

3 March 2008

Dear Consultee

**UK CAA CONSULTATION ON THE IMPLEMENTATION OF THE CIVIL AVIATION
(ALLOCATION OF SCARCE CAPACITY) REGULATIONS 2007**

I am writing to seek your views on the CAA's proposed implementation of the above Regulations, which now govern the way that traffic rights are distributed among eligible Community air carriers on routes:

- (a) which are between the United Kingdom and countries outside the single European aviation market; *and*
- (b) where there are insufficient traffic rights available to accommodate the demands of all UK-designated carriers.

The CAA is obliged to consult widely on any changes it proposes which affect the airline licensing system. In the interests of focusing this consultation, **please note that these proposed changes are likely to have a practical effect only on air carriers that operate or plan to operate between the UK and countries outside the single European aviation market.**

We welcome any comments on this consultation document and the changes which it proposes. Comments should be submitted, preferably by e-mail, to me at the address at the foot of this letter. In accordance with the attached UK Government Code of Practice on Consultation, we are allowing 12 weeks for responses, so the closing date is 30 May 2008.

In line with usual practice and the Freedom of Information Act 2000, a copy of all responses will be placed on the CAA's website. The CAA will only be able to respect requests for confidentiality where consistent with Freedom of Information obligations.

We look forward to receiving your views.

Yours faithfully



Trevor Metson

Government Code of Practice on Consultation

The code of practice and the criteria within it apply to all UK public consultations by government departments and agencies, including consultations on EU directives. UK non-departmental public bodies and local authorities are encouraged to follow this code. Devolved Administrations are free to adopt this code, but it does not apply to consultation documents issued by them unless they do so.¹ Though the code does not have legal force, and cannot prevail over statutory or mandatory external requirements (e.g. under European Community law), it should otherwise generally be regarded as binding on UK departments and their agencies, unless Ministers conclude that exceptional circumstances require a departure from it.

**A full version of the code of practice is available on the Department for Business Enterprise & Regulatory Reform website at:
<http://bre.berr.gov.uk/regulation/documents/consultation/pdf/code.pdf>.**

The code contains six criteria. These must be reproduced within all consultation documents. Any deviation from this code must be highlighted in the consultation document and should state the reasons for departing from the code, and what specific measures have been taken to ensure that consultation is as effective as possible.

Consultation criteria

- 1. Consult widely throughout the process, allowing a minimum of 12 weeks for written consultation at least once during the development of the policy.**
- 2. Be clear about what your proposals are, who may be affected, what questions are being asked and the timescale for responses.**
- 3. Ensure that your consultation is clear, concise and widely accessible.**
- 4. Give feedback regarding the responses received and how the consultation process influenced the policy.**
- 5. Monitor your department's effectiveness at consultation, including through the use of a designated consultation co-ordinator.**
- 6. Ensure your consultation follows better regulation best practice, including carrying out a Regulatory Impact Assessment if appropriate.**

¹ For non-Ministerial departments and other organisations, where 'department' is used it refers to the consulting organisation and where 'Minister' is used it means the decision-maker, for example the board, responsible for the consultation.

CAA CONSULTATION ON THE IMPLEMENTATION OF THE CIVIL AVIATION (ALLOCATION OF SCARCE CAPACITY) REGULATIONS 2007

Purpose of this consultation

We are seeking views on our proposals for implementing The Civil Aviation (Allocation of Scarce Capacity) Regulations 2007. These Regulations now govern the way that traffic rights are distributed among eligible Community air carriers on routes:

- (a) which are between the UK and countries outside the single European aviation market; *and*
- (b) where there are insufficient traffic rights available to accommodate the demands of all UK-designated carriers.

This process is known as the allocation of scarce capacity.

The CAA is obliged to consult widely on any changes it proposes which affect the airline licensing system. In the interests of focusing this consultation, **please note that these proposed changes are likely to have a practical effect only on air carriers that operate or plan to operate to countries outside the single European aviation market.**

In the past, the allocation of scarce capacity was achieved through the CAA's Route Licensing system, ie that governing UK-licensed carriers. The new Regulations have been introduced in order to accommodate potential demands from European carriers which are eligible for UK designation and traffic rights under the UK's Air Services Agreements but which are not licensed by the CAA. As a result, we will now grant a Scarce Capacity Allocation Certificate to allocate scarce capacity, rather than condition route licences.

This requires changes to our published policies, guidance and procedures. We are consulting you on three main aspects:

- A revision to the CAA's Statement of Policies on Route and Air Transport Licensing (paragraphs 6 to 8 below and Attachment A);
- A revision to the CAA's Official Record Series 1, which is the CAA's guide on airline licensing (paragraphs 9 and 10 below and Attachment B); and
- How scarce capacity hearings should be paid for in the future (paragraphs 11 to 21 below).

We are not consulting on the new Regulations themselves, which have now become law.

Background

1. An air carrier's ability to operate between the UK and another country outside the single European aviation market can in some cases be constrained by government-imposed restrictions in the bilateral Air Services Agreement. These restrictions may limit the traffic rights available in terms of the number of carriers that each side can designate, the routes those carriers can operate, and the frequency or capacity they can offer. Where there are competing bids from qualifying European Community air carriers for the traffic rights available to UK-designated carriers, and those rights are insufficient to meet the demands of all carriers that want to serve the route, the CAA must decide how to allocate the scarce capacity.

2. On 31 January 2008, the Civil Aviation (Allocation of Scarce Capacity) Regulations 2007 ("the new Regulations") came into force in the United Kingdom. A copy of the new Regulations, which supersede the scarce capacity provisions contained in the Civil Aviation (Allocation of Scarce Capacity) Regulations 1991, can be seen at www.opsi.gov.uk/si/si2007/uksi_20073556_en_1. These Regulations now govern the way that traffic rights are distributed among qualifying Community carriers¹ on routes:

(a) which are between the UK and countries outside the single European aviation market; *and*

(b) where there are insufficient traffic rights available to accommodate the demands of all UK-designated carriers.

3. The main change brought about by the new Regulations is to alter the legal basis for the allocation of scarce capacity so as to accommodate applications for scarce capacity from any qualifying Community air carrier. The new Regulations introduce a new Scarce Capacity Allocation Certificate (SCAC). This replaces² the previous system based on conditioning UK route and air transport licences, because Community carriers eligible for UK designation and traffic rights under the UK's Air Services Agreements may not necessarily be licensed in the UK.

4. Where the Secretary of State has notified the CAA that there is scarce capacity on a route, the CAA will invite applications for the allocation of that scarce capacity and, if necessary, hold a hearing for the purpose of determining which air carrier(s) should be awarded a SCAC to enable them to operate. Thus the new Regulations allow any qualifying Community carrier to contest a capacity constrained route. Carriers can also apply for a SCAC (or a variation of their SCAC) in order to challenge an incumbent³.

¹ "Qualifying carrier" is defined in Regulation 2 of the new Regulations. The European Court of Justice ruling of November 2002 in the so-called "Open Skies" cases found that Air Services Agreements (ASAs) between Member States and third countries which restricted rights to domestically owned carriers were in breach of Article 43 of the EC Treaty, which allows nationals of a Member State to operate a business in another Member State under the same conditions as its own nationals. As a consequence of this ruling, and the subsequent Regulation 847/2004, Member States are now under an obligation to secure a so-called "Community Designation" clause in their ASAs. This clause allows the UK to designate any Community carrier to take up traffic rights under the ASA concerned.

² The only route licence containing a restriction as a result of a scarce capacity hearing is that held by Virgin Atlantic Airways Ltd. This prevents Virgin from operating services between London and Moscow if to do so would restrict or inhibit either British Airways plc or British Midland Airways Ltd from operating such services. This condition will remain in place.

³ Unlike the licensing system where a licence holder can apply to vary the licence held by another carrier, the new Regulations do not provide for a carrier to apply to vary the SCAC

5. The CAA must allocate scarce capacity in accordance with Regulation 9 of the new Regulations. Section 4 of the Civil Aviation Act 1982 (general objectives of the CAA) does not apply to the allocation of scarce capacity. This change in the legal framework requires some consequent changes in the CAA's Statement of Policies on Route and Air Transport Licensing and Official Record Series 1.

Proposed changes to the CAA's Statement of Policies on Route and Air Transport Licensing

6. Because SCACs are governed by a different legal framework from the licensing system, the CAA proposes to remove any reference to the allocation of scarce capacity from its Statement of Policies on Route and Air Transport Licensing, which it is required to publish under Section 69(1) of the Civil Aviation Act 1982. This requires the following changes:

- Paragraph 3: The first sentence is amended as follows: Consistent with its aim of making the UK's international aviation markets as contestable as possible, the CAA sees no good grounds for constraining competition through the licensing process ~~other than where government-imposed bilateral restrictions prevent British airlines from operating all of the services they plan to provide.~~
- Paragraphs 5 and 6 (headed "Allocation of Scarce Capacity") are deleted.
- Paragraph 12: The effective date will be changed as appropriate.

7. The full text of the proposed Statement of Policies with the changes highlighted is at Attachment A.

8. In place of this deleted text, the CAA proposes to introduce a new section on SCACs in its Official Record Series 1, which currently contains general guidance to UK licence holders.

Proposed changes to the CAA's Official Record Series 1

9. The CAA proposes to add a new section (Part 4) on SCACs alongside, but set apart from, the existing licensing guidance in the Official Record Series 1⁴. The revised text of the relevant sections is at Attachment B.

10. We would draw your attention in particular to paragraphs 9 to 11 on allocation policy. These mirror those from the current Statement of Policies on Route and Air Transport Licensing, except for the first sentences, which set the policy in the context of the new legal framework, and two other references to the Regulations (rather than the Civil Aviation Act) in paragraphs 10 and 11. A new Annex 8 outlines procedures relating to the SCAC system as set out in the new Regulations. In terms of timescales and process these procedures are largely the same as those that applied in previous scarce capacity cases.

held by another carrier. Instead, the CAA would, where necessary, need to propose to vary or revoke the SCAC of an incumbent where the demands of carriers wanting to operate exceeded the rights available.

⁴ The Official Record Series 1 will be subject to further review later this year, when revised European legislation governing airline licensing is expected to take effect.

The future funding of scarce capacity hearings

11. Where competing bids for scarce capacity exceed the traffic rights available to UK-designated carriers and the relevant parties wish to be heard, the CAA is required by Regulation 13 to hold a hearing. Scarce capacity hearings are relatively rare. The November 2004 public hearing on UK/India routes⁵ is the only case the CAA has had in the last five years. However, when they do occur, the cost to participants and the CAA can be significant. The CAA estimates its own administration and staff costs from the India hearing to have been in the region of £100,000.

12. It is arguable that the cost of the India hearing was unrepresentative, as it was a complex case involving three applicants for capacity and a number of potential route/frequency combinations. However, it is possible that in an increasingly competitive market, future cases could be just as complex; particularly with the potential involvement of airlines from across the Community and more UK carriers taking an interest in scheduled operations to markets outside Europe where scarce capacity may occur.

13. To date, the costs attributable to the scarce capacity process have been recovered along with other licensing costs from UK licence holders as part of the CAA's Operating Licences and Air Transport Licences Scheme of Charges (the "general charge"). The introduction of the SCAC system means that non-UK licence holders, which are not subject to the general charge, may now be applicants for scarce capacity and thus potential participants in a hearing. In other words, non-UK licence holders would not contribute to the cost of a hearing at which they were a party.

14. We are therefore consulting on whether we should levy a specific charge on applicants for a SCAC in order to recover the costs of a hearing.

15. The CAA will consider any future charges against its own charging principles, in particular that the CAA shall recover its costs from those it regulates, that charges for a particular scheme shall recover the costs properly attributed to that scheme, and that for activities within a scheme, charges shall be cost related, fair and reasonable. The CAA is therefore consulting on the general principle of whether there should be a separate application charge for a SCAC, what form such a charge should take, and at what level it should be set. (If a decision were to be taken that such a charge should be introduced, the CAA would incorporate this in its proposed charging scheme for 2009/10, which itself would be the subject of further consultation.)

16. We set out three options overleaf on which we would welcome comments:

⁵ The CAA decision following the 2004 India scarce capacity hearing can be found at www.caa.co.uk/docs/213/india%20scarce%20capacity%20final.pdf.

Charging options

Option A	No change to existing charging scheme. Hearing costs continue to be recovered through the general charge levied on all holders of a UK Operating Licence or Air Transport Licence.
Option B	<p>An up-front charge levied on all air carriers applying for a SCAC with effect from 1 April 2009. We propose that this charge be set initially at £15,000, which we calculate is a fair contribution towards the likely costs of a hearing. We would expect to review the charge annually as part of the charging scheme.</p> <p>We propose to retain some discretion to refund the charge where a hearing does not in the event take place and the CAA does not incur the associated costs.</p>
Option C	No up-front charge. The full cost of the hearing – including all administrative and staff costs – would be recovered equally from each applicant by way of a charge after the hearing.

Advantages and disadvantages of the charging options

17. **Option A (no change):** The existing arrangements have the advantage of being well established and understood by the UK aviation industry. There is administrative simplicity in continuing to cover the costs of any hearing through the general charge on UK licence holders. Such hearings are rare, although it is difficult to predict how often they might occur in future. This will depend on the number of potential players in the market, the extent to which restrictions such as capacity or frequency caps continue to be removed from Air Services Agreements, and the Government’s ability to negotiate sufficient “headroom” in traffic rights to cater for all carriers’ demands in those cases where a cap remains; none of these are within the CAA’s direct control. The disadvantage of this option is that the costs of a hearing would be spread across all, but only, UK licence holders in accordance with the general charge (ie in proportion to output), even though the hearing may potentially involve non-UK carrier SCAC applicants.

18. **Option B (pre-hearing charge):** The introduction of an application charge for a SCAC would go some way to ensuring that it is the applicants for scarce capacity rights, including non-UK Community carriers, that contribute to the cost of a hearing. An up-front charge would be the simplest approach, and, compared with Option C, would provide certainty to applicants as to the CAA’s charges irrespective of the duration of the hearing or the number of applicants. Conversely, from the CAA’s perspective there would be a degree of uncertainty about the level of cost recovery, which would depend upon the complexity of the hearing and the number of applicants. Applicants would be charged whether or not they chose to be heard, but objectors that were not applicants would not be charged. The CAA would need to retain some discretion to refund the charge where the application is determined or withdrawn without a hearing well before the CAA incurs any significant costs.

19. **Option C (post-hearing charge):** The CAA’s normal policy is to make an up-front charge as described under Option B, because of the practical difficulties

associated with recovering charges after the event.⁶ The alternative to an up-front charge of invoicing applicants at the end of the process for the CAA's full costs, including all administrative and staff costs, would have the advantage of providing nominal certainty to the CAA with regard to recovery of its own costs, but carries the risk of administrative complexity. It also means that applicants would not be able to predict what charge the CAA would levy after the hearing, which in the case of a complex case could be well in excess of £15,000 per applicant (as noted above in the context of the costs of the India hearing).

Provisional view of the CAA

20. Guided by our principles on charging, we see practical difficulties, potential complexity and financial uncertainty for applicants should we seek to recover our costs through charges after the event, particularly given the relative infrequency of hearings. Our provisional view is therefore that Option B, the introduction of an up-front fee of around £15,000 per application, would best balance the competing needs for fairness, cost predictability and administrative simplicity. In terms of the amount of the charge, £15,000 appears likely to the CAA to make a significant contribution to the costs of administering the hearing, without being so high that it risks over-recovery.

21. We did consider a variation to Option B whereby the charge to each applicant is based on a fixed amount for each day or part-day of the hearing, thus distinguishing between complex and more straightforward cases. However, we are minded to discount this option, as much of our costs are likely to be fixed irrespective of the duration of the hearing, and the charge would add unreasonable complexity. For similar reasons we are minded to keep any refund process under our preferred option as simple as possible, and to regard the whole £15,000 as refundable where an application is determined or withdrawn without a hearing or without the CAA incurring significant costs specifically related to the hearing.

Interim arrangements

Statement of Policies and Official Record Series 1

22. The new Regulations are now in force. Should a scarce capacity hearing be triggered prior to the CAA reaching a conclusion following this consultation, the CAA therefore intends to hold the hearing on the basis of the *proposed* new Statement of Policies and Official Record Series 1 guidance.

Application charge

23. Because the CAA sets its charges annually, the introduction of any new charge would not take effect until the start of the next financial year, ie 2009–10, subject to consulting the Secretary of State. Until then, the cost of any hearings would therefore be met through the existing arrangements, ie the general charge.

⁶ The CAA could not, for example, rely upon Regulation 10(3)(c) of the new Regulations.

Questions on which the CAA would welcome views:

1. Do you have any comments on the proposed changes to the Statement of Policies?
2. Do you have any comments on the proposed changes to the Official Record Series 1?
3. Should the CAA change the way it recovers the cost of administering scarce capacity hearings?
4. If so, what form should a charge take? For example, should it be an up-front application fee or should the costs be recovered from the applicants after the hearing?
5. If an up-front application fee is appropriate, is £15,000 set at the right level?
6. Are there circumstances where the fee should be refundable?

Responses to this consultation

24. In conformity with the Government's code of practice on the conduct of consultations by public authorities⁷, we are allowing twelve weeks for comments on these proposals. We would therefore be grateful for any comments on this consultation document by 30 May 2008. Responses or requests for further information should be submitted, preferably by e-mail, to

Trevor Metson
Economic Policy and International Aviation
Economic Regulation Group
Civil Aviation Authority
4th floor
CAA House
45–59 Kingsway
London
WC2B 6TE

Telephone 020 7453 6230

Fax 020 7453 6236

Email trevor.metson@caa.co.uk

25. In line with usual practice and the Freedom of Information Act 2000, a copy of all responses will be placed on the CAA's website. The CAA will only be able to respect requests for confidentiality if this is consistent with Freedom of Information obligations.

Attachments

Attachment A: Proposed CAA Statement of Policies

Attachment B: Proposed changes to CAA Official Record Series 1

Attachment C: List of consultees

⁷ <http://bre.berr.gov.uk/regulation/consultation/code/>

CAA STATEMENT OF POLICIES ON ROUTE AND AIR TRANSPORT LICENSING

Part 1

GENERAL PRINCIPLES, OBJECTIVES AND APPROACH

1. The CAA's general objectives are set out in Section 4(1) of the Civil Aviation Act 1982, as amended by the Licensing of Air Carriers Regulations 1992, ("the Act") and its general duties in relation to air transport and route licensing functions are set out in Section 68 of the Act.

2. The CAA believes that the interests of users will be best served if airlines are free to operate air services in competition with one another according to their commercial judgement, subject only to the application of normal competition policy. To this end, it believes that the long term interests of users would be best served by a full liberalisation of international aviation markets, involving the removal of all bilateral restrictions so that the airline industry can compete on the same footing as other industries. The CAA will aim to make the UK's international aviation markets as contestable as possible by eliminating all unnecessary restrictions within its licensing and other regulatory processes.

Licensing policy

3. Consistent with its aim of making the UK's international aviation markets as contestable as possible, the CAA sees no good grounds for constraining competition through the licensing process ~~other than where government imposed bilateral restrictions prevent British airlines from operating all of the services they plan to provide~~. This points towards a fully liberal approach to the grant of licences to serve points outside the EU, just as now applies to routes within the EU. The CAA will therefore be prepared to grant global Route Licences for scheduled or charter services which permit the combination of any points world-wide.

4. Many international routes are subject to bilateral restrictions on designation, frequency or capacity which would prevent a British airline from exercising its licence freely. However, the CAA would not regard the absence of the necessary bilateral rights as good grounds for refusing to grant a licence application. If a problem of scarce bilateral capacity should arise as a consequence of the CAA granting an application, then this would be ~~most appropriately~~ addressed through ~~the Scarce Capacity Allocation Certificate specific procedures~~⁸ specifically established to allocate such scarce rights.

~~Allocation of Scarce Capacity~~

~~5. Where bilateral restrictions prevent British airlines from operating all of the services they plan to provide, the CAA will allocate scarce capacity between competing British airlines. In such cases, the CAA's overarching objective will be to maximise economic efficiency. The most comprehensive approach would be to conduct a full economic analysis of the costs and benefits that would accrue to airlines and users, with capacity being awarded to the airline that provided the highest level of net benefit. In conducting this analysis, the CAA will take into account the effect on competition of the proposed services. This will include considering to what extent an award of scarce capacity would~~

⁸ Set out in the CAA's Official Record Series 1.

~~affect rivalry in all the relevant markets, using standard competition analysis and having regard to the Office of Fair Trading's relevant published guidance and guidelines. Any detrimental impact on competition will then be weighed against the benefits which would arise from awarding the scarce capacity to the relevant carrier.~~

~~6. In a limited number of cases competition may be precluded, or unattainable on acceptable terms, because of bilateral constraints. In these circumstances, the CAA will be ready to consider substituting one carrier for another, in whole or in part, so as to safeguard or further the interests of users. It will expect to do so sparingly, and only when to do so would manifestly enhance the achievement of the objectives of the Act. It will take into account the length of time the incumbent has had to establish itself on the route and the degree of commitment it has shown in serving it. It will pay particular attention to the quality of service (capacity, seat availability, frequency, timings and price) offered by the newcomer relative to the incumbent's established standard.~~

Abuse of a Dominant Position

Anti-competitive behaviour

7. The CAA believes that allegations of anti-competitive behaviour are best addressed through the application of normal competition law. With the entry into force of the Competition Act 1998, UK competition law now applies to the UK aviation market, including routes to and from points outside the European Union.

8. However, in the event that the CAA is called upon to apply its regulatory powers to a case involving allegations of anti-competitive behaviour, it will adopt the principles of UK competition law. It will therefore seek first to establish whether the airline whose behaviour is the subject of the complaint is dominant in a relevant market. If so, it will then seek to establish whether its behaviour constitutes an abuse of that dominant position.

Tariffs

9. The CAA believes that the interests of users will be best served if airlines are free to set their own prices without regulatory intervention, subject only to the application of normal competition policy.

Part 2

OTHER POLICIES

Leasing of foreign-registered aircraft

10. The CAA believes that airlines should be free to choose the aircraft they employ and, subject to Article 8.3 of Council Regulation (EEC) 2407/92, will advocate a liberal policy when advising the Department for Transport on applications for the use of aircraft not registered in the United Kingdom. If, however, the applicant fails to demonstrate a genuine commercial requirement for the aircraft within its own operations the CAA will advise that the application would be more appropriately dealt with under the Department's policies on fifth freedom flights.

Part 3

APPLICATION OF POLICY

11. The CAA will reach its decisions on the basis of the facts and circumstances of each particular case. It may need occasionally to depart from its policies in unforeseen circumstances or where the Act requires.

Part 4

COMING INTO EFFECT

12. This Statement of Policies will take effect on ~~7 August 2007~~**[date]** and the Statement of Policies established by the CAA on ~~1 December 2006~~**7 August 2007** will cease to have effect on the same day.

OFFICIAL RECORD SERIES 1

PROPOSED CHANGES

The current version of the Official Record Series 1 can be seen at www.caa.co.uk/default.aspx?catid=213&pagetype=90&pageid=736 or by following the links to Airline Licensing from the Consumer Protection Group webpage at www.caa.co.uk.

The Official Record Series 1 will be subject to further review later this year, when revised European legislation governing airline licensing is expected to take effect.

Changes are proposed to the following sections:

- *Overview*
- *Part 2 Route Licences*
- *Part 4 (new) Scarce Capacity Allocation Certificates*
- *Annex 6 Statement of Policies on Route and Air Transport Licensing (see Attachment A)*
- *Annex 7 Procedures for Applications for the Grant of Route Licences and Air Transport Licences and for Revocation, Suspension or Variation of Route Licences and Air Transport Licences*
- *Annex 8 (new) Policy And Procedures Relating to Scarce Capacity Allocation Certificates*
- *Schedule 8 (new) Form of Scarce Capacity Allocation Certificate*

There will also be some subsequent renumbering required.

OVERVIEW

Add new summary paragraph to the Overview:

Part 4: Scarce Capacity Allocation Certificates

On some routes between the UK and countries outside the single European aviation market, the Air Services Agreement between the UK and a foreign government may limit the traffic rights available in terms of the number of carriers that each side can designate, the routes those carriers can operate, and the frequency or capacity they can offer. Where there are insufficient traffic rights to accommodate the demands of all UK-designated carriers, which may include Community carriers established but not licensed in the UK, the CAA may be required to determine how those rights should be allocated, through the grant of **Scarce Capacity Allocation Certificates**.

PART 2: ROUTE LICENCES**ROUTE LICENSING POLICIES AND PROCEDURES**

Delete paragraphs 16 and 17:

~~16. Most of the issues to be dealt with by a public hearing relate to circumstances where the opportunities for UK airlines are limited by the policies of other countries and their bilateral agreements with the UK, or by airport congestion. This may occur because one airline perceives its opportunities to be restricted and applies to vary the licence of a competitor to limit services so as to allow greater scope for the applicant airline, or it may occur because a formal process known as the “scarce bilateral capacity” procedure is invoked. This arises when the Secretary of State notifies the CAA that the capacity available to UK operators on a particular route or to a particular country is or will shortly be insufficient to allow the airlines that operate services on that route, or plan to do so, to provide the capacity that they propose. The CAA must then hold a hearing to determine how the available capacity can best be allocated between UK airlines. Regulation 27(9) of the CAA Regulations provides an expedited process for appeals to the Secretary of State in relation to hearings in this category.~~

~~17. The CAA has published guidance, at [Annex 8](#), on the economic framework within which it will consider cases relating to the apportionment of scarce bilateral capacity. When it has received the written submissions in respect of any hearing it will normally produce for the parties a statement of what it perceives to be the key issues, and the parties will be invited to address these in the hearing.~~

Insert new paragraph 16:

16. The allocation of scarce bilateral capacity is governed by the grant of Scarce Capacity Allocation Certificates (Part 4).

Insert new Part 4:

PART 4: SCARCE CAPACITY ALLOCATION CERTIFICATES

INTRODUCTION

1. An air carrier's ability to operate between the UK and another country outside the single European aviation market can in some cases be constrained by government-imposed restrictions in the bilateral Air Services Agreement. These restrictions may limit the traffic rights available in terms of the number of carriers that each side can designate, the routes those carriers can operate, and the frequency or capacity they can offer. Where there are competing bids from qualifying European Community air carriers for the traffic rights available to UK-designated carriers, and those rights are insufficient to meet the demands of all carriers that want to serve the route, the CAA must decide how to allocate the scarce capacity.
2. In the UK, a system of scarce capacity allocation certificates (SCACs) administered by the CAA determines which airlines are permitted to operate services on a capacity-constrained route. For this purpose, a capacity-constrained route is one where the Secretary of State has notified the CAA that the relevant traffic rights are insufficient to enable all qualifying carriers⁹ who would wish to operate services on the route to provide all the services they would wish to provide.

LEGAL FRAMEWORK

3. The provisions relating to the grant, refusal, revocation and variation of SCACs are contained in [The Civil Aviation \(Allocation of Scarce Capacity\) Regulations 2007](#) ("the Regulations").
4. The Regulations make provision to comply with Article 5 of Regulation 847/2004 of the European Parliament and Council on the negotiation and implementation of Air Services Agreements between Member States and third countries. Article 5 provides that a Member State shall ensure a distribution of traffic rights among eligible Community air carriers on the basis of a non-discriminatory and transparent procedure.
5. The CAA is required to allocate scarce capacity in accordance with Regulation 9 of the Regulations. Section 4 (general objectives of the CAA) of the Civil Aviation Act 1982 does not apply to the allocation of scarce capacity.

PROCEDURES

6. A route becomes a capacity-constrained route for the purposes of the Regulations when the Secretary of State notifies the CAA under Regulation 4 that within six months the traffic rights on a particular route or to a particular country will be insufficient to meet the demands of qualifying carriers. The CAA will invite applications from qualifying carriers for the allocation of that scarce capacity.
7. A carrier may also apply to the CAA for the grant of a SCAC (or variation of its SCAC) in order to operate all or some of the services already operated on a capacity constrained route by another qualifying carrier (ie challenging an incumbent operator).

⁹ "Qualifying carrier" is defined by Regulation 2 of The Civil Aviation (Allocation of Scarce Capacity) Regulations 2007; it includes both UK-licensed carriers and Community carriers which are not UK-licensed but which are established in the UK.

8. The CAA will publish applications and, where applicants, objectors and others have exercised a right to be heard, the CAA will hold a hearing to determine how the available capacity can best be allocated between the applicant airlines. Procedures relating to SCACs are set out in more detail in Annex 8 to this document.

ALLOCATION POLICY

9. The CAA must allocate scarce capacity in accordance with Regulation 9 of the Regulations (reproduced below). The manner in which the CAA will set about allocating scarce capacity in accordance with Regulation 9 is to assess how best to maximise economic efficiency. The most comprehensive approach would be to conduct a full economic analysis of the costs and benefits that would accrue to airlines and users, with capacity being awarded to the airline that provided the highest level of net benefit. In conducting this analysis, the CAA will take into account the effect on competition of the proposed services. This will include considering to what extent an award of scarce capacity would affect rivalry in all the relevant markets, using standard competition analysis and having regard to the Office of Fair Trading's relevant published guidance and guidelines. Any detrimental impact on competition will then be weighed against the benefits which would arise from awarding the scarce capacity to the relevant carrier.

10. In a limited number of cases competition may be precluded, or unattainable on acceptable terms, because of bilateral constraints. In these circumstances, the CAA will be ready to consider substituting one carrier for another, in whole or in part, so as to safeguard or further the interests of users. It will expect to do so sparingly, and only when to do so would manifestly enhance the achievement of the objectives of the Regulations. It will take into account the length of time the incumbent has had to establish itself on the route and the degree of commitment it has shown in serving it. It will pay particular attention to the quality of service (capacity, seat availability, frequency, timings and price) offered by the newcomer relative to the incumbent's established standard.

11. The CAA will reach its decisions on the basis of the facts and circumstances of each particular case. It may need occasionally to depart from its policies in unforeseen circumstances or where the Regulations require.

CHARGES

12. *[Options subject to consultation]*

EXTRACT FROM THE CIVIL AVIATION (ALLOCATION OF SCARCE CAPACITY) REGULATIONS 2007

Regulation 9

- (1) The CAA must allocate scarce capacity in accordance with this regulation.
- (2) Section 4 of the Act (general objectives of the CAA) does not apply to the allocation of scarce capacity.
- (3) The CAA must allocate scarce capacity in a manner which it considers is best calculated—
 - (a) to secure that qualifying carriers provide air transport services which satisfy all substantial categories of public demand at the lowest charges consistent with a high standard of safety in operating the services, whilst giving an

economic return to efficient qualifying carriers on the sums invested in providing the services;

- (b) to further the reasonable interests of users of air transport services;
- (c) to secure the effective provision of civil air transport to and from the United Kingdom;
- (d) to ensure that qualifying carriers compete as effectively as possible with other airlines in providing air transport services on international routes; and
- (e) to ensure the most effective use of airports within the United Kingdom.

(4) When allocating scarce capacity the CAA must have regard—

- (a) to the effect on existing air transport services provided by qualifying carriers; and
- (b) in any case—
 - (i) where the existing services are similar (in terms of route) to the proposed new service; or
 - (ii) where two or more applicants have applied for a scarce capacity allocation certificate, indicating that they propose to provide a new but similar service,

to any benefits which may arise from enabling two or more airlines to provide the service in question.

(5) In exercising its functions under paragraphs (3) and (4), the CAA must have regard to the need to minimise so far as reasonably practicable—

- (a) any adverse effects on the environment; and
- (b) any disturbance to the public;

from noise, vibration, atmospheric pollution or any other cause attributable to the use of the aircraft for the purposes of civil aviation.

(6) In performing the function of allocating scarce capacity, the CAA must have regard to any advice received from the Secretary of State.

ANNEX 6: STATEMENT OF POLICIES ON ROUTE AND AIR TRANSPORT LICENSING

See Attachment A.

ANNEX 7: PROCEDURES FOR APPLICATIONS FOR THE GRANT OF ROUTE LICENCES AND AIR TRANSPORT LICENCES AND FOR REVOCATION, SUSPENSION OR VARIATION OF ROUTE LICENCES AND AIR TRANSPORT LICENCES

Add to paragraph 1 a reference to Scarce Capacity Allocation Certificates. Delete references to scarce capacity hearing procedures in paragraph 10 and the third bullet of paragraph 12.

1. The procedures set out in this annex apply equally to Route Licensing and Air Transport Licensing. For the procedures relating to Scarce Capacity Allocation Certificates, see Annex 8.

10. The statutory procedures in connection with hearings and decisions by the CAA are set out in Regulations 25 and 26. The CAA will aim to arrange hearings as quickly as possible, consistent with ensuring natural justice and allowing all parties to prepare evidence. For a case where there is no urgent need for an immediate decision, the CAA will normally give two months notice of a hearing date. ~~However, in practice the majority of hearings are about the apportionment of scarce bilateral capacity. In these cases there will usually be an expedited hearing process, and the CAA will aim in most cases to set a date within one month of the time that the need for a hearing becomes known. Once a hearing date has been announced it will be changed only for the most compelling reasons.~~

12. The following procedures and timescales apply to different types of hearing:

[...]

- ~~In a case involving the apportionment of scarce bilateral capacity, the CAA will normally expect to hold a hearing within one month of being notified by the Secretary of State that a need has arisen. The timetable for the submission of written evidence may need to be determined on a case by case basis, but the CAA will normally expect to receive written evidence from both parties 10 working days before the hearing date.~~

Insert new Annex 8:

ANNEX 8: PROCEDURES RELATING TO SCARCE CAPACITY ALLOCATION CERTIFICATES

Introduction

1. The procedures relating to Scarce Capacity Allocation Certificates (SCACs) are set out in full in [The Civil Aviation \(Allocation of Scarce Capacity\) Regulations 2007](#).

Notifications by the Secretary of State that a route is capacity constrained (Regulations 4 and 5)

2. Where the CAA has been notified by the Secretary of State that there will be scarce capacity on a route, the CAA will publish a notice in its Official Record Series 2, which is issued weekly and is available on the CAA's website. The notice will state the date from which the CAA considers that it will be necessary to allocate scarce capacity on the route, and that it proposes to invite applications for the allocation of scarce capacity and, if necessary, hold a hearing for the purpose of determining those applications. The notice will specify what information the CAA will require in connection with the application, and the closing date. The CAA will also publish any notification that there is no longer scarce capacity on a route. The CAA will take reasonable measures to draw such notices to the attention of organisations representing Community carriers licensed outside the UK that are unlikely to monitor or be subscribers to the Official Record.

Applications by qualifying carriers (Regulation 10)

3. Applications for a SCAC can be made by any qualifying carrier¹⁰. This will include both UK-licensed carriers and Community carriers which are not UK-licensed but which are established in the UK.

4. Applications for the grant, revocation or variation of a SCAC should be made to Airline Licensing and Consumer Issues at the CAA's Consumer Protection Group, at the address in Part 5. All applications should be made on the appropriate form, which may be obtained from the same address or from the Consumer Protection Group pages of the CAA website. The CAA will publish any applications in its Official Record Series 2. *[Possible reference to application fee, subject to outcome of this consultation.]*

5. The CAA may refuse to consider an application for the grant, revocation or variation of a SCAC if it has been made less than four months before the SCAC (or variation) is proposed to take effect. The CAA may accept applications on shorter notice, although they will in most cases be subject to a minimum period to allow for the publication process as set out below.

Revocation or variation of a SCAC without application being made (Regulation 11)

6. There will be routes where the conditions of scarce capacity cease to exist or change, or where there are SCAC applications from carriers on an existing capacity-constrained route. In such cases it may be appropriate for the CAA to propose to revoke or vary any relevant SCAC. The CAA will publish any such proposal in the Official Record Series 2.

¹⁰ "Qualifying carrier" is defined by Regulation 2 of the The Civil Aviation (Allocation of Scarce Capacity) Regulations 2007.

Objections and representations (Regulation 12)

7. An "objection period" will be allowed after publication of any application or proposal, during which objections or representations may be served on the CAA. The normal objection period is 21 days. Any objection or representation must state whether the person making it wishes to be heard. A qualifying carrier making an objection or representation must serve a copy on every applicant within 24 hours, and can require the applicant to provide a copy of the application. The CAA will serve a copy of other objections and representations on applicants within seven days indicating whether the person wishes to be heard.

Hearings (Regulations 13 to 16)

8. The Regulations specify who has a right to be heard and can therefore oblige the CAA to hold a hearing. It is highly likely that a hearing will be necessary where the Secretary of State has determined that there is a need for the CAA to allocate scarce capacity, or where there is an objection to an application for grant or variation of a SCAC. The CAA has discretion to hear any person not specified as having a right to be heard.

9. The CAA will aim to arrange hearings as quickly as possible, consistent with ensuring natural justice and allowing all parties to prepare evidence. As most scarce capacity cases will be relatively urgent, the CAA will endeavour to programme the hearing within one month (but no less than 14 days). Once a hearing date has been announced it will be changed only for compelling reasons.

10. The hearings will normally be held in public although in some circumstances the CAA can decide otherwise. The CAA will record the proceedings in writing and will normally make a transcript generally available for a reasonable fee. Requests for a transcript should be made to the CAA as soon as possible after the hearing.

11. The timetable for the submission of written evidence may need to be determined on a case-by-case basis, but the CAA will normally expect to receive written evidence from both parties no less than 10 working days before the hearing date. Once the CAA has received all written submissions, it will normally issue a Statement of Key Issues, which it will expect the parties to have regard to at the hearing. In the event that one party fails to deliver its evidence on time, the CAA will consult the other parties as to whether the hearing should be postponed.

12. The CAA has a discretionary power to hold a preliminary meeting to discuss the conduct of the hearing, although this may not be considered necessary in all cases.

Decisions of the CAA (Regulation 17)

13. The length of time taken to reach a decision will depend on the circumstances of each application. The CAA will aim to issue its written decision and SCAC authorisation (see Schedule 8) within 15 working days of the end of the hearing, or as quickly as possible thereafter. The CAA will publish its decision with reasons in the Official Record Series 2.

Enforcement (Regulations 20 to 24)

14. The Regulations make it an offence to operate for reward any service on a capacity-constrained route without an appropriate SCAC, and they permit the CAA if necessary to detain the aircraft.

Appeals

15. There is no further appeal from the decision of the CAA. The CAA procedure is however subject to the jurisdiction of the Court by way of judicial review.

SCHEDULES

Insert new Schedule 8:

Schedule 8: Form of Scarce Capacity Allocation Certificate

SCARCE CAPACITY ALLOCATION CERTIFICATE

SCAC No XXXXX

1. The Civil Aviation Authority, in exercise of its powers under The Civil Aviation (Allocation of Scarce Capacity) Regulations 2007 hereby grants a Scarce Capacity Allocation Certificate to

.....

authorising it to operate aircraft on flights for the carriage of passengers and/or cargo and/or mail in accordance with the attached schedule.

2. Nothing in this certificate authorises the operation of any flight other than by the certificate holder named in paragraph 1

- (a) otherwise than in accordance with the Air Operator's Certificate held by the certificate holder;
- (b) otherwise than in accordance with any Operating Licence, Route Licence or Air Transport Licence held by the certificate holder; or
- (c) that is prohibited as a result of a direction to the CAA by the Secretary of State or by any Rules that may have been published by the Secretary of State.

3. This certificate shall have effect from the date of signature until it is revoked.

Signed:

Date:

for the Civil Aviation Authority

Attached will be a schedule of rights specifying, in accordance with Regulation 19(2):

- (a) the routes to which the SCAC relates;*
- (b) the services it authorises; and*
- (c) any conditions or restrictions to which a route or service is subject*

LIST OF CONSULTEES

European and Government bodies

European Commission	Alderney
Competition Commission	Gibraltar
Department for Transport	Guernsey
Department for Business, Enterprise and Regulatory Reform	Isle of Man
Office of Fair Trading	Jersey

Trade and professional associations, user representatives, other independent bodies

Air Transport Users Council (AUC)	European Civil Aviation Conference (ECAC)
Airport Operators Association (AOA)	European Low Fares Airline Assoc. (ELFAA)
Association of European Airlines (AEA)	European Regions Airline Assoc. (ERAA)
Board of Airline Rep's in the UK (BARUK)	International Air Carrier Association (IACA)
British Air Transport Association (BATA)	International Air Transport Association (IATA)
Council on Tribunals	National Consumer Council
Which?	

Consultants

Aviation & Tourism Law Consultants Limited	KN Associates Ltd
David Hurst Associates	Martin Clough & Associates

UK Type A Operating Licence holders (excluding North Sea helicopter operators)

Air Kilroe Ltd t/a Eastern Airways	Highland Airways Ltd
Air Southwest Ltd	Jet2.com Ltd
Astraeus Ltd	Loganair Ltd
Atlantic Air Transport Ltd	MK Airlines Ltd
Atlantic Airlines Ltd	Monarch Airlines Ltd
British Airways Plc/BA Cityflyer Ltd	Suckling Airways (Cambridge) Ltd t/a Scot A/w
bmi Group	TAG Aviation (UK) Limited
DHL Air Ltd	Thomas Cook Airlines UK Ltd
EasyJet Airline Company Ltd/GB Airways Ltd	Thomsonfly Ltd/First Choice Airways Ltd
European Aviation Air Charter Ltd	Titan Airways Ltd
Flightline Ltd	Twinjet Aircraft Sales Ltd
Flybe Ltd	Veritair Ltd
Flyjet Ltd t/a Silverjet	Virgin Atlantic Airways Ltd
Global Supply Systems Ltd	XL Airways UK Ltd
Globespan Airways Ltd t/a FlyGlobespan	Zoom Airlines Ltd
HD Air Ltd	

UK Air Transport Licence holders

Air X Ltd t/a Blue Islands	Aurigny Air Services Ltd
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EEA airlines (major airlines and larger regional airlines only)

Austrian Airlines	Adria Airways
Aegean Airlines	Aer Lingus Plc
Air Atlanta Icelandic	Air Baltic
Air Berlin GmbH	Air Comet
Air Europa	Air France
Air Malta	Air Nostrum
Air One	Alitalia
Alpi Eagles	BH Air
Blue1	Brussels Airlines
Bulgaria Air	Bulgarian Air Charter
Cargolux Airlines International	Condor Flugdienst
Cyprus Airways	Czech Airlines
Edelweiss Air	Estonian Air
Eurocypria Airlines	Eurofly
Europe Airpost	European Air Transport
Eurowings Luftverkehrs	Finnair
Flugelag Islands	FlyNordic
Futura International Airways	Germanwings
Hello	Helvetic Airways
Iberia Airlines	Iberworld Airlines
Icelandair	KLM - Royal Dutch Airlines
Lithuanian Airlines	Livingston
LOT Polish Airlines	Lufthansa German Airlines
Luxair - Luxembourg Airlines	Malev
Malmö Aviation	Meridiana
MyAir.com	Norwegian Air Shuttle
Olympic Airlines	Ryanair
SAS Scandinavian Airlines	Sky Europe Airlines
Spanair	Star Air
Sterling Airlines	Swiss International Air Lines
TAP Air Portugal	TAROM
TNT Airways	Travel Service
VLM Airlines	Volare Airlines
Wizz Air Hungary Airlines	

Lawyers

DLA Piper Rudnick Gray Cary UK LLP	Allen & Overy
Barlow, Lyde & Gilbert	Beaumont and Son at Clyde & Co
Bond Pearce	Denton Wilde Sapte
Field Fisher Waterhouse	Gates and Partners
Harbottle & Lewis	Holman Fenwick & Willan
Ince & Co	Lane & Partners
Linklaters	Mr C Haddon-Cave QC
Mr H O'Donovan	Mr M Crane QC
Norton Rose	Richards Butler
Royal Aeronautical Society Air Law Group	Slaughter & May