

5 May 2021

Dear James

CAP2140: Status of the CAA's document

1. We write further to the CAA's document entitled "Economic regulation of Heathrow Airport Limited: "Response to its request for a covid-19 related RAB adjustment", published on 27 April 2021 (the "**Response**"). The Response addressed the request by Heathrow Airport Limited ("**HAL**") (originally sent on 27 July 2020) for an adjustment to HAL's regulatory asset base to address the severe impact of the Covid-19 pandemic on its business.
2. While we are currently considering the detail of the Response, the purpose of this letter is to seek clarification regarding its formal status and effect.
3. Based on our reading of the Response, we understand it to constitute a 'decision' only as regards the package of measures that will apply pending the start of the H7 Price Control. See e.g. §1 of the Response, which states that *'this document... provides our decision on the regulatory intervention package which we will apply ahead of making our proposals for the next ('H7') price control review.*
4. We do not understand the decision to bind the CAA as to the approach that it will take in its determination of any aspect of the H7 Price Control or of any other regulatory intervention that will apply during the H7 Price Control. See for example:
 - a. at §C3, the CAA indicates that it has "*not yet arrived at a final view on the evidence submitted*" due to the fact that the CAA continues to gather its own evidence and stakeholder views "*as part of the H7 price control process.*"
 - b. at §C4, the CAA goes on to state that "*disagreements on the interpretation of evidence are commonplace in economic regulation and can ultimately be resolved through an appeal to the CMA in the context of the licence modifications to be made to HAL's licence to implement the H7 price control.*"
 - c. In §4.26, the CAA indicates that "*for the H7 price review, we will consider further the issues raised by HAL and stakeholders relating to the case for any further intervention in relation to HAL's revenue losses in 2020 and 2021.*"
 - d. At §6, the CAA confirms that the way forward indicated in the Response "*will... be reflected in the modifications we make to HAL's licence to implement the H7 price control, which we anticipate will come into effect in 2022.*"

5. As the CAA will appreciate, the question of whether the Response contains any final decision as to the approach to be taken by the CAA when setting the H7 Price Control is an important one. There are aspects of the Response with which HAL does not agree and may wish to challenge. These include those related directly to the RAB adjustment but also to other matters such as (without limitation) those described at §§4.21 to 4.25.
6. If the CAA considers that the Response is indeed a final decision as to any aspect of the regulatory package that will apply during the H7 Price Control period, HAL would need to consider challenging it now by way of judicial review. In our view, however, the better course, should any challenge be necessary, would be by way of statutory appeal to the CMA against the final H7 licence modifications once they are made. We believe and hope, from what we have read in the Response, that the CAA agrees with us.
7. We should therefore be grateful if you would confirm whether the CAA agrees that:
 - (a) HAL will be entitled to challenge all aspects of the CAA's H7 licence modifications once they are made by way of an appeal to the CMA pursuant to section 25 of the Civil Aviation Act 2012; and
 - (b) the CAA will not seek to argue that HAL is precluded from challenging any aspect of the CAA's H7 licence modifications on the basis that it reflects a decision already taken in the Response and which ought instead to have challenged by way of judicial review of the Response.
8. If the CAA is **not** minded to give the confirmations sought, we will need to consider bringing a judicial review of the Response in order to clarify the status and lawfulness of any 'decisions' contained in that document. If we are required to do that and it subsequently turns out to have been unnecessary, we reserve our rights to pursue the CAA for any costs which could have been saved had the CAA confirmed as requested above.
9. We should be grateful for a reply to the questions at paragraph 7 of this letter as soon as possible, and in any event by close of business on 11 May 2021

Yours sincerely



Helen Stokes

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