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Response to the CAA's Draft Decision on the Regulatory Treatment of Early Costs of Capacity Expansion at Heathrow Airport (CAP 3238)

Heathrow West Limited ("**HWL**") is pleased to submit this response to the CAA's draft decision on the regulatory treatment of early costs of capacity expansion at Heathrow airport (CAP 3238) (the "**Draft Decision**"). HWL is part of the Arora Group, which, as the CAA is aware, is a founding member of Heathrow Reimagined as well as being a prospective DCO applicant with its own proposal for expanding capacity at Heathrow Airport.

Our purpose in submitting this response is to make certain discrete points that are specific to HWL as a prospective DCO applicant.

1. SUMMARY

1.1 HWL welcomes the CAA's decision to allow HWL to recover of its early costs incurred prior to the Government's announcement on 25 November 2025 regarding the use of HAL's scheme as a basis for expansion (the "**Announcement**"), provisionally up to £4.3 million via a modification to HAL's licence. We support this proposed recovery mechanism and agree it is lawful. We look forward to engaging with the CAA on its further assessment of our early costs and we ask for confirmation on the CAA's timeline in this regard.

1.2 As for the significant costs HWL has been incurring since the Announcement and will continue to incur if we are to be an effective rival to HAL, we welcome the additional clarity on how the CAA will assess whether proposals for expansion are "*credible and appropriately mature*", including by reference to Steer's maturity assessment framework. However, considerable uncertainty remains as to how the CAA will assess "*clear benefits to consumers*", which is set as a precondition for any post-Announcement cost recovery by HWL. HWL asks the CAA to set out a framework for assessing consumer benefit that applies equally to all promoters and does not set the threshold unreasonably high so as to stifle effective competition between promoters.

1.3 The Draft Decision defers consideration of recovery of costs incurred after the Announcement to a separate, later consultation.[1] Therefore, even if HWL's latest proposals are found to be credible and appropriately mature, there remains considerable uncertainty as to HWL's cost recovery for an extended period. This is in stark contrast to the certainty relating to costs afforded to HAL. HWL asks the CAA to begin imminently its assessment of whether HWL's proposals are "*credible and appropriately mature*" and, if that threshold is met, to promptly commence consultation on HWL's costs incurred from the Announcement to the end of 2026. The Secretary of State's s.35 direction of 12 March 2026 ("**s.35 Direction**") underscores the urgency of this assessment – as HWL continues to develop its proposals at pace.

1.4 HWL welcomes the CAA's positive endorsement of the concerns we have raised in previous consultation responses regarding coordination and information sharing between competing promoters. However, we remain concerned that the implementation of any initiatives in this regard will be too late to be effective. We urge the CAA to commit to settling, as a matter of urgency, a package of initiatives and mechanisms to encourage and ensure the transfer of (non-commercially sensitive) work product between promoters, including the appointment of an independent party to facilitate information sharing – ideally within the same timetable as the appointment of an independent cost expert[2] ("**Cost Expert**"), i.e., no later than July 2026. If this is not feasible, then we ask that the CAA commits to publishing a shortlist of potential candidates within six weeks of the Final Decision on early costs incurred in 2025 and 2026 ("**Final Decision**"), which we understand will be published no later than July 2026.

1.5 HWL asks that the CAA introduces a positive licence condition requiring HAL to engage and share information with rival promoters to enable them to further their proposals for expansion. We remain supportive of the levers the CAA proposes to have in its *ex post* efficiency review of HAL's costs, which aim to penalise duplication and inefficiency, but we do not think this is sufficient alone to bring about an effective information sharing regime.

2. RECOVERY OF HWL'S PRE-ANNOUNCEMENT COSTS

2.1 HWL welcomes the CAA's provisional decision to allow HWL to recover its early costs incurred up to the Announcement, based on Steer's independent assessment of the planning work done by HWL up to the Announcement.[3]

[1] HWL has repeatedly emphasised the urgent need for the CAA to develop a clear regulatory framework to accommodate rival promoters' proposals, alongside developing a mechanism for cost recovery. While the CAA's proposals to develop structured mechanisms to promote information sharing and minimise duplication of costs are positive, early costs policy cannot be divorced from proposed reforms to HAL's regulatory model. The CAA must therefore accelerate its work to table viable regulatory frameworks that promote competition to ensure that the two are considered in tandem and operate effectively, to further the interests of consumers.

[2] Referred to variously in the Draft Decision as a cost or technical expert, cost assessor and an assurance provider, HWL agrees that the appointee should be technically capable, sufficiently resourced and operationally independent from HAL (Draft Decision, para 3.73).

[3] Draft Decision, paragraph 4.31.

2.2 HWL supports the proposed mechanism for cost recovery and is aligned with the CAA's assessment as to its lawfulness, including the CAA's reasoning that section 21(1)(b) of the Civil Aviation Act 2012 provides broad discretion to implement such arrangements.

2.3 HWL stands ready to provide the CAA with such information as it reasonably requires as part of its further assessment of the costs we have incurred. We would welcome clarity from the CAA on what further evidence of HWL's costs is required and the CAA's timeline for completing its additional assessment.

3. RECOVERY OF HWL'S POST ANNOUNCEMENT COSTS

A. Timing of the technical assessment

3.1 HWL welcomes the CAA's commitment to consult on the treatment of any early costs incurred by HWL after the Government's Announcement if and when HWL's latest proposals are considered *"credible and appropriately mature"*.[4] However, the Draft Decision does not confirm a timeline for the CAA/Steer to complete this assessment or the process for this. HWL therefore asks the CAA to confirm it will:

3.1.1 begin imminently its assessment of whether HWL's post-Announcement plans are "*credible and appropriately mature*" in relation to HWL's continued work after the Announcement; and

3.1.2 if that threshold is met, define the process and commence consultation on the recovery of HWL's costs incurred between the November 2025 Announcement and the end of 2026, i.e. over the same period as is being considered for HAL in the Draft Decision.

3.2 The grant of the s. 35 Direction confirms that HWL's proposal is "*of significance to the UK's aviation sector as a whole*" and that it should be "*treated as a proposed application for which development is required*". Supported by this certainty, HWL has been incurring significant costs in its pursuit of its proposals for a DCO. In the absence of a firm commitment from the CAA, HWL is left without any certainty on whether or when its post-Announcement costs will be recoverable, notwithstanding the CAA's express recognition that consultation will be required if the credibility threshold is met. Open-ended deferral is inconsistent with the CAA's stated commitment to supporting "*the timely and effective development*" of credible expansion proposals, including by providing *"reasonable certainty over the recovery of early costs*". Instead, it places the entirety of the cost risk on HWL.[5]

3.3 Moreover, the CAA previously assessed HWL's proposals to be sufficiently credible and mature to warrant detailed consideration. In 2020, supported by its technical consultants, Arcadis, the CAA concluded that these very proposals were "*reasonably mature and credible*" and "*likely [to] be sufficient to allow CAA to commence more detailed work on them*".[6] The CAA should therefore be

[4] Draft Decision, paragraph 1.27.
[5] CAA, *Heathrow Capacity Expansion – consultation on regulatory policy on early costs,* CAP 3149, paragraph 1.13.
[6] CAA decision in CAP 1940, Appendix G paragraph 9.

able to commence now – and complete in short order – its fresh assessment of HWL's updated proposals.

3.4 Until HWL achieves certainty over cost recovery up to the end of 2026, the asymmetry in treatment between HAL and HWL will persist. HAL can assume that its expenditure up to £320 million is recoverable through the RAB, subject only to an *ex post* efficiency review, whereas HWL has the burden of demonstrating that its proposals deliver consumer benefits. This disparity is clearly inconsistent with the CAA's "level playing field" principle; it risks undermining effective competition between promoters and entrenching HAL's position by virtue of incumbency rather than competitive merit, as pointed out by the airlines[7] – see further our comments in paragraphs 3.6 - 3.10 below.

B. Tests to be applied in the technical assessment

3.5 HWL welcomes the clarity provided in the Draft Decision on how the CAA will assess whether HWL's plans are "*credible and appropriately mature*". HWL also accepts the proposal to assess consistency with the scheme specification set out in the Announcement and any further details emerging from the Government's review of the ANPS, provided this is applied consistently to all promoters.

3.6 By contrast, considerable uncertainty remains as to how the CAA will assess "*clear benefits to consumers*" as a precondition for HWL's post-Announcement cost recovery. In our January 2026 response to CAP 3201, HWL specifically requested clarity on how this test would be assessed and cautioned the CAA against holding competing promoters to a higher standard than that which would apply to HAL. We asked that the test not be interpreted in a manner that would set the threshold unreasonably high, which would risk stifling effective competition between promoters.

3.7 The Draft Decision provides only limited guidance on this test. The CAA states that competing proposals would need to explain how they deliver consumer benefits "*in line with the benefits set out by DfT as part of the economic case for capacity expansion*",[8] and that promoters should set out the benefits clearly in their proposals, explain how they have been estimated, and demonstrate how they will ensure the overall benefits from expansion will be delivered. However, this high-level guidance does not address HWL's concern that the test may be applied inconsistently between promoters.

3.8 HWL remains concerned that the framework, as currently articulated, risks creating an asymmetry between HAL and rival promoters. HAL's costs are being approved on the basis that expansion will deliver consumer benefits, without HAL being required to demonstrate how its specific proposals deliver those benefits relative to alternative approaches. Rival promoters, by contrast, would be required to demonstrate "clear benefits to consumers" before any post-Announcement costs are recoverable. This asymmetry is inconsistent with the CAA's stated commitment to a level playing field for promoters. It also cuts across the CAA's own finding regarding the benefits of the rivalry

[7] Draft Decision, paragraphs 4.17-4.19.

[8] Draft Decision, paragraph 4.45.

between HWL and HAL during 2025[9] and feedback from the CAA expert panel that the CAA's policy on early costs must reasonably support the competitive provision of airport infrastructure.

3.9 HWL therefore asks the CAA to provide further clarity on the following matters in the Final Decision:

3.9.1 The criteria the CAA will use to assess whether a competing proposal delivers "clear benefits to consumers".

3.9.2 Confirmation that HAL will be required to demonstrate the consumer benefits of its proposals and that the CAA will assess any claimed benefits against the same criteria as those used to assess the proposals of rival promoters.

3.9.3 Whether the CAA will take into account the competitive benefits of rivalry itself (including downward pressure on costs and the evaluation of a wider range of options) when assessing whether a competing proposal delivers consumer benefit.

3.10 Without this clarity, rival promoters face an uncertain and potentially higher evidential burden than HAL, which is inconsistent with the CAA's and Government's commitment to a level playing field and the equal treatment of promoters. If allowed to persist, this will undermine meaningful competition in the development of expansion proposals.

3.11 In pursuit of equal treatment of promoters, HWL notes the *ex post* efficiency tests set out by the CAA at paragraph 3.68 of the Draft Decision in relation to HAL. HWL would be willing, in principle, to be subject to similar and proportionate standards.

4. COORDINATION OF INFORMATION SHARING AND DUPLICATION OF COSTS

A. Information Sharing

4.1 Coordination of information sharing between promoters and the avoidance of unnecessary duplication of costs was a core theme of HWL's response to CAP 3201. We welcome the CAA's positive endorsement of the concerns we have raised in previous consultation responses. The Draft Decision has advanced significantly on this issue. In particular, we welcome[10]:

4.1.1 the CAA's expectation that HAL shares relevant work which is not commercially confidential with competing promoters assessed as having credible and appropriately mature proposals;

4.1.2 the CAA's indication that failure to cooperate will be considered as part of the *ex post* efficiency review, and that costs arising from inappropriate duplication may be disallowed; and

[9] Draft Decision, paragraph 4.30.

[10] CAP 3238, paragraph 3.65-3.68.

4.1.3 that the CAA may appoint an independent third party to assess whether information should be shared between promoters and to arbitrate disputes between them (the "**Information Arbitrator**").

While these proposals represent welcome progress, we remain concerned about the pace of these time critical interventions. HWL urges the CAA to go more quickly and further in the following respects.

1. Timing of binding arrangements

4.2 HWL requires core information now to be able to develop credible alternative proposals for expansion. The CAA should commit to finalise mechanisms to enable the transfer of work product between promoters, including committing to the appointment of the Information Arbitrator to facilitate information sharing. These measures should be agreed and implemented urgently, ideally on the same timescales as the appointment of the Cost Expert (i.e. no later than July 2026).

4.3 The loose commitment in the Draft Decision to put "*arrangements in place in a timely way*" does not go far enough.[11] It also overlooks that these are real, present issues, not merely hypothetical concerns. HWL is actively progressing its proposals for a DCO and incurring significant levels of costs, which includes avoidable expenditure in areas where relevant data is already held by HAL if this issue is not addressed. Each additional day without effective information sharing arrangements in place will result in unnecessary duplication of expenditure by rival promoters at the airlines', and ultimately consumers', expense.

2. Scope of information to be shared

4.4 We reiterate our position as set out in our response to CAP 3201 that many of the data categories HWL requires, such as land referencing, environmental surveys, and similar non-sensitive data, are not commercially sensitive in the first instance. To inform the CAA's decisions on the scope of the mechanisms to enable the transfer of relevant work between promoters, we request that the CAA establishes:

4.4.1 A non-exhaustive presumptive list of categories of data that it expects can be shared as a matter of course, for instance land referencing reports and environmental surveys. The CAA could seek the technical input of the Cost Expert in this regard.[12] The Cost Expert's experience of DCO processes may also assist the Information Arbitrator in helping to determine information that is genuinely confidential or by facilitating appropriate and efficient information flows for the ultimate benefit of consumers.

4.4.2 Clarity on the definition of "*commercially confidential*" as used in CAP 3238 (see paragraph 3.66). Left undefined this ambiguity could be used obstructively by HAL to

[11] Draft Decision, paragraph 4.52.

[12] The CAA (supported by HAL and airlines) considers that the Cost Expert should be "*sufficiently expert in large and complex planning applications and land, property and enabling costs.*" Drawing on their familiarity and expertise in this area, the Cost Expert can be expected to have a good grasp of what information can be shared between promoters, or shared with appropriate safeguards in compliance with competition law.

refuse to share information that rival promoters legitimately require. The CAA could draw on the CMA's established approach to information disclosure under the Enterprise Act 2002 in the context of merger control and market investigations when assessing and requiring justifications for non-disclosure, and when seeking to strike a balance between non-disclosure and the public interest.[13]

4.5 HWL requests that the Information Arbitrator is:

4.5.1 empowered to override unsubstantiated confidentiality claims and require disclosure of such information;

4.5.2 tasked with proposing (and implementing) solutions to solve for the relevant confidentiality concern e.g. by way of applying redactions or establishing clean teams to facilitate data sharing that is genuinely needed to further a rival promoter's plans. As such, their determination would consist of (i) an assessment of the legitimacy of the confidentiality claim; and (ii) proposed safeguards for removing the concern while facilitating information sharing in compliance with competition law;

4.5.3 subject to transparent and independent governance. While HAL could appoint and fund the Information Arbitrator, their independence would need to be (and could be) assured by, among other things, the relevant party being selected form a short list agreed with the CAA with it being provided that the Independent Arbitrator takes its instructions from the CAA and owes relevant duties to the CAA, rather than any single promoter. This could be clarified in draft licence condition G2, which does not currently make this point; and

4.5.4 Entitled to share underlying documents supporting its conclusions directly with the CAA. There is currently no explicit provision to this effect in draft licence condition G2. The CAA should clarify that disclosure is permitted upon reasonable request by the CAA.[14]

4.6 The process by which confidentiality claims will be assessed should also be clearly prescribed. This should make clear that:

4.6.1 the burden of justifying a confidentiality claim rests with the party asserting confidentiality and withholding information; and

4.6.2 disputes on information sharing will be conducted according to a clear timetable and the promoters' cooperation should be encouraged through mechanisms that will encourage timely resolutions.

[13] See for instance, Chapter 17 of Mergers: Guidance on the CMA's jurisdiction and procedure (CMA2), available here: Mergers: Guidance on the CMA's jurisdiction and procedure and the CMA's Guidance on Disclosure of Information (CC7 Revised), available here: CC7 (Revised), Chairman's Guidance on Disclosure of Information.

[14] As drafted, draft licence condition G2 would allow the CAA to receive factual findings from the Independent Arbitrator provided that this is "within the scope of [the CAA's] terms of reference on a fair and reasonable basis." (emphasis added) The meaning of the underlined text is ambiguous and should be clarified in line with HWL's representations in paragraph 4.5.4 above.

4.7 Coordination between the Information Arbitrator and the Cost Expert conducting the *ex post* efficiency review of HAL's costs is essential. The instruments of appointment for both the Information Arbitrator and the Cost Expert should confirm that they are both expected to consult with each other and, where necessary, coordinate their work. This would ensure that conduct that impedes effective engagement on matters of coordination and information sharing is reported and may be penalised via the cost recovery mechanism.

4.8 We ask the CAA to enshrine that:

4.8.1 the Cost Expert conducting the *ex post* efficiency review of HAL's costs can consult and/or receive information from the Information Arbitrator to help assess the efficiency of HAL's costs. As noted in paragraph 4.4.1 above, we also see value in allowing exchanges between the Cost Expert and the Information Arbitrator; and

4.8.2 where the Information Arbitrator determines that HAL should share specific information or work product with a rival promoter, it must advise the Cost Expert so that any costs subsequently incurred by the competitor on duplicative workstreams can be identified and referred to the Cost Expert for a disallowance in HAL's costs.

4.9 This coordination would ensure that HAL cannot recover costs arising from work product or activities which the Information Arbitrator has determined are disclosable, thereby providing a direct and meaningful consequence for non-compliance with their determinations.

3. <u>Introduction of a positive licence condition requiring HAL to share information</u>

4.10 HWL is concerned that *ex post* cost review alone is not an effective deterrent, and as such would not adequately counter HAL's incentive to extinguish competition by pursuing a strategy of non-cooperation / non-disclosure.

4.11 HWL has already commented on the urgent need for the CAA to proactively design a regulatory framework which ensures a transparent process for coordination and information sharing.[15] We do not propose to repeat our representations on this topic in this consultation, particularly pending our review of the CAA's recent further publication on regulatory models.

4.12 However, to help address our concerns that HAL can currently leverage its existing position of significant market power to stifle the progress of other promoters, jeopardising the level playing field the CAA and Government are aiming to promote, we consider that the CAA should introduce a positive licence condition requiring HAL to engage and share information with credible rival promoters to enable them to further their rival proposals for expansion. Such a condition would complement the levers in the *ex post* efficiency review which aim to penalise duplicative costs, and would provide a clear and enforceable obligation on HAL.

4.13 This condition should also be framed to require positive engagement on the set-up of the information sharing arrangements, to prevent HAL from playing for time, and could also serve to correct the

[15] HWL, Response to CAP 3195, paragraph 3.1.

imbalance between HAL and rival promoters by placing the onus on HAL to demonstrate that its costs are not duplicative and are reasonably incurred.

4.14 Alternatively, we note the proposed new Condition G, which imposes obligations on HAL in relation to efficiency, the appointment of independent technical experts, business planning, and reporting. We support the broad intent of these requirements, which should help to protect consumers from inefficient expenditure by HAL. Condition G could be adapted further to oblige HAL to develop its plan for expansion in an efficient manner, including reducing duplication and obliging cooperation with other promoters.

B. Interim measures to facilitate coordination and information sharing by HAL

4.15 We support the CAA's draft position that it will assess whether HAL has responded promptly and appropriately to requests from other promoters to share relevant analysis or studies which are not commercially confidential as part of its *ex post* review.[16] This is directionally positive.

4.16 However, under the current architecture, any disallowance of those costs would occur only through the *ex post* efficiency review, which the CAA has indicated will take place no sooner than 2027.[17] We are concerned that this will not adequately address HAL's incentive to stifle the progress of rival promoters in the near-term.

4.17 As the airline community has observed, once costs are incurred and sunk, regulatory leverage is significantly reduced.[18] HAL's substantial information advantage makes it more difficult for the CAA, airlines, or rival promoters to demonstrate duplication or inefficiency after the event. HWL submits that this is a critical weakness in the proposed framework which must be addressed if the information-sharing arrangements are to have any meaningful effect.

4.18 HWL therefore requests that the CAA considers possible interim measures to facilitate coordination and information sharing by HAL. Specifically, we are advocating for:

4.18.1 Mechanisms for prioritising the real time assessment of costs incurred by HAL. Some of HAL's costs for 2026 will not yet have accrued, and there would be value in scrutinising HAL's plans for incurring these costs.

4.18.2 Clarity on:

(a) whether the Information Arbitrator will have any formal enforcement powers, and

(b) the relationship between the Information Arbitrator and the Cost Expert. In particular, whether there a formal mechanism for the Information Arbitrator to influence HAL's ability to recover its costs in real time.

[16] Draft Decision, paragraph 3.68.

[17] *Ibid*, paragraph 5.8.

[18] *Ibid*, paragraph 3.58.

4.18.3 Guidelines explaining the procedure for completing the *ex post* review of HAL's costs. The guidelines should clarify the status of the Cost Expert's cost determinations, including whether their recommendations will be binding on the CAA and any circumstances / relevant factors that would lead the CAA to override their determination.[19]

4.18.4 Confirmation that HAL's costs will be disallowed where:

(a) The costs are incurred in respect of works which are duplicative; and/or

(b) Where the duplication results from an unreasonable stance taken by HAL, such as obstruction or refusal to engage or share results with a third party, in a timely manner, without a compelling reason.

In these circumstances, HAL's costs should be disallowed up to the amount incurred by HAL (rather than a competing promoter) for a specific workstream, and which the CAA could benchmark against another promoter's equivalent costs to assess efficiency.

4.19 Clarity on these points should serve to promote constructive engagement between HAL and competing promoters while also providing an additional incentive on HAL to monitor and ensure the efficiency of the costs it incurs.

4.20 We would welcome the opportunity to engage further with the CAA on any refinements to the proposed licence drafting ahead of the final decision.

Yours sincerely,

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[19] See paragraphs 5.1-5.4 of HWL's response to CAP 3201 on this point.