

British Airways plc response to the CAA's consultation on its draft guidance on the application of the Market Power Test

12 February 2016

In response to the CAA's Consultation on the draft guidelines on the application of the Market Power Test ("MPT") under the Civil Aviation Act 2012 ("guidelines") British Airways plc ("BA") makes the following comments:

1. CAA's proposed approach to applying Tests A, B and C

Test A and market definition

As the CAA has acknowledged, the SSNIP test under the Hypothetical Monopolist Test has limitations especially in the context of airports which are already regulated. The draft guidelines are vague on what other tests or factors the CAA would take into in these circumstances and BA requests that the CAA provides further guidance and details on this matter in the guidelines.

Test C and potential adverse effects from licence regulation

The guidelines list management distraction as a potential adverse effect based on the premise that it can distort incentives by distracting management to focus on maximising the value from a regulatory settlement rather than to focus on improved efficiency or service quality.

However if the CAA ensures, as it ought to, that licence regulation includes incentives that are properly aligned with efficiencies, such that there is never any upside for management not continuing to strive to meet efficiency targets, then such an affect will be avoidable. This should be the case under any licence regulation. If it is not then it is a failure of the licence itself, rather than an adverse effect from effective licence regulation.

2. CAA's proposed approach to deciding when to launch the process for undertaking MPDs

BA has some concerns regarding the time limits for responding to a request for a MPD set out in paragraphs 3.7 to 3.12 as follows:

- The timetable of six months for the CAA to respond to a request for a MPD is excessive. In practice such a timetable effectively adds six months (at least – see second bullet point below) to the 18 month timetable for the MPD itself. It is not clear why the CAA requires six months as it has not provided any explanation or justification for this timeline. We submit that this timetable should be reduced to ensure a reasonably timely process.
- The timetable of six months for the CAA to respond to a request for a MPD only commences after the requesting party has submitted its final submission (paragraph 3.9). It is not clear whether the requesting party or the CAA or both determine whether and what further information is required for review and when a submission may be considered final. This creates potential uncertainty and could add significantly to the timetable for consideration of the MPD if the CAA uses this as an opportunity push back the review start date by making repeated information requests and refusing to accept a submission as final. BA recognises that the CAA requires a certain amount of information to carry out a review, however the guidelines should be made more explicit and certain as to when, and by whom, a request may considered final.

4. CAA's proposed process for undertaking MPDs

Confidentiality

Regarding the provisions on confidentiality set out paragraphs 3.28 and 3.29, rather than the CAA stating it will only share information more widely “where to do so would, in our view, be appropriate in the circumstances” BA submits that it would be more appropriate and reassuring for businesses submitting data for the CAA to reference the processes set out in the CAA’s own guidelines on its treatment of confidential information as set out in CAP1235: Guidance on the Application of the CAA’s Competition Powers, Chapter 4 Information gathering and disclosure.