

## APPENDIX I

# Evidence and analysis on Test B

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## Introduction

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- I1 As outlined in chapter 1, section 3 of the Civil Aviation Act 2012 (CA Act) prohibits the operator of a dominant area at a dominant airport from requiring payment of charges without a licence. The CA Act only permits economic regulation of an airport operator and the granting of a licence by the CAA if all three components of the market power test set out in section 6 of the CA Act are satisfied.
- I2 As outlined in chapter 5, the CAA's final decision under Test A is that Stansted Airport Limited (STAL) does not have, nor is likely to acquire, substantial market power (SMP) in the relevant market. As a result, there can therefore be no risk of STAL engaging in conduct that would amount to an abuse of SMP. In circumstances where Test A is not met, Test B cannot be met.
- I3 This appendix sets out the CAA's evidence and analysis relating to Test B for the relevant market for STAL. In particular, it considers:
- The legal framework.
  - The history of consultation on Test B, including the Stansted market power assessment: Developing our 'minded to' position (the minded to Consultation), the Stansted Market Power Assessment: consultation on relevant market developments, CAP 1104 (the additional Consultation) and stakeholders' views.<sup>1</sup>
  - The CAA's final decision.

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<sup>1</sup> The minded to Consultation and the additional Consultation are available on the CAA's website.

## Legal framework

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### The statutory test

- 14 In its assessment of the market power test, having established that an airport operator has SMP in a relevant market, the CAA may only go on to consider the benefits of licence regulation of that airport operator where it *'is satisfied that competition law does not provide sufficient protection against the risk of abuse of SMP'*.<sup>2</sup>
- 15 Although Test B is a separate test, it cannot be divorced from the wider regulatory context: i.e. that the CAA has already determined that the relevant operator has SMP in the relevant market. There is therefore a risk of abuse of that position in the relevant market. It is also a precursor to Test C: i.e. it is only if ex post regulation via competition law is inadequate that the CAA should go on to consider the appropriateness of ex ante regulation via a licence.<sup>3</sup>
- 16 The assessment of Test B must be conducted in accordance with the CAA's general duty in section 1 of the CA Act; that is in a manner which it considers will further the interests of users of air transport services regarding the range, availability, continuity, cost and quality of airport operation services<sup>4</sup> and to do so, where appropriate, by carrying out its functions in a manner which it considers will promote competition in the provision of airport operation services.<sup>5</sup> The CAA must also have regard to various matters set out in section 1(3) of the CA Act. These include:
- The need to secure that all reasonable demands for airport operation services are met.
  - The regulatory principles in section 1(4) of the CA Act, namely that its regulatory activities should be transparent, accountable, proportionate and consistent and targeted only at cases where action is needed.

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<sup>2</sup> Section 6(4) of the CA Act.

<sup>3</sup> Although the tests can reasonably be considered to be cumulative, it is not set out as such in statute.

<sup>4</sup> Section 1(1) of the CA Act.

<sup>5</sup> Section 1(2) of the CA Act.

- 17 Lastly, the CAA has a duty under section 104 of the CA Act to avoid the imposition or maintenance of unnecessary burdens when exercising its functions under Chapter 1 of the CA Act relating to the regulation of operators of dominant airports.
- 18 Test B itself requires the CAA to assess the adequacy of competition law from the perspective of ‘users of air transport services, which are defined in section 69(1) of the CA Act as passengers carried by the air transport service or a person who has a right in property carried by the service. Accordingly, when assessing the merits of competition law, the CAA has to further the interests of passengers and cargo owners, and not the interests of commercial passenger airlines or cargo airlines or other intermediary service providers, such as groundhandling providers, car parking or retail concessionaires.

## History of consultation on Test B

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### Minded to Consultation

- 19 The minded to Consultation concluded that Test B was met as competition law alone would not be sufficient to prevent the risk of STAL abusing its market power in the two relevant markets identified. The two relevant markets were the passenger market and the cargo market. Because the minded to Consultation found that Test A was met for the passenger market and the cargo market, Tests B and C were assessed together for the passenger and cargo markets.
- 110 The CAA decided that some form of ex ante regulation under the CA Act would provide a more effective safeguard against the risk of abuse than competition law alone and would be better adapted to protect the interests of passengers and owners of cargo.<sup>6</sup>

### Stakeholders’ views on the minded to Consultation

- 111 The CAA received seven responses to the minded to Consultation, six of which were relevant to the STAL passenger airline market:
- easyJet;
  - GAL;
  - MAG (two submissions);

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<sup>6</sup> The minded to Consultation, paragraph 8.71.

- Ryanair; and
  - London Southend Airport Company Limited (Southend).
- I12 The responses on Test B to the minded to Consultation were mixed.
- I13 Passenger airline responses supported the CAA's conclusions on Test B.
- I14 MAG and GAL considered that the CAA had erred in a number of respects.<sup>7</sup>

### The additional Consultation

- I15 On 17 September 2013, the CAA announced that, as market conditions appeared to have changed materially since the minded to Consultation closed, and stakeholders may have new evidence that would not have been possible for them to present previously, the CAA invited representations on how these developments may affect the market power assessment in relation to Stansted.
- I16 In October 2013, the CAA issued an additional targeted and limited phase of consultation in relation to the specific matters raised. The additional Consultation considered the passenger and cargo markets separately.
- I17 The additional Consultation set out the CAA's provisional views in relation to Tests A, B and C as applied to the STAL passenger market.
- I18 On Test A, the CAA's provisional view was that Test A for the Stansted passenger market would not be met because the bilateral agreements with easyJet and Ryanair could imply that there was a sufficient level of buyer power to constrain STAL's behaviour.
- I19 On Test B, the CAA's provisional view was that bilateral agreements between STAL and a large proportion of the airlines might be viewed as substantially reducing the risk of price based abuse of dominance. Test B therefore would be failed for the passenger market.

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<sup>7</sup> Details of the responses to the January 2013 consultation can be found on the CAA website at: <http://www.caa.co.uk/default.aspx?catid=1350&pagetype=90&pageid=14395>.

- I20 On Test C, the CAA's provisional view was that, even if STAL did have SMP, Test C for the passenger market would not be met because the agreements cover the overwhelming majority of passenger traffic and are long term in nature. The CAA considered there was no evidence to suggest that the agreements would operate against the interests of passengers and hence there was not a compelling case for a licence.

### Stakeholders' views on the additional Consultation

- I21 The CAA received seven responses to the additional Consultation, five of which were relevant to the STAL passenger airline market:
- London First;
  - GAL;
  - MAG;
  - Ryanair; and
  - Stansted Airport Consultative Committee (SACC).
- I22 Responses received from MAG and GAL set out their views as to why Tests A to C under section 6 of the Act were not met by STAL.
- I23 London First submitted representations that the CAA should conclude that STAL no longer required regulation.
- I24 The SACC and Ryanair submitted representations rejecting the CAA's provisional conclusions in respect of Tests A to C and setting out reasons why in their view all three tests were still met.<sup>8</sup>

### Final decision

- I25 As set out in its assessment of the application of Test A above, the CAA has concluded that STAL does not currently have nor is likely to acquire SMP in the passenger market at Stansted.
- I26 Test B presupposes a finding of SMP against which to assess the sufficiency of competition law to protect against the risk of abuse of that SMP. The reference to '*that substantial market power*' in section 1(4) of the CA Act makes this clear.

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<sup>8</sup> Details of the responses to the additional Consultation can be found at <http://www.caa.co.uk/default.aspx?catid=78&pagetype=90&pageid=15482>.

- I27 In light of the CAA's conclusion on Test A, there can therefore be no risk of STAL engaging in conduct that would amount to an abuse of that SMP. In circumstances where Test A is not met, Test B also cannot be met. Accordingly, there is no need to consider whether competition law provides sufficient protection against the risk that STAL may engage in conduct that amounts to abuse of SMP.