs of this ground. HAL also highlighted criticisms of the CAA's approach under Grounds B and C. HAL therefore contended that the CAA should bear a portion of the CMA's costs under these grounds alongside the Airlines and itself.²⁹ Following the PDC, HAL made the following additional submissions:
- (a) In respect of Ground B, in which we had proposed in the PDC a split of costs of 5% (CAA), 47.5% (HAL) and 47.5% (Airlines), HAL submitted that a figure of 40% for HAL was more appropriate. HAL submitted that this figure would reflect the fact that the Airlines' Ground B appeals were larger overall than HAL's. Further, HAL submitted the split proposed in the PDC allocated too great a proportion of costs to HAL because the CMA had double counted the Airlines' partial success in relation to Ground B2.³⁰
 - (b) In respect of Ground D, in which we proposed in the PDC that the CMA should recover 95% of its costs of Ground D from the CAA and 5% of its costs from HAL, HAL maintained its position that the CAA should bear the CMA's costs of Ground D in full. It submitted that the CAA had not succeeded in part and that, as the successful party, it should not be held responsible for any of the CMA's costs.³¹

²⁶ CAA response to PDC, paragraphs 16-21.

²⁷ Airlines' costs submission dated 17 November 2023 (**Airlines costs submission**), paragraphs 2.6-2.9.

²⁸ Airlines' response to the PDC dated 11 January 2024 (**Airlines response to PDC**), paragraph 2.

²⁹ HAL's costs submission dated 17 November 2023 (**HAL costs submission**), paragraphs 11-12 and 27(d).

³⁰ HAL's response to the PDC dated 11 January 2024 (**HAL response to PDC**), paragraphs 4-8.

³¹ HAL response to PDC, paragraphs 10-12.

Submissions concerning departure from the ‘loser pays’ starting point

Airlines’ submissions regarding Grounds A and C

- 4.11 In their submissions prior to the PDC, the Airlines submitted that there were good reasons to depart from the ‘loser pays’ starting point under Grounds A and C.
- 4.12 Regarding Ground A, the Airlines submitted that they had reasonably understood the Final Decision as stating that the CAA had not carried out a review of its 2021 RAB Adjustment, but that – for the first time, during the hearing – the CAA had revealed that it had considered whether evidence had emerged of poor service quality in 2021. The Airlines’ understanding at the time of the appeal had left them with no other option but to appeal this part of the Final Decision (given the strict deadline for bringing appeals). This meant that it was appropriate that the CAA should contribute to part of the CMA’s costs in relation to this ground.³²
- 4.13 Regarding Ground C, the Airlines submitted that the methodology changed as between the publication of the Final Proposals and the publication of the Final Decision. This meant that the Airlines had no opportunity to engage with the CAA on its final methodology, which left them no other option but to bring an appeal on these points. According to the Airlines, taking into account the CAA’s partial loss on Ground C (see paragraph 4.9 above), overall it would be fair to apportion 15% of the CMA’s costs under Ground C to the CAA, and 85% of the CMA’s costs to the Airlines.³³
- 4.14 The Airlines did not make further submissions on these issues following the PDC.

HAL’s submissions regarding Ground E

- 4.15 In its submissions prior to the PDC, HAL submitted that the CAA had created disproportionate and unnecessary additional work in relation to Ground E by filing a lengthy new expert economic report which had been prepared by the consultancy NERA after the decision under appeal had been made. HAL noted that the report was 85 pages in length with more than 3,000 pages of exhibits and submitted that the report had not been relied on by the CMA in the Final Determination and, accordingly, the CAA had failed to assist the CMA in fairly and efficiently disposing of appeal Ground E. However, HAL did not propose how the CMA should re-apportion costs between itself and the CAA to reflect this unreasonable conduct, in its view, on the CAA’s part.³⁴ HAL did not make further submissions on Ground E following the PDC.

³² Airlines costs submission, paragraphs 2.4-2.5.

³³ Airlines costs submission, paragraphs 2.10-2.12.

³⁴ HAL costs submission, paragraph 20.

Apportionment of CMA costs as between HAL and the Airlines

- 4.16 The CAA did not comment on the apportionment of the CMA's costs as between HAL and the Airlines; it stated that this was a matter for the CMA to exercise its own judgement.³⁵
- 4.17 The Appellants' submissions on apportionment of the CMA's costs as between themselves focused on Grounds A and B, where the CMA had considered together HAL's and the Airlines' appeals. These submissions were made prior to the PDC, and neither HAL nor the Airlines made further submissions on these points following the PDC.
- 4.18 The Airlines submitted that costs incurred by the CMA in dealing with HAL's appeal under Grounds A and B should be allocated to HAL and the costs relating to the Airlines' appeals under Grounds A and B should be allocated to the Airlines. They submitted that it would not be appropriate to split equally the totality of the costs of these between HAL and the Airlines.³⁶
- 4.19 Further, the Airlines submitted that they had acted proportionately throughout the appeal and had taken significant steps to limit the volume of evidence provided to the CMA, including jointly instructing AlixPartners, their expert economists, to prepare expert evidence and other steps to coordinate throughout the proceedings, such as making joint oral submissions at the hearings and joint written submissions on the CMA's Provisional Determination. In contrast, they submitted, HAL's submissions and evidence had been voluminous and overlong.³⁷
- 4.20 With regards to Ground A, the Airlines submitted that HAL's appeal had been more substantial than their own and that the CMA would have incurred more costs dealing with it. They noted that HAL had submitted a greater volume of witness evidence under this ground and that more pages of the Final Determination dealt with HAL's appeal than the Airlines' appeals. They proposed that HAL should bear 55% to 60% of the CMA's costs. The Airlines proposed that the same approach should be taken with regards to Ground B and that HAL should bear around 65% of the costs allocated to the Appellants, given that HAL's appeal under Ground B had involved a significantly greater volume of witness evidence.³⁸
- 4.21 HAL submitted that those costs to be borne by the Appellants should be split four ways evenly between each of the four appellants (ie 25% each). HAL submitted that this was the appropriate approach because each of the appeals had been brought separately and individually. HAL submitted that the Airlines' NoAs had been largely duplicative in nature and that it had been open to them to have

³⁵ CAA costs submission, paragraph 25.

³⁶ Airlines costs submission, paragraphs 2.2-2.3, 2.7 and 2.15-2.20.

³⁷ Airlines costs submission, paragraphs 2.2-2.3, 2.7 and 2.15-2.20.

³⁸ Airlines costs submission, paragraphs 2.2-2.3, 2.7 and 2.15-2.20.

submitted a single NoA with accompanying company-specific evidence. The failure to do this had resulted in increased costs to all parties. In addition, HAL highlighted aspects of the Final Determination where the CMA had rejected the Airlines' appeals as unsubstantiated. HAL also criticised the Airlines' conduct in the hearing where certain evidential material (slides) had been handed up to the group (and HAL) during the course of the hearing, rather than circulated in advance.³⁹

Our assessment

General matters

- 4.22 Our starting point is the principle that costs follow the outcome of the appeal. That is, the Appellants pay the CMA's costs for grounds dismissed and the CAA pays the CMA's costs for grounds which were upheld. Where an appeal is partially allowed and partially dismissed in respect of a particular ground, the allocation of liability for the CMA's costs should broadly correspond to the extents to which the appeal is allowed and dismissed. Having considered the Parties' submissions on costs, we do not consider that there were any good reasons to depart from this approach in this case. We address the submissions regarding departures from the 'loser pays' starting point, and the extent to which each party has succeeded under each ground, on a ground-by-ground basis further below.
- 4.23 Regarding the apportionment of the costs to be borne by the Appellants, we reject HAL's submission that such costs should be split evenly between the four Appellants. Rather, we prefer the Airlines' submission that those costs incurred by the CMA in dealing with HAL's appeal should be allocated to HAL and those costs relating to the Airlines' appeals should be allocated to the Airlines. In our judgement this approach is fairer as it ensures that the recovery of the CMA's costs reflecting the reality of the burdens borne by the CMA in disposing of the differing appeals. We note that, to the extent that the CMA bore greater costs dealing with an 'airline' appeal because the same matter was raised by three airline appellants, rather than just a single airline appellant, our costs order will reflect this. HAL's proposed approach would unfairly penalise the Airlines since it would not reflect the reality that the significant coordination between them greatly reduced the burden in dealing with those appeals. We consider the proper apportionment of the CMA's costs between HAL and the Airlines on a ground-by-ground basis below.
- 4.24 For similar reasons, where the CMA has recorded costs as 'general costs' rather than as costs relating to a specific ground of appeal, we have decided to apportion those general costs pro rata across the different grounds of appeal according to

³⁹ HAL costs submission, paragraphs 19 and 27.

the proportion of staff and group time spent on each ground. We consider that this approach best reflects how costs have been incurred by the CMA in this case since the different grounds (A to E) did not overlap to any significant degree. It would not, in our view, be appropriate to seek to allocate them equally (25:25:25:25) across all four appellants (or 50:50 across HAL and the Airlines).

- 4.25 We also take into account, in connection with the allocation of liability for the CMA's costs between the Appellants, that both HAL and the Airlines criticised the other's conduct of the appeals and submitted that this should be reflected in the allocation of liability for the costs. All parties should focus their appeals as tightly as possible and submit evidence and information to the CMA and to one another in a timely way. There were shortcomings by the Parties in these regards but none that stood out more than another such as, in our judgement, to alter the balance of liability for the CMA's costs.
- 4.26 While we have the power to order interveners to bear a portion of our costs that we consider appropriate,⁴⁰ in this case we do not intend to exercise this power. In general, we found the interveners' submissions to be a helpful supplement to the CAA's response. Further, the interveners are all parties to the case (only VAA did not intervene) and so will be bearing a portion of our costs in any event. Accordingly, we do not consider it appropriate to exercise this power in relation to these appeals.

Ground A

- 4.27 The CAA wholly succeeded under this ground and, in our view, there are no good reasons to depart from the 'loser pays' principle. Accordingly, we consider that 100% of the CMA's costs in relation to this ground should be borne by the Appellants.
- 4.28 We reject the Airlines' submission that the CAA should bear a portion of the CMA's costs on the basis that they had no other option but to appeal the Final Decision because it was not clear – until the hearing – that the CAA had considered whether evidence had emerged of poor service quality in 2021 (see paragraph 4.12 above). At paragraphs 5.298 to 5.315 of the Final Determination we examined the CAA's contemporaneous statements regarding the contingencies that attached to the 2021 RAB Adjustment Decision and the CAA's subsequent actions in the Initial Proposals, Final Proposals and Final Decision. We concluded that the CAA had not committed to a review in the sort of terms that the Airlines had contended and that the CAA had monitored HAL's performance.⁴¹ Accordingly, we disagree that the Airlines had no option but to pursue their appeal

⁴⁰ Schedule 2, paragraph 32(4) of the Act.

⁴¹ CMA's FD in the H7 Heathrow Airport Licence Modification Appeals, <https://www.gov.uk/cma-cases/h7-heathrow-airport-licence-modification-appeals>.

on this ground such that, where it failed, the CAA should nonetheless bear some of the CMA's costs.

- 4.29 As to the apportionment of the CMA's costs between HAL and the Airlines in respect of Ground A, we have considered the comparative weight of the two sets of appeals. We consider that HAL's appeal was more substantial (in terms of complexity and volume of supporting material) than any one of the Airlines' appeals looked at in isolation. However, the Airlines' appeals, taken together, were more substantial than just a single appeal.
- 4.30 We have also considered whether the proportion (in terms of pages) of the Final Determination spent dealing with each set of appeals might assist us in assessing the relative weight of the appeals. In our view, a page count reveals no more than the fact that each set of appeal grounds relating to the RAB Adjustment was lengthy and complex. A page count does not provide greater insight than this because it is the case that some highly complex points – which take significant time and discussion to reach a view on – can be addressed relatively briefly in writing. Conversely, other points may require many pages of writing to address fully, despite being relatively straightforward conceptually.
- 4.31 We also take account of the value and importance of the points at stake in the appeal on this ground. In particular, that the points raised by each of the Parties concerned the allocation of risk and regulatory certainty in price controls, that were relevant to the H7 price control and have the potential to be relevant to future controls. They also raised questions of substantial financial value and potential impact on the level of the price control.
- 4.32 Considered in the round, our judgement is that it is appropriate that these costs should be split equally (50:50) between HAL on the one hand, and the Airlines on the other hand. The portion of costs to be borne by the Airlines should be split equally three ways between each airline appellant.

Ground B⁴²

- 4.33 The CAA largely succeeded under this ground. The Airlines succeeded in a small part (in relation to the level of an index linked premium under Ground B2). HAL did not succeed under this ground at all. Having assessed the matter, we consider that that the CAA should bear 5% of our costs to reflect the (minor) success of the Airlines under Ground B2. We consider that the remaining costs should be split equally (50:50) between HAL and the Airlines. The portion of costs to be borne by the Airlines should then be split equally three ways between each airline appellant.

⁴² Three subgrounds (B1, B2 and B3) were considered within Ground B

- 4.34 We reject the CAA's submission, made prior to our PDC, that the Appellants should bear 100% of the CMA's costs because the Airlines' success under Ground B2 was merely 'technical'. As we noted at paragraph 7.306 of the Final Determination, the error regarding the index linked premium has the potential to have a significant impact on the overall level of the price control set by the CAA and was one which might have a significant effect on future price controls. Accordingly, we consider it appropriate to reflect the Airlines' success in the apportionment of CMA costs.⁴³ On the other hand, we do accept that this issue was one of many issues raised under Ground B and was substantially smaller than the sum of all those issues. It was only one sub-issue within Ground B2, and the other, substantially greater, matters raised by the Airlines within Ground B2 were dismissed. Accordingly, we consider that the CAA should bear only 5% of our costs in relation to this ground. Following sight of the PDC, the CAA did not raise objections to this 5% figure.
- 4.35 As to the apportionment of the remaining CMA costs between HAL and the Airlines, we have considered the comparative weight of the two sets of appeals. We have also taken account of the Airlines' partial success under Ground B2 and the lack of success by HAL. Unlike Ground A, we consider that overall the Airlines' appeals under Ground B were slightly more substantial than those of HAL when assessed collectively. In particular, this is because whilst both HAL and the Airlines raised matters under Grounds B1 and B2, only the Airlines raised matters under Ground B3. Against that, the Airlines had a greater measure of success than did HAL (as reflected in our finding that the CAA should bear 5% of the costs of Ground B). Each of the Parties also raised matters of comparable importance and value to the H7 price control and, potentially, to future price controls. Taking account of only the non-successful portions of the Airlines' appeals under Ground B, we consider that HAL's and the Airlines' appeals were comparable in size and, having taken a view in the round, we continue to consider that it is appropriate that the remainder (95%) of CMA's costs in relation to Ground B should be split 50:50 between HAL on the one hand, and the Airlines on the other hand (this proportion to be further split three ways between each airline appellant). As we have taken account of only the non-successful portions of the Airlines' appeals, we do not consider that there is any element of double-counting in this outcome.

Ground C

- 4.36 We conclude that the Airlines should bear 95% of our costs and that the CAA should bear 5% of our costs of Ground C.

⁴³ CMA's FD in the H7 Heathrow Airport Licence Modification Appeals, <https://www.gov.uk/cma-cases/h7-heathrow-airport-licence-modification-appeals>.

- 4.37 The CAA largely succeeded under Ground C. The Airlines succeeded in a small part (in relation to the level of the Shock Factor). For similar reasons to those above given in relation to the costs of the index linked premium, we reject the CAA's submission that the Airlines' success was merely 'technical'. As we noted at paragraph 9.305 of the Final Determination, the error identified had the potential to have a significant impact on the overall level of the price control and, further, the error might have a significant effect on future price controls.⁴⁴ As against that, we accept that this point was only a minor element of Ground C. In the round, our judgement is that the CAA should bear 5% of our costs in relation to this ground. We reject the CAA's submission that 2% would be a more appropriate portion for the CAA to bear. Whilst it is true that the Shock Factor made up only a small element of the CAA's total passenger forecast, we determined this to be a material error and – exercising our discretion – we consider that an order requiring the CAA to bear 5% of our costs and requiring the Airlines to bear 95% of our costs appropriately reflects their overall levels of success on this ground.
- 4.38 We reject the Airlines' submission that the CAA should bear a greater portion of the CMA's costs on the basis that the CAA's methodology changed between the Final Proposals and Final Decision which meant that they had no opportunity to engage with the CAA (see paragraph 4.13 above). In our Final Determination we rejected the Airlines' submissions that the CAA had lacked transparency in its consultation process, and accordingly there is no basis to depart from the 'loser pays' starting point.
- 4.39 As to the apportionment of the 95% of our costs to be borne by the Airlines, these should be split equally three ways.

Ground D

- 4.40 HAL and the CAA each claimed to have largely succeeded under Ground D. However, in our view, it was HAL that was in substance the clear overall successful party. We consider that our costs award should reflect that reality and, accordingly, we judge that the CAA should bear 95% of the CMA's costs and that HAL should bear 5% of the CMA's costs.
- 4.41 In our Final Determination we concluded – contrary to HAL's submissions⁴⁵ – that the CAA's decision to apply an additional adjustment factor (the AK factor) for 2020 and 2021 was not in and of itself wrong. Providing for such an adjustment factor, where charges are set on a prospective basis and there may be a need for a retrospective tallying-up process based on out-turns, to prevent over-recovery by HAL, was a standard part of the regulatory settlement process. To that extent, this

⁴⁴ CMA's FD in the H7 Heathrow Airport Licence Modification Appeals, <https://www.gov.uk/cma-cases/h7-heathrow-airport-licence-modification-appeals>.

⁴⁵ HAL NoA, paragraph 275.

was a success for the CAA. However, in our judgement that point of relatively straightforward principle was far from the main element of HAL's appeal and our determination. The main element concerned the manner of the CAA's application of the AK factor adjustment for the relevant years. We found in favour of HAL and concluded that the CAA was wrong in law and erred in the exercise of discretion in the mechanistic manner that it applied the AK factor adjustment for those years. In substance, therefore, we consider that HAL was largely successful in this ground of appeal and we consider that a 95:5 split reflects that degree of success.⁴⁶

4.42 We have taken into account that, in response to the PDC – where we proposed the 95% (CAA) and 5% (HAL) split of the CMA's costs – HAL maintained its submission that it should be considered the 100% winner on this ground, whereas the CAA accepted that HAL had succeeded, in part, but submitted that a 50:50 split of the CMA's costs would be more appropriate.⁴⁷ We reject both these submissions:

- (a) We reject HAL's submission that it should be considered fully successful on Ground D. HAL failed on the point of principle that an AK factor adjustment was appropriate. This had the practical consequence that the matter was remitted to the CAA for reconsideration, rather than, as HAL had contended before us, there being no matter to remit to the CAA. We consider that this means that HAL was not fully successful in bringing its appeal on Ground D. Further, we consider that the CAA's success on this point of principle has some relevance for future price controls. Overall, we consider it appropriate to reflect this in our costs order.
- (b) We do not accept the CAA's submission that its success in relation to the point of principle should be reflected in a 50:50 apportionment of costs. We consider that its success was a relatively minor element of Ground D overall (in the sense described in paragraph 4.41 above) and that our costs order should reflect this.
- (c) Taking a view in the round, we consider it appropriate to reflect the CAA's part success in our costs recovery by requiring HAL to pay a small share (5%) of the CMA's costs of this appeal ground.

Ground E

4.43 We conclude that HAL should bear 100% of the CMA's costs of Ground E, as this reflects the fact that the CAA wholly succeeded in defending this appeal ground.

⁴⁶ Final Determination, paragraphs 10.61 to 10.67.

⁴⁷ HAL response to PDC, paragraphs 9 to 12. CAA response to PDC, paragraphs 16 to 21.

4.44 We reject HAL's submission that we should depart from the 'loser pays' starting point on the basis that the NERA report submitted by the CAA generated disproportionate and unnecessary additional work (see paragraph 4.15 above). The NERA report addressed HAL's submission that the CAA's proposed Capex regime was not consistent with relevant regulatory precedent. In this regard, HAL referred to Gatwick, Dublin and other European comparator airports. The NERA report responded to these points. While HAL noted that the CMA had not referred to the NERA report in its Final Determination, this reflects the fact that HAL's appeal failed for other reasons meaning the CMA did not need to refer to the report. It does not demonstrate that the report was disproportionate or unnecessary, since the CAA did not know that HAL's appeal would fail for those other reasons. In our view, therefore, the CAA acted reasonably in commissioning the report as part of its defence of this ground of appeal.

Summary

4.45 In Table 4.1 below we summarise the percentage of the CMA's costs to be apportioned to each party by ground.

Table 4.1: Apportionment of CMA's costs to each party by ground (percentage)

Ground	CAA	HAL	Airlines
A	-	50%	50%
B	5%	47.5%	47.5%
C	5%	-	95%
D	95%	5%	-
E	-	100%	-

Source: CMA analysis

4.46 In Table 4.2 below, we set out the amount of CMA's costs payable by each party, by ground (including general costs pro-rata as per paragraph 4.24 above). See Appendix A for more detail on how these have been calculated.

Table 4.2: Apportionment of CMA's costs to each party (amount (£))

	Ground							
	A	B	C	D	E	Total		
Total CMA costs	234,341	405,826	293,110	142,878	131,859	1,208,000*		
<i>Apportioned by party</i>								
CAA		5% 20,291	5% 14,655	95% 135,734				170,681
HAL	50% 117,171	47.5% 192,767		5% 7,144	100% 131,859			448,941
Airlines	50% 117,171	47.5% 192,767	95% 278,454					588,392
BA	39,057	64,256	92,818					196,131
Delta	39,057	64,256	92,818					196,131
VAA	39,057	64,256	92,818					196,131

Note: Overall total rounded to nearest £100, underlying calculations unrounded

Source: CMA analysis

Final determination on the CMA's costs

- 4.47 Taking into account the percentage of CMA's costs to be apportioned to each ground as shown in Table 4.1, and the pro-rata allocation to each ground of the unattributable costs (see Appendix A), our determination is that, pursuant to Schedule 2, paragraph 32 of the Act, the CMA's costs of £1,208,000⁴⁸ should be paid by the Parties as follows:
- (a) BA: £196,131.
 - (b) CAA: £170,681.
 - (c) Delta: £196,131.
 - (d) HAL: £448,941.
 - (e) VAA: £196,131.
- 4.48 Rounding to the percentage point, this means that the CAA will bear approximately 14% of our costs, HAL will bear approximately 37% of our costs and, combined, the Airlines will bear approximately 49% of our costs. Given that we have rejected the CAA's submissions that it should bear only 2% of our Ground C costs and only 50% of our Ground D costs (as opposed to 5% and 95% of our respective cost figures), it follows that the proportion that the CAA will bear (14%) is greater than the upper end of the no more than 10% share of our costs that it had contended it should bear. Stepping back, this overall result is, in our view, sound since it is consistent with our findings that the CAA was largely successful in defending the appeals overall but nonetheless made some errors we determined to be material, most substantially so on Ground D. Accordingly, we consider that this overall result is one which does justice in all the circumstances of the case.

5. Inter partes costs

Requests for inter partes costs

- 5.1 On 18 October 2023, we invited the Parties to provide their views on inter partes costs and to submit statements of costs if they wished to apply for inter partes costs.

⁴⁸ Rounded to the nearest £100, underlying calculations unrounded. The unrounded amount to be recovered within the Order is £1,208,014. For the purpose of the FDC we have imposed a 'cut off' of 14 January 2024 for staff costs and 31 December 2023 for Group costs for calculating the CMA costs incurred during the costs process. These figures have been updated for the Final Determination on Costs in the light of further quality assurance checks of the calculations and to include further costs incurred.

- 5.2 Prior to the PDC, all the parties submitted views on inter partes costs on 17 November 2023. The CAA and HAL (but not the Airlines) also submitted statements of costs.
- (a) The CAA sought its costs for all grounds of the appeals from the Appellants. The CAA's statement of costs did not distinguish its costs incurred by ground.
 - (b) HAL sought its costs from the CAA in relation to Ground D only. HAL's statement of costs contained information relating to Ground D only; it did not reveal the totality of the costs of HAL's appeals.
- 5.3 We note that HAL and the Airlines did not seek any order for inter partes costs with respect to each other's interventions and in this case we agree that it would not be appropriate to order costs against the interveners. This means we need only to decide inter partes costs as between the CAA and the Appellants.
- 5.4 Following the PDC, the CAA and HAL made further specific submissions on inter partes costs. The Airlines stated that they considered the approach we proposed in the PDC to be 'sensible and proportionate'.
- 5.5 We set out the Parties' views below.

HAL's submissions

- 5.6 HAL sought 100% of its costs from the CAA in relation to Ground D as the successful party. HAL's statement of costs totalled £[REDACTED] and comprised:
- (a) External solicitors' fees (1 partner, 2 directors, 1 consultant, 2 associates and 3 trainees/paralegals) of £[REDACTED].
 - (b) Counsel fees (KC and 3 junior counsel) of £[REDACTED].⁴⁹
- 5.7 HAL submitted that its costs were reasonable and proportionate for the following reasons:
- (a) HAL's advisers organised themselves efficiently; each team member was allocated to specific claims to avoid duplication of effort.
 - (b) HAL's written submissions were succinct and targeted.
 - (c) The value of Ground D was highly material, which HAL estimated at £55.5 million.⁵⁰

⁴⁹ All figures are exclusive of VAT.

⁵⁰ HAL's costs submission, paragraphs 35-38.

- 5.8 In our PDC, we set out our provisional view that a reasonable sum for HAL to recover in relation to Ground D would be £[REDACTED], which is substantially less than claimed. HAL's response to the PDC (which we set out in more detail at paragraphs 5.27 to 5.44 below) was that no downwards adjustment should be made to its costs. Alternatively, a downwards adjustment of no more than [REDACTED] would be appropriate.⁵¹
- 5.9 Prior to the PDC, HAL submitted that, when determining the costs to be awarded to the CAA, the CMA should take into account the fact that HAL had already paid substantial sums of money to the CAA under a 'Scheme of Charges' established under section 11 of the Civil Aviation Act 1982. HAL further submitted that the CAA had already recovered (or invoiced) sums relating to its appeal and that the CMA's costs order should be drafted such that there was no double recovery on the part of the CAA.⁵² Following the PDC, HAL accepted that it was not the CMA's responsibility to police the Scheme of Charges. However, HAL continued to submit that the CMA should state, as a matter of principle, that the CAA should not be entitled to double recover the costs of defending these proceedings.⁵³

The CAA's submissions

- 5.10 The CAA sought 100% of its costs from the Appellants. The CAA's statement of costs totalled £[REDACTED] and comprised:
- (a) Internal solicitors' fees (2 in-house lawyers) of £[REDACTED].
 - (b) External solicitors' fees (2 partners, 4 counsel, 8 associates, 7 trainees/apprentices/paralegals), and expenses, totalling £[REDACTED].
 - (c) Counsel fees (a KC and 2 junior counsel) of £[REDACTED].
 - (d) Fees for economic expert evidence provided by four consultancies (NERA, First Economics, Alexander Mann Solutions, Flint Global) totalling £[REDACTED].⁵⁴
- 5.11 The CAA sought to recover its costs incurred from the date of publication of its Final Decision (8 March 2023). The CAA submitted that it was aware from this date that appeals would be lodged and accordingly began to incur costs in respect of the (yet to be filed) appeals. The CAA submitted that it would not be appropriate to restrict its recovery of costs to after the date when it received the first NoA

⁵¹ HAL response to PDC, paragraphs 13-17.

⁵² HAL costs submission, paragraphs 29-34 and annex to HAL's costs submission (letter from HAL's external lawyers to the CAA dated 18 October 2023).

⁵³ HAL response to PDC, paragraphs 18-20.

⁵⁴ All figures are exclusive of VAT.

(17 April 2023) as this would unduly restrict its recovery of reasonably incurred costs.⁵⁵

5.12 The CAA submitted that the amount of its claimed costs was reasonable for the following reasons:

- (a) The CAA sought to conduct itself efficiently and proportionately throughout the appeal process.
- (b) The CAA sought to use its internal legal and economic expertise to the greatest extent practicable to respond to the appeals.
- (c) The rates claimed in relation to work done by in-house lawyers (£[X]) per hour being those used when it provides assistance to the Secretary of State pursuant to section 16 of the Act) were significantly below the Guideline Hourly Rates (which would have been £282 per hour).⁵⁶
- (d) The instruction of external lawyers (solicitors and counsel) was necessary and appropriate given the extensive and complex appeals the CAA faced. The rates charged by the CAA's external lawyers were significantly discounted compared with standard market rates as they were obtained through public procurement processes.
- (e) The CAA's expert teams had been involved in the analysis and development of the Final Decision, meaning that they avoided the need to 'read in'. No consultancy fees were claimed from the date of the hearings.⁵⁷

5.13 The CAA also submitted, prior to the PDC, that no inter partes costs order should be made against it in favour of the any other party but that, should such an order be made, such costs should be calculated at hourly rates no higher than those the CAA obtained.⁵⁸ In the PDC we had assessed HAL's reasonable costs at £[X] and proposed awarding HAL 95% of this sum, leading to an award of £[X]. Following the PDC, as noted at paragraph 4.8(b) above, the CAA accepted that HAL had succeeded in part on Ground D, but it submitted that, as the overall winner of the proceedings, it would be appropriate for it to recover at least 85% to 90% of its costs following any netting off of costs awards made against it. Regarding HAL's claimed costs, the CAA made submissions (which we set out in more detail at paragraphs 5.27 to 5.44 below) that HAL's reasonable costs should be assessed at a figure very significantly below £[X], but it did not propose a specific figure for us to consider.⁵⁹

⁵⁵ CAA costs submission, paragraph 27.

⁵⁶ Exclusive of VAT.

⁵⁷ CAA costs submission, paragraphs 29-37.

⁵⁸ CAA costs submission, paragraphs 51.

⁵⁹ CAA response to PDC, paragraphs 4 and 32-35.

- 5.14 The CAA submitted that the Scheme of Charges was of limited relevance to the CMA's costs determination. First, the Scheme of Charges does not cover the full costs of the appeals in these proceedings. Second, HAL had not paid any of the invoices sent to it pursuant to the Scheme of Charges since March 2023.⁶⁰

The Airlines' submissions

- 5.15 Prior to the PDC, the Airlines submitted that any award for inter partes costs in favour of the CAA should be apportioned between HAL and the Airlines based on the same apportionment for which they submitted was appropriate for the recovery of the CMA's costs (ie HAL should pay more than half of the CAA's costs). The Airlines reserved their position in relation to the Scheme of Charges.⁶¹ Following the PDC, the Airlines made no further specific submissions on inter partes costs, noting that they considered the approach we proposed in the PDC to be 'sensible and proportionate'.

Our assessment

Introduction

- 5.16 Our approach to determining inter partes costs is as follows.
- (a) We first consider whether we should exercise our discretion to award inter partes costs. We conclude that we should exercise that discretion.
 - (b) We then consider whether we should require further information from the CAA in relation to its statement of costs. We conclude that that would not be appropriate.
 - (c) We then consider the reasonableness of HAL's claimed costs and HAL's submissions regarding the Scheme of Charges.
 - (d) We then consider the reasonableness of the CAA's claimed costs.
 - (e) We then set out our conclusion.

Whether to award inter partes costs

- 5.17 We have discretion to require a party to an appeal to make payments to another in respect of costs reasonably incurred by the other party in connection with the appeal.⁶² We first considered whether to exercise our discretion to make no costs awards in favour of the successful parties but have decided against this course for

⁶⁰ CAA costs submission, paragraphs 38-41, Annex 2 to the CAA costs submission.

⁶¹ Airlines costs submission, paragraphs 3.1-3.2.

⁶² Schedule 2, paragraph 32(5) of the Act.

reasons similar to those in section 4 above. In this case, HAL and the CAA (but not the Airlines) have sought an order for inter partes costs and we consider that it is appropriate that they should be able to recover their reasonable costs from the relevant losing party (or parties) to the extent that they succeeded in these proceedings.

- 5.18 We have set out our views on the Parties' relative success in these appeals in paragraphs 4.27 to 4.44 above. In summary, the CAA was largely successful in defending the appeals on Grounds A, B, C and E. HAL was largely successful in bringing its appeal on Ground D. The Airlines had minor successes in their appeals on Grounds B and C. For convenience, we set out in Table 5.1 below which party succeeded on each ground (and the extent to which we have assessed they won as a percentage) and which party or parties are, we determine, to pay the successful party's reasonable costs.

Table 5.1: Illustration of successful party and apportionment in principle of inter partes costs per ground (based on CMA costs analysis)

<i>Ground</i>	<i>Successful party (recovery of reasonable costs %)</i>	<i>Paying party/parties (and share of reasonable costs to be borne by party)</i>
A	CAA (100%)	HAL - 50%, Airlines - 50%
B	CAA (95%)	HAL - 50%, Airlines - 50%
C	CAA (95%)	Airlines - 100%
D	HAL (95%)	CAA - 100%
E	CAA (100%)	HAL - 100%

Source: CMA Analysis

- 5.19 In forming this view, we have had regard to the factors referred to in Rule 19.5 in relation to the way the discretion on inter partes costs may be exercised. In line with the views set out in section 4 above, we do not regard any particular party as outstanding in terms of any of:
- (a) the extent to which it assisted the CMA to meet the overriding objective;
 - (b) unreasonably raising, pursuing or contesting a particular issue; or
 - (c) the manner it pursued its case or a particular aspect of its case.
- 5.20 Neither, in our assessment, is a costs order that reflects the extent to which the CAA was unsuccessful on material points liable to result in a chilling effect on its decision-making. No submissions were made to us that there was a real risk of such an effect.
- 5.21 Accordingly, we see no basis to depart from our approach to the Parties' costs, set out above in paragraph 5.18, subject to an assessment of their reasonableness and proportionality (as set out below), following the event.

Approach to apportioning the CAA's costs

- 5.22 The CAA has submitted a statement of costs for all of its costs in the appeal without any ground-by-ground breakdown. This raises the question of how we can make an award of costs which avoids the CAA recovering its costs incurred in relation to: (i) its largely unsuccessful defence of Ground D; and (ii) its part losses in respect of Grounds B and C. In contrast, HAL's statement of costs concerns its costs in relation to Ground D only. This means that we are in a position to make an award in HAL's favour for it to recover 95% of its reasonably incurred costs for that ground.
- 5.23 We have considered whether we should require the CAA to provide us with a further break down of its costs. We have decided not to do so.
- 5.24 Costs awards in regulatory appeals are a matter of case management in which it falls to us to make a broad soundly based judgement which does justice in all the circumstances of the case. Such awards do not require the sort of detailed assessment that would be required in litigation in the civil courts. Particularly where parties were part successful/part unsuccessful in an appeal, the award of inter partes costs necessarily involves the exercise of significant degree of discretion.
- 5.25 In that context, we consider that obtaining further costs information from the CAA is neither necessary nor necessarily will it be helpful. We are in a position, with the information we have, to make a reasonable estimate of the deduction to be applied to the CAA's costs in a way that, in our judgement, will do justice in the circumstances.
- 5.26 In section 4 above, we have determined that the CAA should bear approximately 14% of the CMA's costs, HAL should bear approximately 37% of the CMA's costs and the Airlines should together bear approximately 49% of the CMA's costs (this sum will be divided equally between the three Airlines). We consider it appropriate that these same percentages should apply in relation to the CAA's award of inter partes costs. We therefore award the CAA 86% of its reasonably incurred costs, to be split on a 37:49 ratio between HAL and the Airlines. We will separately calculate an award of costs against the CAA, and in favour of HAL, in respect of HAL's part success under Ground D. This sum will be then offset against the sum the CAA can recover from HAL.

HAL's costs

Reasonableness of HAL's claimed costs

- 5.27 HAL can request an order for its costs reasonably incurred in bringing the appeal.⁶³
- 5.28 Having reviewed HAL's statement of costs, we set out in the PDC our provisional view that some of the claimed costs should be disallowed as they were not reasonably incurred. This provisional view was based on a number of factors which we set out below, together with HAL's and the CAA's specific responses, our assessment of those submissions, and then our final overall determination.

Level of fees incurred by HAL

- 5.29 In the PDC we noted that the hourly fees incurred by HAL were high. We noted that the fees HAL sought were significantly higher than both the rates that the CAA obtained for its own external legal advice and the Guideline Hourly Rates used by the Courts for the conduct of summary assessments of costs, to which we have had regard.⁶⁴ We considered that it would not be appropriate to limit HAL to recover its fees at the level of either of these hourly rates (as market rates for specialist legal advice may exceed the Guideline Hourly Rates). However, we took this as indication that an appellant in HAL's position could have reasonably run its appeal on Ground D at a lower cost.
- 5.30 In its response to this part of the PDC, HAL submitted that price control regulation involves complex matters of law and economics requiring specialist external legal advice: the level of fees incurred by HAL were not unreasonable in that light.⁶⁵ For its part, the CAA submitted that the level of HAL's claimed fees were clearly excessive and unreasonable. Even the reduced sum of £[£], the CAA submitted, was too high and should be further reduced.⁶⁶
- 5.31 We accept that the proceedings before us on Ground D were sufficiently complex that it was reasonable for HAL to instruct specialist external lawyers to conduct the proceedings. We maintain our view, as set out in the PDC, that it would not be appropriate in this case to limit HAL to recovering the rates set out in the Guideline Hourly Rates. Nevertheless, given HAL incurred fees that exceeded – by a substantial margin – the benchmark provided by the Guideline Hourly Rates, we

⁶³ Rule 19.3, which reflects Schedule 2, paragraph 32(5) of the Act.

⁶⁴ Judicial Guide to Summary Assessment of Costs 2021, see <https://www.gov.uk/guidance/solicitors-guideline-hourly-rates>.

⁶⁵ HAL response to PDC, paragraph 15(a) and (d).

⁶⁶ CAA response to PDC, paragraphs 33-35.

continue to consider that this is a factor which suggests that HAL's claimed costs are higher than is reasonable.

Size of HAL's legal team and the work connected with Ground D

- 5.32 In the PDC we noted that HAL engaged a large external legal team to work on Ground D. HAL engaged four counsel (one KC and three juniors), six qualified solicitors, and a number of non-qualified legal staff. We noted that a full comparison with the CAA's legal team was not possible since we did not know which part of the CAA's legal team had worked on Ground D. We also took into account the fact that HAL may have borne a heavier burden in bringing an appeal than did the CAA in defending its Final Decision. Nevertheless, we considered that the size of HAL's legal team (in particular the fact that HAL's counsel team (four persons) working on Ground D was larger than CAA's smaller counsel team (of three persons) in relation to the entire appeal) suggested that HAL could have reasonably run the appeal at lower cost. This was particularly the case given that Ground D was one of the less substantial grounds of appeal. For comparison, we noted that approximately 10% of the CMA's costs were associated with Ground D (see Table 4.2 above).
- 5.33 In its response to this part of the PDC:
- (a) HAL submitted that a counsel team of four was not unreasonable for a set of proceedings as large and complex as these. In addition, HAL submitted that Ground D had entailed a lot of preparatory work to allow it to present in the appeal what the CAA had done and why.⁶⁷
 - (b) The CAA submitted that the work involved in relation to Ground D was comparatively modest. The CAA observed that only six pages of HAL's NoA concerned Ground D. Similarly, the CAA submitted that only a small portion of the factual evidence, and no expert evidence, was connected with Ground D. The CAA further submitted that the costs that HAL sought in relation to Ground D were neither efficiently incurred nor reasonable.⁶⁸
- 5.34 We have considered those submissions but are not persuaded that we should change the view we provisionally adopted. HAL's legal team, and the time and costs involved, were conspicuously large. The size and value of the ground relative to the whole appeal, the relative sizes of the relevant Parties' legal teams, and taking the CMA's costs as a reference point indicative of the size and complexity of Ground D relative to the whole appeal if not a precise guide to the appropriate level of costs (as to which see further below), all suggest that HAL's claimed costs are higher than is reasonable. That said, neither are we persuaded

⁶⁷ HAL response to PDC, paragraph 15(b)-(c).

⁶⁸ CAA response to PDC, paragraphs 33 and 34.

by the CAA's submissions (relying on page counts) to the effect that Ground D was a very modest aspect of the proceedings. We accept that HAL may reasonably have expended more effort (and therefore may reasonably have incurred more costs) bringing the appeal, and Ground D had more complexity and value, than a simple page count would suggest.

HAL's approach to 'common' time

- 5.35 In the PDC we suggested that an explanation for the high overall cost sought by HAL might be HAL's approach to charging for time not specifically spent on any one ground of appeal. HAL was advised by two law firms: Freshfields LLP and Towerhouse LLP. HAL split 'common' time equally between the three grounds which Towerhouse LLP led on (namely, Grounds A, B and D). However, Grounds A and B were significantly weightier than Ground D and we indicated that we did not consider that this approach was appropriate as it may have led to more costs being allocated under Ground D than was appropriate.
- 5.36 Neither the CAA nor HAL commented on this portion of the PDC. We continue to consider that HAL's approach to charging for 'common' time may have led to more costs being allocated under Ground D than was appropriate. Accordingly, we treat this as a factor which suggests that HAL's claimed costs are higher than is reasonable.

Our provisional conclusion in the PDC and our final conclusion

- 5.37 In the PDC we stated that we did not consider it appropriate to require HAL to submit a revised statement of costs which would seek to remedy the issues identified above, especially in view of the relatively modest sums claimed in the context of these appeals. We stated our provisional view that our task was to come to a judgement on an appropriate sum, rather than to calculate a precise sum 5.35with spurious accuracy. Neither HAL nor the CAA disagreed with this approach in their responses to the PDC.
- 5.38 In the PDC our provisional judgement was that HAL's reasonable costs in respect of Ground D (to be adjusted to reflect the level of its success on Ground D) should be considered to be £[£]. This figure was about [%]% of HAL's claimed costs. By way of a 'sense check', we noted that we had apportioned approximately 10% of the CMA's costs to Ground D and that had 10% of the CAA's claimed costs related to Ground D, then the CAA would have spent £[£] on this ground, which was close to the figure that we had proposed HAL should recover. Taking a view in the round, therefore, our provisional view was that the £[£] figure we had proposed was appropriate.
- 5.39 As noted at paragraph 5.8 above, HAL submitted that it should be entitled to recover its full claimed costs or, alternatively, that a downwards adjustment of no

more than 10-20% would be appropriate. In relation to the 'sense check' we had set out in the PDC, HAL submitted that the portion of time the CMA had spent on addressing Ground D could not be assumed as a good yardstick to use for a sense-check of its (HAL's) costs. This was because HAL had engaged in substantial preparatory work to bring the appeal; once this preparatory work had been done, the task for the CMA to adjudicate upon the dispute had then been comparatively less burdensome.⁶⁹

- 5.40 The CAA, on the other hand, submitted that the 'sense check' we had set out in the PDC substantially overestimated its costs attributable to Ground D. This was because HAL had only claimed legal costs under Ground D, but the 10% figure based on the CAA's total costs we had used included the CAA's expert fees in addition to its legal costs. The CAA submitted that had the 'sense check' examined only its legal costs then the figure would be £[£]. Accordingly, the CAA submitted that HAL's costs were unreasonable and excessive and that a figure significantly lower than £[£] would be appropriate (but the CAA did not put forward an alternative figure that it contended we should adopt).⁷⁰
- 5.41 We remind ourselves that our task is not to conduct a detailed assessment of costs. Rather, it falls to us to make a broad soundly based judgement which does justice in all the circumstances of the case. In our view, a downwards adjustment to HAL's claimed sum is appropriate, and we consider that that reduction should be greater than 10-20% as contended by HAL, in light of the factors we have identified above: namely the high fees incurred by HAL, the large legal team it employed and its inappropriate approach to claiming 'common' time.
- 5.42 Our 'sense check' looked at the proportion of CMA costs spent addressing Ground D (approximately 10%) and applied that percentage to the CAA's total costs for both legal and expert fees. We were minded to apply the 'sense check' because the CAA had not submitted its costs broken down by ground and it would not have been proportionate to require it to produce such a costs breakdown. We used the 'sense check' to inform the scale of costs that HAL should be able to recover, not as a means to precisely calculate HAL's reasonable costs. We consider HAL and the CAA have made valid points to show that the 'sense check' is not as helpful as we provisionally thought. For example, having taken account of those points, we agree that HAL may have in principle borne a greater burden in bringing the appeal than did the CMA in adjudicating upon it (ie suggesting the 10% figure may understate HAL's reasonable costs to some extent). Similarly, the CAA makes the valid point that HAL did not rely on expert evidence (ie suggesting

⁶⁹ HAL response to PDC, paragraph 15(b), (c) and (f).

⁷⁰ CAA response to PDC, paragraphs 16-21.

that taking 10% of its total costs might overstate HAL's reasonable costs).⁷¹ However, these points tend to neutralise one another.

- 5.43 We consider that it is necessary to take a step back and consider what order would do justice in the circumstances. In doing so, we are guided by the approach of the CAT in *Unichem v OFT* [2005] CAT 31 (in a passage cited with approval by the Supreme Court in *Flynn Pharma*⁷²):

While it is open to a company which chooses to make an appeal to the Tribunal to assemble a legal team and to present its case in the manner it sees fit, and to incur any costs which it considers appropriate in doing so, it does not necessarily follow that the Authority, (or indeed any other party) against whom an order for costs is made should necessarily be liable for the full extent of those costs. A successful applicant is entitled to no more than reasonable and proportionate costs.⁷³

- 5.44 On balance, we consider that the original figure proposed in the PDC, which represented approximately 65% of HAL's claimed costs, does justice in all the circumstances of the case. In forming this view, we have considered the points referred to above and in paragraph 5.41 in particular,⁷⁴ in light of the nature, complexity and inherent value of the ground (and the limits thereon). We therefore find HAL's reasonable costs in respect of Ground D to be £[£].

Scheme of charges

- 5.45 We have considered the Parties' submissions regarding the Scheme of Charges. As HAL acknowledged in its response to the PDC, regulating the Scheme of Charges does not fall within the CMA's statutory functions in respect of regulatory appeals. In this context, those functions are to determine the costs payable and to make corresponding orders in accordance with the provisions of the Act. Those orders must be complied with.
- 5.46 The CAA is a public body and must act in accordance with the law. The question of the lawfulness of the CAA's Scheme of Charges and any consequent adjustment of charges paid or payable is for the CAA, subject to any challenge by HAL. We decline HAL's invitation in its response to the PDC to us to opine on the operation of the Scheme of Charges as this is outside our function.⁷⁵ If, after we

⁷¹ For completeness, we note that we consider the alternative estimate put forward by the CAA (10% of its legal fees only, which amounts to £[£]) is also inappropriate. We note that this estimate uses the 10% starting point which may be too low. Further, the estimate may underestimate HAL's reasonable costs as the rates available to the CAA (as a government organisation) may be lower than those available to businesses generally.

⁷² *Flynn Pharma v CMA* [2022] UKSC 14, paragraph 142.

⁷³ *Unichem v OFT* [2005] CAT 31, paragraph 27.

⁷⁴ Namely, the high fees incurred by HAL, the large legal team it employed and its inappropriate approach to claiming 'common' time.

⁷⁵ HAL response to PDC, paragraphs 18-20.

have made our costs order in these proceedings, HAL believes that the CAA has failed to comply with the law then it is open to HAL to challenge the CAA's conduct via judicial review proceedings.

Interim conclusion

- 5.47 Applying the 95% recovery rate to our assessment of HAL's reasonable costs, our view is that HAL should receive a total of £[~~8~~] in respect of its part success under Ground D.

Reasonableness of the CAA's claimed costs

- 5.48 We have considered whether any portion of the CAA's claimed costs should be disallowed on the basis that they were not reasonably incurred. We are of the view that the CAA's costs are, on the appropriate broad and soundly based assessment, reasonable and proportionate:
- (a) The sizes of the CAA's external legal and expert teams, whilst large, do not appear excessive given the complexity and number of the appeals faced by the CAA and the tight deadlines to which the CAA was subject. Further, given the complexity and centrality of the economic matters to a number of the grounds of appeal it was reasonable for the CAA to instruct external experts in these proceedings.
 - (b) The CAA's rates for legal fees are reasonable and do not depart significantly from the Guideline Hourly Rates. In the case of the CAA's in-house lawyers the fees claimed are in fact significantly below the Guideline Hourly Rates.
 - (c) The CAA's rates for expert fees were substantial, and some (but not all) of the fees charged exceeded the legal rates by a noticeable margin. However, in the absence of evidence from the Airlines or HAL as to their own costs for expert evidence, we do not regard these fees as excessive or unreasonable.
- 5.49 The CAA seeks costs it incurred following publication of the Final Decision (8 March 2023), but before it received the relevant NoAs (17 April 2023). Our view is that it is appropriate to permit the CAA to recover these costs in this case since realistically the CAA would have needed to begin work on its Response prior to receiving the NoAs in order to meet the relevant deadline for filing a reply. This does not contradict the Guide which, in a passage framed neutrally so as to apply to both appellants and the CAA, states: 'the CMA will not normally allow any amount in respect of costs incurred before the CAA first published its decision'.⁷⁶

⁷⁶ Paragraph 6.6 of the Guide.

5.50 Accordingly, we assess the CAA's reasonably incurred costs to be the full amount claimed, namely £[X]. Applying the 86% recovery rate to our assessment of the CAA's reasonable costs, and before any setting off of costs awarded against the CAA, this means the CAA would receive a total of £[X] in respect of its part-successes in the appeals.⁷⁷ (After netting off the sum of £[X] to reflect HAL's reasonable costs of Ground D, this means that the CAA will recover £[X] which is a net recovery of [X]% of its costs. We note that this percentage is lower than the net recovery of 85-90% which the CAA had sought. However, this reflects two matters. First, our assessment – contrary to the CAA's submissions – that HAL should recover 95% of its costs of Ground D. Second, our view that HAL's reasonable costs should be assessed at £[X] and not significantly lower, as the CAA had contended.

Summary of conclusions

5.51 Taking account of our decisions above, we reach the following conclusions:

- (a) HAL's reasonable costs in bringing Ground D are assessed at £[X]. We consider it appropriate that HAL should recover 95% of these costs (namely, £[X]) from the CAA.
- (b) The CAA's total reasonable costs are assessed at £[X]. We consider it appropriate that the CAA should recover 86% of these costs; the 14% deduction reflects the CAA's partial losses under Grounds B, C and D.
 - (i) HAL is to pay 37% of the CAA's total reasonable costs (£[X]), but from this sum we shall deduct HAL's recoverable costs connected with Ground D (£[X]). Accordingly, the CAA shall recover from HAL the sum of £[X].
 - (ii) The Airlines are to pay 49% of the CAA's total reasonable costs (£[X]). This sum is to be split equally three ways between each Airline. Accordingly, the CAA shall recover from each of BA, Delta and VAA the sum of £[X].
- (c) The net result is that the CAA shall recover the total sum of £[X] from the Appellants.

Final determination of inter partes costs

5.52 In view of the foregoing, and in all the circumstances, our determination regarding inter partes costs (ex VAT) is as follows:

⁷⁷ See Appendix B for a table showing the calculations.

- (a) BA to pay the CAA £[X].
- (b) Delta to pay the CAA £[X].
- (c) HAL to pay the CAA £[X].
- (d) VAA to pay the CAA £[X].

5.53 We note that the CAA requests that its recoverable costs be ‘grossed up’ to include ‘irrecoverable VAT’ at 19.8%.⁷⁸ We note that the practice direction 44 of the Civil Procedure Rules permits the recovery of VAT ‘when the receiving party is unable to recover the VAT or a proportion thereof as input tax’.⁷⁹ The above figures are exclusive of VAT and we would expect the Parties to act in accordance with practice direction 44 when agreeing on the extent to which these figures should be adjusted to account for VAT.

6. Interest

6.1 A person who is required by an order to pay a sum to another person must comply with the order before the end of the period of twenty-eight days beginning with the day after the making of the order.⁸⁰ If the sum required to be paid has not been paid within this period, the unpaid balance carries interest at a rate specified in the CMA’s order or determined in accordance with the CMA’s order.⁸¹

7. Final costs determination

7.1 Our determination is therefore as follows:

- (a) In relation to the CMA’s costs incurred in connection with the appeals, the Parties should pay £1,208,000⁸² to the CMA, apportioned as set out in paragraph 4.47 above.
- (b) In relation to inter partes costs, the Appellants should pay £[X] to the CAA in respect of its claimed costs of the appeal, apportioned as set out in paragraph 5.53 above.

7.2 In addition, our determination is that the interest rates which shall apply in the event of sums set out in paragraph 7.1 above being unpaid (see paragraph 6.1) will be one percentage point above the Bank of England’s base rate.

⁷⁸ Paragraph 2, CAA submission dated 17 November 2023.

⁷⁹ Paragraphs 2.3–2.6, see <https://www.justice.gov.uk/courts/procedure-rules/civil/rules/part-44-general-rules-about-costs/part-44-general-rules-about-costs2#para2.3>.

⁸⁰ Schedule 2, paragraph 32(6) of the Act.

⁸¹ Schedule 2, paragraph 32(7) of the Act.

⁸² Rounded to the nearest £100, the unrounded amount to be recovered within the Order is order is £1,208,014.

7.3 An Order is enclosed with this determination.

Appendix A: Statement of the CMA's costs

Overview

1. This appendix outlines how the CMA's costs were calculated. All costs incurred by the CMA in connection with the appeals have been included in the assessment and, in line with the recommendations of the CAT in *BT v CMA*,⁸³ this appendix provides details of:
 - (a) the names, grades and cost recovery rate for each of the staff and the panel who worked on the appeals, together with the number of hours worked and a brief description of the issues on which each staff and panel member worked (ie ground of appeal);
 - (b) travel and subsistence costs incurred in the appeals;
 - (c) a breakdown of fees charged by Counsel instructed by the CMA;
 - (d) direct costs; and
 - (e) an explanation of how the CMA's overhead rate has been calculated.
2. This Appendix also describes how the CMA's costs have been attributed to specific grounds, and how we have allocated non-attributable costs.

CMA's costs

Overheads

3. The CMA is able to recover all costs incurred, not just its direct costs. The CMA therefore includes an amount for the recovery of overheads in its calculated costs.
4. The CMA overhead rate applied to the recharging of costs is calculated by applying a pre-determined recovery charge percentage to the total direct costs of the rechargeable work. The CMA's pre-determined recovery charge percentage is calculated by dividing the combined back-office annual budgets (Corporate Services and Board) and depreciation by the combined front line service annual budgets (including Enforcement, Legal Services, Mergers, Markets, Regulation, Office of Chief Economic Adviser, Policy & International and Panel) for the relevant financial year. The rate applied in this case (for the financial year 2023/24) is 50.38%.

⁸³ [BT v CMA \[2017\] CAT 11](#), paragraph 32.

Staff costs

5. Tables 1 and 2 set out the names, job titles, grades and cost recovery rates (£ per hour) for each member of the staff team who worked on the appeals. They also include the number of hours worked by each member of the staff team on the appeals, and the consequent direct costs and overhead costs incurred by the staff member. Table 1 details the costs incurred in relation to the substantive determination of the appeals and Table 2 in relation to the determination of costs.
6. Where staff worked in excess of their conditioned (salaried) hours on the appeal, their hours were 'capped' at conditioned hours, for the purpose of calculating CMA costs.

Table 1: Staff costs for the substantive determination

[illegible]

*CMA staff recovery rates are based on the average salaries for staff of that grade

**Totals rounded to nearest £100, underlying figures unrounded

Source: CMA analysis

Table 2: Staff costs for this determination on costs

Name	Job title	Grade*	To 31 Aug 23		From 1 Sep 23		Grounds	Direct cost (£)	Overhead (50.38%) (£)	Total (£)
			Rate (£/h)	Time (hours)	Rate (£/h)	Time (hours)				
[X]	[X]	[X]	[X]	[X]	[X]	[X]	[X]	[X]	[X]	[X]
[X]	[X]	[X]	[X]	[X]	[X]	[X]	[X]	[X]	[X]	[X]
[X]	[X]	[X]	[X]	[X]	[X]	[X]	[X]	[X]	[X]	[X]
[X]	[X]	[X]	[X]	[X]	[X]	[X]	[X]	[X]	[X]	[X]
[X]	[X]	[X]	[X]	[X]	[X]	[X]	[X]	[X]	[X]	[X]
[X]	[X]	[X]	[X]	[X]	[X]	[X]	[X]	[X]	[X]	[X]
[X]	[X]	[X]	[X]	[X]	[X]	[X]	[X]	[X]	[X]	[X]
[X]	[X]	[X]	[X]	[X]	[X]	[X]	[X]	[X]	[X]	[X]
[X]	[X]	[X]	[X]	[X]	[X]	[X]	[X]	[X]	[X]	[X]
Total**								[X]	[X]	[X]

*CMA staff recovery rates are based on the average salaries for staff of that grade

**Totals rounded to nearest £100, underlying figures not rounded.

Source: CMA analysis

Panel member costs

7. Tables 3 and 4 set out the names, job titles, grades and cost recovery rates (£ per hour) for the group chair and group members who worked on the appeal. They also include the number of hours worked by the group chair and each of the group members, and the consequent direct costs and overhead costs incurred (see paragraph 4 above).

8. Panel members who were not group members contributed to expert panel discussions on the cost of capital.

Table 3: Panel member costs for the substantive determination

Name	Job title	Recovery rate (£ / hour)	Time spent (hours)	Grounds	Direct costs (£)	Overhead (50.38%) (£)	Total (£)
Kirstin Baker	Chair	[X]	[X]	[X]	[X]	[X]	[X]
Juliet Lazarus	Member	[X]	[X]	[X]	[X]	[X]	[X]
Paul Muysert	Member	[X]	[X]	[X]	[X]	[X]	[X]
[X]	[X]	[X]	[X]	[X]	[X]	[X]	[X]
Total**					[X]	[X]	[X]

*CMA panel recovery rates are based on the average salaries for staff of that grade.

**Totals rounded to nearest £100, underlying figures not rounded

Source: CMA analysis

Table 4: Group costs for this determination on costs

Name	Job title	Recovery rate* (£ per hour)	Time spent** (hours)	Grounds	Direct costs (£)	Overhead (50.38%) (£)	Total (£)
Kirstin Baker	Chair	[X]	[X]	[X]	[X]	[X]	[X]
Juliet Lazarus	Member	[X]	[X]	[X]	[X]	[X]	[X]
Paul Muysert	Member	[X]	[X]	[X]	[X]	[X]	[X]
Total**					[X]	[X]	[X]

*CMA group recovery rates are based on the average salaries for staff of that grade.

** Hours rounded to nearest whole hour, totals rounded to nearest £100, underlying figures not rounded

Source: CMA analysis

Non-staff costs

9. Table 3 sets out the non-staff costs incurred on the appeal, including:

- (a) counsel costs;
- (b) travel and subsistence costs; and
- (c) transcription costs, including transcription services for hearings.

Table 5: Non-staff costs

	<i>General (£)</i>
Counsel	[X]
Travel and subsistence	[X]
Transcription charges	[X]
Total*	[X]

*Total rounded to nearest £100, underlying figures not rounded

Source: CMA analysis

Total CMA costs to recover

10. Our records show that the total of CMA's costs to recover is as set out in Table 6 below.

Table 6: Total CMA costs to recover

	<i>Substantive determination (£)</i>	<i>Determination of costs (£)</i>	<i>Total to recover (£)</i>
Staff team	[X]	[X]	[X]
Group/panel	[X]	[X]	[X]
Non-staff costs	[X]	[X]	[X]
Total	[X]	[X]	1,208,000

Note: Presented rounded to nearest £100, underlying figures not rounded

Source: CMA analysis

Attribution of the CMA's costs to 'general', grounds and 'costs'

11. CMA staff (including contractor time) was recorded against the following categories:
- (a) General (see paragraph 13 below)
 - (b) Ground A
 - (c) Ground B
 - (d) Ground C
 - (e) Ground D
 - (f) Ground E; and
 - (g) Costs (ie the costs incurred in relation to the determination of costs in these appeals).

12. The group chair and other group members have reported where their time should be attributed to these same categories.
13. A significant proportion of the CMA's costs in conducting the appeal were not directly associated with a specific ground of appeal. The costs associated with this work included (but are not limited to):
- (a) the appointment and administration of an appeal group;
 - (b) resources to support the group and the staff team (the core 'delivery staff');
 - (c) the clarification hearing and main hearing;
 - (d) drafting of sections of the provisional and final determinations not relating to a specific ground of appeal;
 - (e) dealing with matters of procedure;
 - (f) instructing counsel, including counsel's fees;
 - (g) transcription fees; and
 - (h) communication and publication throughout and at the end of the appeal.

We have recorded these costs under the 'general' category.

14. As noted in paragraph 4.24 above, the general and costs categories were then attributed to grounds A to E on a pro-rata basis in the same proportions as the costs directly attributed to each ground, as shown in Table 7.

Table 7: Allocation of CMA costs to general, grounds and costs (£)

Cost category	Staff excl. contractor	Group and panel members	Overhead (50.38%)	Contractor	Counsel	Transcription and T&S	Total*
General	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
Ground A	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]			[REDACTED]
Ground B	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]			[REDACTED]
Ground C	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]			[REDACTED]
Ground D	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]			[REDACTED]
Ground E	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]			[REDACTED]
Costs	[REDACTED]	[REDACTED]	[REDACTED]				[REDACTED]
Total*	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	1,208,000

*Totals rounded to nearest £100, underlying figures not rounded

Source: CMA analysis

15. This allocation process resulted in the allocation of the CMA's costs to grounds shown in Table 8.

Table 8: Allocation of CMA costs to grounds (£)

Cost category	Staff excl. contractor	Group and panel members	Overhead (50.38%)	Contractor	Counsel	Transcription and T&S	Total
Ground A	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	234,341
Ground B	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	405,826

Ground C	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	293,110
Ground D	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	142,878
Ground E	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	131,859
Total*	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	1,208,000

*Total rounded to nearest £100, underlying figures not rounded

Source: CMA analysis

Appendix B: Calculation of the CAA's awarded costs

	<i>Claimed costs (£)</i>	<i>CMA assessed reasonable costs (£)</i>	<i>Grounds in which party was successful</i>	<i>Percentage recoverable and from which party/ parties</i>	<i>Award of costs to HAL (£)</i>	<i>Total award of costs to CAA (£)</i>	<i>Attribution of award to CAA (£)</i>	<i>Total payable to CAA per party (£)*</i>
CAA	[£]	[£]	A, E, substantively in B and C, partly in D	86% (HAL 37%, Airlines 49%)	-	[£]		-
HAL Airlines	[£] -	[£] -	D Partly in B and C	95% (CAA) -	[£] -	- -	[£] [£]	[£] -
BA	-	-			-	-		[£]
Delta	-	-			-	-		[£]
VAA	-	-			-	-		[£]
						Total		[£]

Source: Parties' costs submissions, CAA and HAL statements of costs, CMA Analysis