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14th December 2011

Dear Richard,

Civil Aviation Bill – Indicative Licence

1. This letter contains BAA's initial high-level observations on the indicative licence prepared by the CAA in order to assist Parliament in its consideration of the Draft Bill. The letter provides comments on the indicative licence from both a Heathrow and a Stansted perspective.
2. As discussed, BAA's comments are high level because, as we understand it, the CAA's document is intended to provide a "rough guide" only - that is, to illustrate the basic composition and structure of the Licence - as opposed to draft text that may form the basis of the actual licence that will be issued.
3. The rest of this letter is divided into three sections.
 - a) In the first section, we set out high-level principles which we consider should inform the drafting process. Given the current status of the document, this seems to be the most productive way of proceeding.
 - b) In the second section, we offer some initial comments on the specific terms and conditions of the indicative licence. Although we do not set out any detailed comments, we do understand that terms and conditions of the type contained in the indicative licence may well appear in the final document.
 - c) Other comments.

Section 1 – principles

4. We set out below certain headline principles which we consider should guide the CAA in drafting licences under the Civil Aviation Bill. In proposing these principles we have considered carefully the draft statutory framework and have had particular regard to the proposed duties for the CAA in the first part of Chapter 1.
 - a) Proportionality: careful consideration should be given to proportionality in the drafting of each and every term and condition in each licence to ensure it is appropriate to the relevant circumstances in which it is intended to apply. This will be particularly important in an airport context, given the potential differences between the market power of different airports. This is consistent with the proposed principle in clause 3 (4) of the Draft Bill as well as with the administrative law principle of proportionality.
 - b) Regulatory Consistency: it is important that the provisions of each licence are consistent with and complement other applicable regulatory regimes. This could be relevant to sector specific rules – such as provisions relating to operational resilience – or to rules which apply across the economy such as the Competition Act and the Enterprise Act. This, again, fits with the proposed principle at clause 3(4) of the Draft Bill.

- c) Non-duplication: this is an important aspect of the principle of regulatory consistency: where rules are required, they should be found in the same place rather than being duplicated in multiple jurisdictions. Again, this fits well with the proposals at clause 3(4) of the Draft Bill and, in particular, the proposal that regulatory activity should be targeted only at cases where intervention is needed. This is also consistent with clause 2, and the CAA's proposed duty to ensure it does not impose unnecessary burdens.
 - d) Regulatory Certainty: each licence should be capable of being understood and applied with certainty. This entails clear, specific obligations. Insofar as generic regulatory obligations are necessary and proportionate, they should find binding expression through – for example – detailed operational plans.
 - e) Targeted at dealing with a finding of dominance ("substantial market power"): since the licence will by definition only apply to persons operating an airport area which is "dominant", it is important that the provisions of each licence are only relevant to that (finding of) dominance. In other words, the proposed conditions must be a way of dealing with the airport operators' market power rather than with other more general regulatory matters.
 - f) Obligations should be within the licensee's control: this should be self explanatory - but it would be disproportionate to impose obligations on matters which are not within the licensee's control. To take an extreme example, it would clearly be meaningless to impose an operational resilience condition which obliges the licensee to remain fully operational under all circumstances, or which obliges the licensee to carry out operational functions or otherwise not usually within its control.
5. Although not exhaustive, our hope is that the proposed principles will prove both relevant and helpful in informing the detailed drafting exercise in due course.

Section 2 – comments on specific types of terms and conditions listed in the indicative licence

6. We recognize that at this stage the licence is indicative; and that, for this reason, the CAA is not requesting detailed comments on the text of the indicative licence. Naturally, as the CAA continues to progress work and consult on the licence, we reserve the right to make detailed comments on the specific provisions and conditions, proposed text and any other matter relating to the development of the final proposed licence.
7. We turn now to our high-level comments on certain issues, dealing first with Conditions:
- a) Operational resilience: although this type of condition is not normally a function of economic regulation, we understand the concerns which lead to its inclusion here but would wish to add that the role of third parties is also key to operational resilience. We will comment in detail on the policy in this area as part of the process of creating the full licence in due course. One option which we consider merits very serious consideration is the separation of day-to-day obligations on efficiency and reliability (on the one hand) from detailed provisions relating to continuity of service in the event of (for example) extreme weather conditions. We look forward to working through the detail of this with the CAA, including a satisfactory way of effectively engaging the airport community in this area.
 - b) Indicative condition 5 - non-regulated charges: although we do not wish to venture any detailed comments on this indicative condition, we do consider the time is right to change the name of these provisions because the charges concerned are, in fact, regulated. We therefore propose "Charges for Other Services".
 - c) Financial resilience: we are not making submissions on financial resilience at this point and we look forward to working through this policy with you in due course.

- d) Price control: we understand this policy is not being considered in the current exercise and we therefore offer no comment.
 - e) Regulatory accounts: we broadly welcome the inclusion of these provisions in principle. However, we see no need to reinvent the wheel and would suggest that the existing regime, which is acknowledged to work well, be rolled over.
 - f) Service quality: the service quality provisions represent a copy-out of the current SQR regime. We have no issue with that in principle but would expect the non-duplication principle to apply, to prevent the regime being set out in multiple different jurisdictions/documents. In addition, we would hope that the regime remains flexible to allow for future improvements. For example, quality commitments which are not directly passenger-facing might in due course be replaced by measures negotiated between airlines and airports rather than imposed by the regulator.
 - g) Revocation: this kind of extreme sanction should always be a last resort and we believe the drafting should reflect this. The licence should be revocable only where there is genuinely no alternative. In addition, the principle that there should be no duplication across regulatory regimes means that the licence should only be revoked for breaches of the statutory framework under which it is issued. We therefore do not agree with any of condition 2(d). In respect of the rest of the Condition, as with the other indicative provisions: we would expect these to be tempered by appropriate procedural provisions and, in respect of enforcement orders and penalties, the revocation provisions should only become engaged once all court actions have been exhausted. We consider these points to be a fairly straightforward expression of the principle of proportionality (and we understand broadly consistent with practice in other sectors).
8. We currently have only one comment on the proposed Terms, which is in respect of the Licensed Area: the proposal that specific areas of airports might fall to be licensed at some point in the future is an interesting one which we expect to be debated under the umbrella of the Draft Bill. Given the potential wider implications, and relationship with the operable conditions, we assume that the proposal for the first licence will be to specify Heathrow Airport as the “licensed area”.

Section 3 – other comments and process issues

9. Transitional Issues: although many of these will be governed by the provisions of the Draft Bill, we would request that the final licence be issued as far as possible in advance of its coming into force. We would anticipate that any materially new rules might take up to 12 months to comply with (possibly more in some cases). To the extent that it is not possible to issue the licence that far in advance, we think that it will be appropriate for certain provisions to into force later than the licence itself.
- For these reasons, we would welcome an opportunity to start work on the detail of the draft licence somewhat sooner than proposed in the CAA's indicative timetable.
10. Rollover rules: we do appreciate that in some contexts it will be appropriate for the current rules to be reflected under the new structure. However, we do not believe that obligations should simply be rolled over without serious consideration being given as to whether they are actually required and, in particular, whether they comply with the newly proposed duties, including in Clause 2 of the Draft Bill (duty not to impose or maintain unnecessary burdens). The new regime represents an ideal opportunity to put that duty into practice. The same point is likely to apply where a Civil Aviation Act licence is eventually revoked where there is no longer a finding of dominance: in those circumstances we would expect the obligations to drop away. This is the logical implication of the provisions of the licence being targeted at dealing with the consequences of dominance as proposed in **Section 1** above.

11. Reopening provisions: in some cases it may be appropriate for the detailed rules of a condition to be modified within its life. For example, where conditions are predicated on certain assumptions or where the market dynamic has evolved and there have been material changes in circumstances. We would welcome clarification as to the CAA's view on whether this is possible in the current structure.

I hope these comments are useful, and I look forward to working together to develop the document and policy in this area.

Yours sincerely,

BY EMAIL

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Director, Regulation