



CAA's response to consultation CAP 1261

On 27 February 2015 the CAA published a consultation '*Review of advice on SES Market Conditions for Terminal Air Navigation Services in the UK*' (CAP 1261). The consultation closed on 30 March 2015.

This document sets out the key details of the responses received and the action, if any, the CAA proposes to take. It also highlights amendments made to the substantive advice, published alongside this as CAP 1293, as a result of the consultation.

This document is to be read in conjunction with the final advice published as CAP 1293.

The consultation received five responses:

- Gatwick Airport Ltd (GAL);
- IATA;
- London (Heathrow) Airport Consultative Committee (LACC);
- NATS; and
- NATS Trade Union side (NTUS).

The remainder of this document sets out the commentary received from IATA, NATS and NTUS, and the CAA's consideration of that response.

GAL provided a positive response with no points on the CAA's analysis. The CAA welcomes its response and considers it requires no further action. Similarly the LACC provided a response in support of IATA's submission; this is therefore dealt with as part of that discussion.

IATA's comments

IATA raised a number of points with regards to the CAA's assessment. Primarily, these are focussed around a different interpretation of the test and the evidence that the CAA has collected.

On the substance of the test IATA considered that the market conditions are not adequately demonstrated. IATA considered that there is insufficient evidence on which to base the CAA's analysis and that the contract round in 2017-18 will provide additional data for the test. IATA contends that the evidence presented within CAP 1261, in fact, reinforces the earlier position of CAP 1004. Specifically, CAP 1261 demonstrates that barriers still exist with regards to criterion 1, 2 and 3.

Further, IATA considers that the CAA has not met the requirements of Criterion 6 by assessing the towers as a group. It also takes the view that, in undertaking an assessment of the towers on a group level, the CAA has not taken account of conflicts within the evidence presented for criterion 1, 2 and 3.

IATA also considered that the CAA has misinterpreted the required assessment; with the CAA having considered the 'presence of market conditions' rather than whether the market is 'subject to' market conditions. In conclusion, IATA considered that the CAA should take a prudent approach at this time and not recommend that the DfT seeks derogation.

CAA review of IATA's comments

The CAA does not agree with IATA's interpretation of the evidence presented in CAP 1261 and considers that events illustrate that there has been a significant shift in the market: the fact that major airport operators are now actively seeking to put TANS provision out to (formal or informal) tender and, further, to change suppliers, is strong evidence of this. As such, it appears that the barriers that the CAA had previously identified in CAP 1004 (and set out in Chapter 5 of CAP 1293), are now much lower than the CAA previously considered them to be.

In addition, the CAA does not consider that the existence of "market conditions" would mean that there would be no barriers to entry at all. The nature of the TANS service in itself means that there will likely be a certain level of investment up front to provide the necessary supporting infrastructure, not least those arising from the safety critical nature of the service and the need to commit to provide the service for a suitable period of time.

The CAA agrees with IATA in that the 2017-18 contract round will provide additional data on which to assess the test. However, the CAA considers that there is sufficient evidence already to show that market conditions are present in the provision of TANS in the UK. The CAA is, however, aware that the next contracting round is important for maintaining the continuing development of market conditions in the long-term. The CAA has undertaken to keep the market under review during this period.

The CAA has set out in detail in Chapter 6 its reasoning for not considering it appropriate to assess the towers on an individual basis for criterion 6 and will continue to conduct reviews on the basis of the market as a whole, and not at individual airports.

As to the interpretation of the test, it is clear from Article 3 that the test is whether the market is subject to market conditions as set out in Annex 1 of EU 391/2013. The CAA considers that this is identical to market conditions being in existence, the text at 6.19 has been clarified to reflect this.

CAA conclusions

For the avoidance of doubt, the CAA considers that the test is passed. The CAA has, however, commented that it does not consider that this test is the same as those which it may apply in the exercise of its competition law powers, as detailed in chapter 1 of the CAP 1261. Even if the derogation is granted, the CAA will continue actively to monitor the development of the market and will take action to protect or promote competition where appropriate within the scope of its powers. The CAA, in its regulatory judgement, considers that its assessment is prudent and reflects the evidence that it has gathered during this review. Furthermore, the CAA considers that the provision of TANS through a competitive market, rather than through regulated provision, is the best route to secure benefits for consumers in terms of cost and service quality.

Finally, the advice provided is consistent with its duty to promote competition where appropriate.¹ TANS operators in the UK have not previously been subject to detailed economic regulation. Having identified that the sector is subject to market conditions the CAA considers that detailed regulation will impose significant distortions. Particularly, as set out in CAP 1004, the CAA considers that publication of detailed cost data at the tower level will remove competition from the market. As a result, the CAA considers that economic regulation of TANS in the UK is not justified, and would not be beneficial.

The CAA notes that in the event that derogation is sought and granted the sector will still be subject to reporting requirements as set out in EU 390/2013 and 391/2013. This constitutes reporting on capacity target and a reduced form of cost disclosure.

In this light, the CAA proposes to make no amendments to its advice on the basis of representations from IATA other than those to section 6.19 mentioned above.

NATS

NATS's comments

NATS is generally supportive of the CAA's assessment. The CAA considers that its comments are mostly ones of emphasis.

NATS welcomed the CAA distinguishing between the current analysis and any assessment under the CAA's concurrent powers. However, it considered that the CAA is prejudicing its future position with comments made at 5.65-5.67 and 7.1 of CAP 1261 in relation to long-term contracting.

NATS considered that the wording at 5.70 should be altered. As drafted in CAP1261 NATS contend that it may inadvertently reinforce a view that NERL favours NSL where there is no evidence to support discriminatory treatment of TANS providers.

NATS did not consider that it should provide information on the cost of secondments to bidders. NATS noted that NSL already supplies salary and staffing information within the confidential data rooms.

CAA review of NATS's comments

The CAA does not consider that the comments referred to above prejudice its position in relation to the impact of long term contracting. The CAA is not currently taking any action under its concurrent competition powers. If, in the future, the CAA were to have grounds for taking such action, it would, in any event, be required to prove any case it were to investigate to the relevant legal standard. The CAA would remind all players in this market that they are responsible for ensuring that they comply with competition law. The CAA has, however, modified the text to clarify that the CAA does not have a formal position on long-term contracting but will keep the situation under review.

The CAA has rephrased paragraph 5.70. The rephrased text sets out more explicitly the CAA's point and is consistent with the evidence presented to the CAA. The paragraph now reads:

¹ Section 2 (4) Transport Act 2000

‘As set out in CAP 1004, there is an incentive on NERL, given the shared ownership, to favour NSL as a TANS provider to increase the overall profitability of the NATS group. However, there are some protections within the NERL licence to mitigate this risk, for example, by prohibiting discrimination in the operation of NERL’s systems. The CAA has not been presented with any evidence of preferential treatment in practice.’

The CAA does not consider it is appropriate to remove its recommendation on the publication of secondment data by NSL. However, the CAA notes the need for additional clarity. In this light, we have added the following to the report:

‘The CAA considers that it would be beneficial for NSL to provide greater clarity of the charges that it will levy for arranging secondments in the event that staff covered by ToaP opt not to transfer to a new provider. As NSL already provides information on salary, which the CAA considers should form the basis for the secondment costing, NSL should aim to provide detail on any additional charges that it may levy due to cost incurred in seconding staff. This information could be provided as part of the data room exercises and would not need to be publically available. The CAA considers that additional information in this area would allow for a more even playing field and reduce the uncertainty associated with ToaP. The CAA notes this is a recommendation and would welcome voluntary action from NSL on this issue.’

NATS Trade Union Side

NTUS supported the CAA’s assessment, although it noted that it did not consider a market based approach for the provision of TANS delivers the best outcomes for consumers.

NTUS did not support a recommendation for a review of whether a clear obligation should be placed on airport operators to put the provision of TANS services out to tender. It also considered that the CAA should consider carefully any review of long-term contracting within the market. NTUS highlighted the benefits in long-term contracting such as stability for investment.

NTUS did not consider that the CAA should address ToaP as a barrier to the functioning market. NTUS pointed out that it will only form a barrier where parties are not willing to negotiate on the terms of the transfer and will in any event diminish over time.

The CAA proposes no changes as result of the NTUS submission.