

AN INDICATIVE AIRPORT LICENCE

Developing the CAA's response to the Secretary of State's request for advice

SUMMARY OF RESPONSES

19 JANUARY 2012

1 Introduction

Responses

1.1 On 23 November 2011, and in response to the Secretary of State's (SoS) request for advice and assistance under section 16(1) of the Civil Aviation Act 1982¹, the CAA issued a Discussion Document on "An indicative airport Licence" using Heathrow as an example². The CAA sought views and comments by 14 December 2011. The very tight timescale was driven by the SoS' desire to receive advice by January 2012 as there was an opportunity for the Government to introduce the draft Civil Aviation Bill into Parliament near the beginning of 2012.

1.2 The CAA would like to thank the following 8 organisations who attended meetings and/or submitted written responses in the very short time that was available.

BAA Limited (covering Heathrow and Stansted airports)

British Air Transport Association

British Midland International

British Airways

easyJet

Gatwick Airport Limited

London (Heathrow) Airline Consultative Committee & Airline Consultative Committee

Ryanair

1.3 The written responses that were received can be found on the CAA website³.

Purpose of this document

1.4 This document sets out a brief summary of the comments received. It also sets out how the CAA has taken into account responses in its advice to the SoS. Given the very limited time available and that the Indicative Licence was not designed to represent the CAA's policy on Heathrow nor the full licences, the CAA has only made limited changes to the Indicative Licence.

¹ The SoS sought advice on specific issues and those requests can be found [here](#)

² Available at <http://www.caa.co.uk/docs/5/IndLicenceSlides.pdf>

³ Available at <http://www.caa.co.uk/default.aspx?catid=78&pagetype=90&pageid=68>

- 1.5 Many of the responses raised interesting issues that will require further exploration and stakeholder discussion as part of the development of the full licences (see section 8). The fact that the CAA did or did not make a change to the Indicative Licence should not be treated as an expression of CAA's policy intent. All comments will continue to be considered as part of the programme to develop the full licences whether or not they are mentioned in this document and irrespective of whether they have been reflected in the Indicative Licence provided to the SoS.

Next steps

- 1.6 The CAA has started its review of the appropriate future arrangements for price and service quality regulation at the three designated airports for the next regulatory period (Q6). It remains the CAA's intention, subject to the Parliamentary progress/timing and content of the Civil Aviation Bill, to consider the development of the full airport licences alongside this review and to be in a position to grant the licences in advance of Q6. However none of the licence conditions will come into force before April 2014 to ensure the Government's commitment that the new regime should not disturb the current settlement (Q5) is maintained.
- 1.7 The CAA remains keen to discuss with stakeholders their views on the structure and content of the full airport licences and proposes that these discussions take place during 2012. Please contact Barbara Perata-Smith on 0207 453 6202 or at Barbara.PerataSmith@caa.co.uk to register your interest in any events on this subject.

2. General comments from Respondees

- 2.1 There was general agreement that the CAA's approach to licensing should be based on Better Regulation principles and a recognition that the approach adopted largely reflected the structure in other regulated sectors where licences are present.
- 2.2 The draft Civil Aviation Bill proposes to introduce a licensing regime where licence conditions could be tailored to the specific circumstances facing individual airports. As such, it was suggested by BAA that the current obligations should not simply be 'rolled over'. Additionally there was an expectation that the licences for each airport operator would be differentiated with the conditions reflecting the outcome of the CAA's market power assessments.

CAA views

- 2.3 The CAA accepts that 'one size may not fit all' and that whilst there may be many common features applicable to all licensees with substantial market power there may also be different conditions that are more proportionate and targeted to the specific circumstances and risks at each airport. The CAA also accepts that the licence can only place obligations on the licensee and that it cannot be used to bind say, airlines, to particular courses of action.
- 2.4 However the CAA does not agree with the suggestion from BAA and BA that the conditions included in a licence should be limited to addressing the CAA's finding of dominance within the meaning of the draft Civil Aviation Bill.

- 2.5 The draft Civil Aviation Bill makes express provision for the CAA to include “*such other conditions as the CAA considers necessary or expedient having regard to its duties under section 1*”⁴. The proposed legislation puts it beyond doubt that, the CAA would have the ability to impose conditions in areas such as Operational Resilience and Financial Resilience where it could be argued that such conditions go beyond what is necessary to protect users against the risk the licensee might misuse its substantial market power. Any proposal by the CAA to impose or modify a licence condition would be constrained by its duties under the draft Civil Aviation Bill ie, it would have to be in the interests of users, the CAA must have regard to the Better Regulation principles and that “*regulatory activities should be targeted only at cases in which action is needed*”⁵. Furthermore the legislative process will require the CAA to consult on its proposals to grant or modify a licence and any decision would be subject to appeal to the Competition Commission⁶.

3. Terms of the Licence

- 3.1 The SoS requested the Indicative Licence include the conditions required to make the licence work – the CAA included these as ‘Terms of the Licence’ and ‘Operable conditions’.

Licensed Operator

- 3.2 No comments were made on this.

Licence Area

- 3.3 A number of respondents noted the complexity of the arrangements within the draft Civil Aviation Bill in relation to the Licence Area. The CAA considers it might be useful to explain its understanding of the purpose of this term to provide some clarity and to allay any concerns stakeholders may have.
- 3.4 A licence must include provision specifying (a) the airport area for which it is granted and (b) the airport at which the area is located⁷. This is necessary to lift the prohibition on levying charges for airport operation services at that airport that would otherwise apply. The area will not necessarily be a restriction on the conditions that can be imposed in the licence as the draft Civil Aviation Bill makes express provision for the CAA to include conditions “*relating to activities carried on outside the airport area for which the licence is granted*”⁸. For example the scope of the Regulatory Accounts are likely to extend beyond the licence area and may include, for example, the financial performance of car parks and providing space to shops/other retail businesses. Additionally the financial arrangements of an operator are unlikely, in practice, to be restricted to the licence area so any related licence condition (and derogation) will have to be drafted accordingly.

⁴ Draft Civil Aviation Bill published November 2011, section 18(1)(b)

⁵ Draft Civil Aviation Bill published November 2011, section 1(4)(b)

⁶ Draft Civil Aviation Bill published November 2011, sections 16 and 22

⁷ Draft Civil Aviation Bill published November 2011, section 21

⁸ Draft Civil Aviation Bill published November 2011, section 18(2)(f)

Licence Duration

- 3.5 No comments were made on this.

Interpretation of the Licence

- 3.6 No comments were made on this.

4. Operable conditions

Payment of Fees

- 4.1 This did not attract particular comment other than a suggestion from two respondents (BA and LACC/ACC) that a clearer commitment on fees would be welcomed to avoid, for example, the risk of cross subsidy to or from other areas of CAA. The CAA has not amended the Indicative Licence condition as stakeholders will have an opportunity to comment on the CAA's scheme of charges and charging principles through its wider consultation under section 11 of the Civil Aviation Act 1982 prior to the introduction of a licence. The CAA is not currently required to consult charge-payers although in practice it does. Respondees may be interested to note that the draft Civil Aviation Bill proposes to introduce a statutory obligation on the CAA to consult charge-payers⁹.

Licence Revocation

- 4.2 BAA expressed its view that the licence should only be capable of being revoked for breaches of the statutory framework under which it was issued and therefore the provisions relating to non-compliance with Orders issued under the Competition Act should be deleted. Whilst failure to comply with an Order under the Competition Act is not a circumstance for revocation in the Post or Rail sector, it does appear in the air traffic services, water as well the gas and electricity sector licences. The CAA has therefore not amended the Indicative Licence condition but has recorded the matter, in section 8, for further discussion with stakeholders.
- 4.3 GAL suggested a "warning" of revocation could be introduced to give the airport operator an opportunity to address any shortcomings. BA expressed concern that because revocation of an airport licence would have severe consequences for the operator, providers of services at that airport as well as users, revocation might not be seen as a credible sanction and therefore the operator might not be that incentivised to comply with notices issued by the CAA.
- 4.4 The legislative process¹⁰ will impose a duty on the CAA, before revoking the licence, to give the operator a notice of its intention to revoke the licence and to allow it a period of time to make representations. If the CAA still wished to proceed it must then publish a notice stating that the licence would be revoked within a period of not less than 30 days and there are rights of appeal against such a notice. Replicating this within the licence could be considered as unnecessary duplication.

⁹ Draft Civil Aviation Bill published November 2011, section 95

¹⁰ Draft Civil Aviation Bill published November 2011, section 46

- 4.5 The CAA does however agree with the principle that sanctions must be proportionate to the harm caused by the airport operator's behaviour or non-compliance. It therefore fully supports the proposed 'sliding scale' approach to sanctions with revocation being the sanction of last resort. The CAA believes that if, in the circumstances and in the interests of users¹¹, it was appropriate to revoke a licence then the CAA should take that action. Furthermore the proposed legislation will give the CAA the discretion to determine the date the revocation would take effect¹² so as to facilitate continuity of service.

5. Price Control and Public Interest Conditions

Price Control

- 5.1 The SoS requested that the Indicative Licence include, for illustrative purposes, a transposition of Heathrow's current price control condition and no substantive comments were made on this.
- 5.2 It was however suggested by BAA that as the draft Civil Aviation Bill does not confer any rights on the operator to request an interim review of the price control, provision could be included within the licence for a 'reopener' in the event of there being a material change of circumstances. The CAA has recorded this, in section 8, as a potential issue for discussion in developing the full licences alongside its Q6 review.

Alternative form of Regulation

- 5.3 Respondee recognised that the CAA had included, as requested by SoS and for illustrative purposes, an example of a condition that could be imposed as an alternative to the CAA setting a maximum price limit for a five-year period. Respondee also recognised that the actual form of price regulation at each airport would be dependent on the outcome of the CAA's competition assessments and that any licence condition as a result of that assessment could only be properly considered then. The CAA intends to publish its emerging views on its market power assessments for each of the three currently designated airports in January 2012.
- 5.4 A few comments were received on the draft Indicative Licence condition:
- a) Confirmation was sought that the CAA would not enforce any breach of an obligation under this licence condition where there was an overlap with the obligations under the Airport Charges Regulations 2011. The CAA agrees that additional clarity would be helpful on this point.
 - b) It was suggested that there might be some overlap between Condition 3.2 d) and the Regulatory Accounting Guidelines, under Condition 6. The CAA agrees that if, in the future, the Regulatory Accounting Guidelines impose an obligation to provide a reconciliation of the charges levied and income stated in the regulatory accounts, then the obligation under Condition 3.2 d) would not be necessary.

¹¹ As defined in the Draft Civil Aviation Bill published November 2011, section 67(1)

¹² Draft Civil Aviation Bill published November 2011, section 46(6)-(8)

- c) BA thought Condition 3.3 should be broadened beyond capital investment and suggested it could cover all price control matters and related matters such as the Master Plan. The CAA's current thinking is that a minor change could be included now and that the substance could be considered at a future date alongside its discussions under the category of "the provisions for the licensee's consultation with stakeholders and information disclosure" – see section 8.

Public Interest Conditions

- 5.5 BA and LACC/ACC favoured the CAA transposing all the current Public Interest conditions into licence conditions whereas the airports thought that this should not occur without there being serious consideration as to whether they were still needed. There was also some interest in how the CAA would investigate public interest-type conditions in the future. Section 8 below records the CAA will need to seek views on which Public Interest conditions should be transposed and whether particular licence conditions could remedy or prevent those risks from occurring.

Public Interest Conditions: Service Quality Rebate Scheme

- 5.6 There were no particular objections to the transposition of this current Public Interest condition for inclusion in the Indicative Licence.
- 5.7 The airlines generally favoured the continuation of the SQR scheme so that those affected by the airport's poor performance would be entitled to the rebates provided that the rebates, and any penalty imposed on the airport operator as a result of enforcement action, were funded by the airport's shareholders and not included as part of the regulatory settlement.
- 5.8 BAA commented that it hoped the new regime would be flexible so as to allow for future improvements such as, for example, replacing some non-passenger facing commitments with measures negotiated between airlines and airports.

Public Interest Conditions: Non-regulated charges

- 5.9 No comments were made on this apart from an observation by BAA that "Charges for Other Services" might be a better description of the condition. The CAA agrees.

6. Other Conditions

Regulatory Accounts

- 6.1 The two airport responses confirmed their, in principle, agreement that they should be under an obligation to provide such accounts. BAA suggested that as the existing regime worked well then for ease it should simply be formalised.
- 6.2 GAL suggested that the licence condition did not need to specify the accounting standards to be used and that these could more usefully be contained in any Regulatory Accounting Guidelines. The CAA agrees that it should consider whether it would be more appropriate for this information to be in the Guidelines rather than in the licence condition.

Operational Resilience

- 6.3 The SoS had asked the CAA to include, in the Indicative Licence, a high level example of a condition that would provide the CAA with flexibility to strengthen airports' resilience, where appropriate. All respondents appreciated that further discussions with stakeholders would take place if such a condition was to be pursued alongside Q6, particularly on the detail of what the exact obligations might be so that all parties were clear as to its scope.
- 6.4 However a number of initial views were expressed including:
- a) GAL expressed support for the CAA's preferred approach that operational resilience solutions should be voluntary sector-led.
 - b) CAA was urged by BAA and BA to give serious consideration to the separation of day-to-day obligations on efficiency and reliability from detailed provisions relating to continuity of service in the event of, for example, extreme weather conditions as this could create a potential conflict.
 - c) Some respondents (bmi, LACC/ACC) suggested that the airport operator's obligation "to operate an efficient and reliable airport" should be "to levels of reliability agreed with its users". The CAA agrees this might be helpful clarification.
 - d) There were other concerns that the obligations could give rise to unintended consequences such as—
 - I. the airport reducing available capacity too much or building in an excessive level of contingency; or
 - II. encouraging the airport operator to 'gold-plate' its response and investment through the Regulatory Asset Base to these issues.
 - e) Concern that an airport operator could be subject to 'double jeopardy' ie, it could be required to pay a rebate to airlines and it could also be subject to enforcement action by the CAA for breach of a licence condition.
- 6.5 BATA and BA stated they thought the obligations in Indicative Licence Condition 7.3 were too narrow and that they should extend to communicating information to other parties providing services at and around the airport. The CAA agrees this might add additional clarity so the drafting has been expanded.
- 6.6 There was unanimous agreement that the Board of the licensed airport should be responsible for, and approve, the content of the resilience plan, not the CAA. Since the CAA issued its consultation document, Monitor (the independent regulator of NHS Foundation Trusts) has issued a number of consultations on the shape and content of its licensing regime and licence conditions¹³. Their proposals include an obligation, in certain circumstances, for an assurance report to be provided in relation to information submitted to the regulator. The CAA believes that this could be a further option worth discussing with stakeholders when it develops the airport licences and considers whether a resilience plan should be "approved".

¹³ <http://www.monitor-nhsft.gov.uk/home/monitors-new-role/licensing-providers/stakeholder-engagement-the-licence>

Financial Resilience

- 6.7 The CAA had not been asked to provide examples of financial resilience conditions in the Indicative Licence. The Department for Transport advised that it would be sufficient for Parliament to be provided with the list of potential ring fence provisions.
- 6.8 Airlines welcomed the Government's confirmation that the CAA's proposed financing duty "*does not require the CAA to...put the interests of users at risk by making them pay for an inefficient operator's financing decisions*"¹⁴. All respondees accepted that how financial resilience should best be encouraged (having regard to any statutory guidance that is issued to CAA¹⁵) and the development of any licence condition would be for later discussion between the CAA and stakeholders.

7. Other issues

Conditions of Use

- 7.1 Some airlines questioned whether there would be a licence condition placing an obligation on airports to ensure that their Conditions of Use were transparent, fair and reasonable. This goes beyond the specification SoS requested for the Indicative Licence so the CAA has recorded this as an issue, in section 8, for further discussion with stakeholders.

Transitional arrangements

- 7.2 Further clarity on the transitional arrangements from the Airports Act 1986 to the new regime was sought although it was recognised that these will, in part, be dependent on the provisions included in the draft Civil Aviation Bill.

Timetable

- 7.3 There was a request for the licence to be issued as far as possible in advance of it coming into force. The CAA shares this objective but it is unlikely to be in a position to grant the licences much before January 2014 although it will begin discussions of the form and content of the licences shortly after the Draft Civil Aviation Bill is introduced into Parliament. Legislation is always uncertain until it receives Royal Assent – but it is the CAA's planning assumption that if the draft Civil Aviation Bill is introduced near the beginning of 2012, then it is possible that commencement could occur by Q1 2013. Shortly thereafter the CAA plans to issue its initial Q6 proposals and a draft of the licence for consultation with a further consultation in the autumn of 2013 when it issues a notice proposing to grant the licences.

¹⁴ Draft Civil Aviation Bill Explanatory Notes published November 2011, paragraph 30a)

¹⁵ Draft Civil Aviation Bill November 2011, section 1(3)(d)

8. Potential issues for discussion in developing the full licences

- 8.1 The development of full licences will be subject to extensive stakeholder discussion and consultation alongside the Q6 review of price and service quality regulation.
- 8.2 The potential issues for discussion include:
- a) the most appropriate arrangements for price regulation;
 - b) whether there should be provision for 're-opening' the price control;
 - c) how service quality and improving the passenger experience can best be incentivised including the use of airport-airline negotiated service level agreements;
 - d) which Public Interest conditions should be transposed into a licence condition and whether they should include 'sunset' clauses;
 - e) whether the accounting standards to be used for preparing the Regulatory Accounts should be specified within the licence condition or Regulatory Accounting Guidelines;
 - f) the scope of any operational resilience obligations including whether the CAA should "approve" a Resilience Plan;
 - g) how financial resilience should best be encouraged (having regard to any statutory guidance issued by the SoS);
 - h) the circumstances in which the licence may be revoked including whether this should include failure to comply with an order under the Competition Act 1998, a linkage to insolvency and loss of the operator's aerodrome safety licence;
 - i) whether it would be appropriate to stagger the start date for some licence conditions, for example those that impose new obligations on licensees and that require significant preparation to ensure compliance;
 - j) how the licence can best support the promotion of effective competition between airports;
 - k) provisions for the licensee's consultation with stakeholders and information disclosure;
 - l) provisions to ensure an airport's Conditions of Use were transparent, fair and reasonable;
 - m) provisions in relation to non-discrimination; and
 - n) a further detailed review of lessons from other sectors.