Mr A Plant Head, International Aviation Policy Civil Aviation Authority CAA House K403 45-59 Kingsway London WC2B 6TE

Dear Mr Plant

REVIEW OF THE CAA'S STATEMENT OF POLICIES IN RESPECT OF ALLOCATION OF SCARCE CAPACITY RIGHTS

I write in response to the CAA 's review of the Statement of Policies in respect of the allocation of scarce capacity rights. British Airways ('BA') would like to make the following comments on the CAA's proposal.

BA understands that the CAA, given the procedure it has chosen to follow, needs to adopt guidelines on market definition for scarce bilateral capacity cases. BA is content with the proposal to adopt the OFT guidelines rather than for the CAA to prepare specific aviation guidelines of its own. It would make little sense for the CAA to invent its own guidelines when the OFT's are in place and are used for all other competition issues in the UK. However, due attention must be given to some of the aviation industry's special characteristics in that, for example, competition is often much more intense than a cursory look at the direct route between two points may suggest. Further, whilst it may be unnecessary to create aviation specific guidelines, the more important question remains if it is relevant and appropriate to perform a competition analysis within the context of the scarce bilateral capacity process.

To apply a competition law analysis suggests that there is a competition law problem. That is not the case in a scarce bilateral capacity hearing, which is only triggered by the inability of UK airlines to mount the desired level of frequencies on a bilaterally constrained route. There are no competition issues to be addressed and the need for the application of such complex and detailed rules must be seriously questioned.

To that extent, I would like to restate some of the comments made by BA in the response to the CAA's consultation paper on the review of its Statement of Policies on Route and Air Transport Licensing originally submitted in ... 2001. BA remains nervous that the process adopted by the CAA could work against its interests as the preliminary competition analysis could be used to filter out BA's application because of a narrow definition of the relevant market. Much will depend on the precise methodology applied, of course, but the concern remains that insufficient weight will be given to a broad range of market analyses and consumer benefits at the initial stage. BA submits, again, that the correct relevant market to take into account is one that provides for the full range of indirect and connecting passengers as well as, rather than simply, the point to point traffic (it is realised that the CAA will not just look at the narrowest definition but it is not obvious that adequate weight will be given to the broader picture).

In any event, even if a carrier is 'dominant' in a particular market, why should it not be granted the right to take up the disputed scarce bilateral frequency(ies). There does appear to be a presumption that a significant market position would be a major disadvantage in the CAA's decision making process. This could even cut in at a preliminary stage with the possibility that a full hearing may not be held. There is nothing in competition law that says that dominance in a market is *per se* anti-competitive. It is only the abuse of that dominant position that is illegal and it is only when that abuse takes place (or is alleged) that competition law intervenes. Therefore the existence of a dominant position should not provide undue influence in determining the result of a scarce bilateral process. BA acknowledges that the CAA

notes that the creation or strengthening of a dominant position is no longer the appropriate competition test and trusts that any future analysis will properly reflect this.

To that extent, if a competition law analysis is to be performed in this context, the wording proposed by the CAA for the new paragraph 5 replacing the references to dominance with an effect on rivalry in all relevant markets is to be welcomed and should provide a better and more effective basis for analysis in scarce bilateral capacity cases.

I trust this letter gives enough information but if you have any further questions or seek any clarification do not hesitate to contact me.

Yours sincerely

Steve Aylward Manager Competition and Regulatory Affairs