

Guidance on the Application of the CAA's Competition Powers

CAP 1235

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Foreword

Competition law: a key element of the CAA framework

1. The Civil Aviation Authority exists to protect the public and, in particular, consumers of aviation services. We do that by making sure that the aviation sector meets the highest standards of safety; upholding consumers' legal rights; and protecting them if travel companies cease trading.
2. We act to encourage choice and value to consumers. In doing this, our approach is guided by our statutory duty to promote competition as far as appropriate. Experience has demonstrated that with only a few exceptions¹, a market based approach, where providers compete with each other on the merits of their offering, across the aviation value chain, has delivered major benefits to consumers.
3. This means that we now only regulate directly, via a licence, two airports and the NATS en-route air traffic service. We are also currently implementing direct economic regulation of terminal air navigation services as a result of EU legislation. For the rest of the sector, competition law is one of the main ways in which we fulfil our objective to promote consumer choice and value.
4. Therefore, a key element of our approach is using our powers to take action when companies do not comply with competition law or where there may be particular barriers to the functioning of competition and delivery of the benefits expected.
5. From 6 April 2013, we were given powers to apply competition law provisions in respect of airport operation services, to add to our existing competition law powers over air traffic services.² This means that we now enforce the UK and EU competition law prohibitions on anti-competitive agreements and abuses of dominant market positions

¹ En-route air traffic control being one particular example, as a natural monopoly.

² We received concurrent competition powers for air traffic services under the Transport Act 2000. We received concurrent competition powers for airport operation services under the Civil Aviation Act 2012.

in these areas. We can also conduct market studies and refer a market for a full investigation by the Competition and Markets Authority (CMA).

6. Our competition powers are held concurrently with the CMA. Concurrency means that either we or the CMA will take on a particular case or conduct a market study. The way we work together with the CMA has also recently been revised by the Enterprise and Regulatory Reform Act 2013 (ERRA13) and associated secondary legislation. We have also agreed a Memorandum of Understanding with the CMA about how we interact at working level.
7. We are required to consider in individual cases whether using competition law, to deal with particular issues, is more appropriate than using economic licence enforcement powers.
8. The CAA and the CMA are members of the UK Competition Network (UKCN), a forum consisting of the CMA and all sectoral regulators which have concurrent competition law powers. The UKCN was established in December 2013 with a mission to promote competition for the benefit of consumers and to prevent anti-competitive behaviour both through facilitating use of competition powers and development of pro-competitive regulatory frameworks, as appropriate.

Purpose of this guidance

9. This Guidance contains general information designed to inform stakeholders about how we apply our competition powers and duties in relation to airport operation services and air traffic services.
10. Guidance on our powers and how we apply those powers is important for all our stakeholders. This is particularly important as market participants are responsible for assessing their own compliance with the law. In particular, companies should not expect the CAA to pre-approve particular agreements or business practices. It is for companies to assure themselves that they comply.
11. Guidance is also important to help potential complainants prepare submissions to us and inform them how we will deal with them. It sets out what businesses should expect if they are subject to investigation or enforcement action and what routes are available to challenge our decisions.

12. Likewise, the Guidance seeks to clarify the relationship between sectoral regulation and competition law and to promote awareness of how competition law applies to the aviation industry and the importance of compliance with the latter.
13. Finally, we identify other relevant documents that we will refer to in enforcing competition law in respect of airport operation and air traffic services. In particular, we refer to relevant guidance issued by the CMA and the European Commission on individual aspects of competition law.
14. This Guidance replaces CAP1016 (The CAA's Concurrent Competition Powers for Airport Operation Services and Air Traffic Services)³ which was published in March 2013 as well as all other existing guidance on our competition powers.⁴

What to do if you want to contact the CAA about a competition issue

15. The CAA welcomes information from businesses and their representatives, as well as consumers relating to our competition and regulatory work (including complaints). You can contact us to share information with us and discuss any concerns you may have. If you want to raise any issues with us please email economicregulation@caa.co.uk.
16. Once you have contacted us, we may ask you to send us supporting information or invite you to submit a formal complaint as explained in the relevant chapters of this Guidance.

³ This document is available from:
<http://www.caa.co.uk/application.aspx?catid=33&pagetype=65&appid=11&mode=detail&id=5467>

⁴ Air traffic services and competition law – a CAA policy document (April 2006) http://www.caa.co.uk/docs/5/ats&complaw_policy_april06.pdf and Concurrent powers for air traffic services (March 2001) <http://www.caa.co.uk/docs/5/ergdocs/sectorguidelines0301.pdf>

CHAPTER 1

Introduction

Introduction

This Guidance is designed to inform our stakeholders – businesses and their advisers, consumers, consumer groups, and other interested parties about how we apply our competition powers and duties.

Taken together, our competition powers mean that we can take one or more of the following actions:

- Consider complaints about anti-competitive behaviour and where necessary, take action to stop it. Where we find a business is acting anti-competitively, we can impose financial penalties of up to 10% of the business' relevant turnover and apply other penalties on the individuals involved.
- Carry out sector reviews of the market in order to maintain our expertise and facilitate future action.
- Conduct market studies where we identify some aspect of a market that may potentially impede competition, such as creating barriers to entry, or harming consumers.
- Make market investigation references (MIRs) to the CMA to carry out an in-depth market investigation over a period of up to 18 months which may lead to the CMA imposing remedies to rectify any adverse effects on competition (AECs) that it finds.
- Investigate super-complaints submitted to us by designated consumer bodies and publish a reasoned response stating what action, if any, we intend to take within 90 days of receiving a complaint.
- Communicate with stakeholders about how the market is functioning, and how to comply with competition law. This includes issuing guidance on our powers.

Purpose

- 1.1 This Guidance is designed to inform our stakeholders – businesses and their advisers, consumers, consumer groups, and other interested parties - about how we apply our competition powers and duties. In doing so, this document also seeks to give some guidance on the interface between generally applicable competition law and aviation sector-specific legislation.
- 1.2 Specifically, it sets out how we will apply our concurrent competition powers in relation to airport operation services (AOS) and air traffic services (ATS).
- AOS are generally those services provided at an airport, other than air traffic services or services provided in shops or other retail businesses.
 - ATS generally consist of air traffic control while the aircraft is cruising as well as when aircraft take off and land at airports.⁵
- 1.3 The CMA publishes on its webpages a range of guidance on the application of competition law and, where appropriate, we refer to these publications elsewhere in this document. This Guidance should be read in conjunction with the CMA's documents and the relevant legal instruments.⁶
- 1.4 This Guidance is not intended to be comprehensive in that it cannot cover every possible set of circumstances. Instead, it aims to set out the general framework we use so that businesses that have an interest in these matters, and other stakeholders including consumer bodies and the Government, will be aware of the processes and principles to which we will have regard when dealing with suspected competition law infringements and using our other competition powers.
- 1.5 We will apply this Guidance flexibly. However, we may depart from it if the particular facts of an individual case reasonably justify it.
- 1.6 We will apply the guidance in accordance with the better regulation principles, which are: proportionality, accountability, consistency,

⁵ These terms are explained more fully in chapter 2.

⁶ The CMA guidance is available from: <https://www.gov.uk/cma>

transparency, and targeted action.⁷

- 1.7 We may, in the future, revise and reissue this Guidance in the light of our ongoing experience and other developments in law and practice. Please visit our website to ensure that you have the latest version of this Guidance.
- 1.8 This Guidance is not a definitive statement of, nor is it a substitute for, the law itself. It should be read in conjunction with the appropriate legal instruments, EU case law and United Kingdom case law.⁸ As stated above, it is advisable to read this Guidance alongside other competition law publications and, in particular, those of the CMA.
- 1.9 Anyone in doubt about how they may be affected by the UK and European legislation referred to in this Guidance should seek independent legal advice.

The CAA: a sector regulator and a competition authority

- 1.10 The CAA is the UK's specialist aviation regulator. Our activities include making sure that the aviation industry meets the highest technical and operational safety standards and securing choice, quality and value for consumers. We are the economic regulator for airports and ATS, and provide advice on aviation policy to the Government.
- 1.11 Our competition powers largely stem from the Civil Aviation Act 2012 (CAA12) and the Transport Act 2000 (TA00). These give us the power to undertake sector reviews to consider the functioning of the markets for which we have responsibility, where we want to gain a more in depth understanding of the industry or a particular market.
- 1.12 In addition, this legislation means we are a national competition authority (NCA) with concurrent powers with the CMA in relation to the application and enforcement of UK and EU competition law to the

⁷ The Better Regulation Principles are available from:
<https://www.gov.uk/government/organisations/better-regulation-delivery-office>

⁸ This case law is available from: <http://curia.europa.eu/>,
<http://ec.europa.eu/competition/court/index.html>, <http://www.catribunal.org.uk/> and
<http://ec.europa.eu/competition/elojade/antitrust/nationalcourts/>

provision of AOS and the supply of ATS. This means that the CAA, concurrently with the CMA, has the power to apply and enforce the competition prohibitions – that is Chapters I and II of the Competition Act 1998 (CA98) - which prohibit anti-competitive agreements and an abuse of a dominant position respectively (the UK competition prohibitions) and the equivalent EU law prohibitions in Articles 101 and 102 of the Treaty on the Functioning of the EU (the EU competition prohibitions).

- 1.13 The legislation also gives us powers under the Enterprise Act 2002 (EA02), in relation to the provision of AOS and the supply of ATS, to undertake market studies and make market investigation references to the CMA ('the market provisions'). The CAA also has power to investigate super-complaints in relation to the provision of AOS and the supply of ATS.
- 1.14 The competition law powers described in paragraphs 1.12 and 1.13 are held concurrently with the CMA. This means that, in respect of the provision of AOS and the supply of ATS, either the CAA or the CMA may exercise these powers. There is, since April 2013, a legal procedure for allocating cases under the competition prohibitions as between the CAA and the CMA: this is to be achieved by agreement between the two authorities, but if agreement cannot be reached, the CMA determines which authority should exercise the power. The CMA has published guidance on concurrent application of competition law to regulated industries.⁹
- 1.15 Taken together, our competition powers mean that we can take one or more of the following actions:
1. Consider *complaints about anti-competitive behaviour* and where necessary, take action to stop it. Where we find a business is acting anti-competitively, we can impose financial penalties of up to 10% of the business' relevant turnover and apply other penalties on the individuals involved.
 2. Carry out sector *reviews* of the market in order to maintain our expertise and facilitate future action.

⁹ 'Regulated industries: 'Concurrent application of competition law to regulated industries' (CMA10), This is available from: <https://www.gov.uk/government/publications/guidance-on-concurrent-application-of-competition-law-to-regulated-industries>

3. Conduct *market studies* where we identify some aspect of a market that may potentially impede competition, such as creating barriers to entry, or harming consumers.
4. Make *market investigation references (MIRs)* to the CMA to carry out an in-depth market investigation over a period of up to 18 months¹⁰, which may lead to the CMA imposing remedies to rectify any adverse effects on competition (AECs) that it finds.
5. *Communicate* with stakeholders about how the market is functioning, and how to comply with competition law. This includes issuing guidance on our powers.

1.16 One of our aims is to improve quality, choice and value for aviation consumers. Competition works for the benefit of consumers when businesses compete fairly on the merits of the product or service they provide. We will therefore use our competition powers, where necessary, to achieve this in practice for businesses and consumers.

1.17 Further information on the CMA and our concurrent competition powers is set out in chapter 2.

How to comply with competition law

1.18 The majority of businesses¹¹ will wish to comply with competition law.

1.19 It is the responsibility of each business to satisfy itself that it is complying with competition law on an on-going basis. We recognise that a 'one size fits all' approach is not necessarily appropriate for competition law compliance and that the appropriate actions to achieve compliance may vary, for example depending on the size of business and the nature of the risks identified. Neither we nor the CMA will endorse or approve a business's compliance programme or give pre-approval to specific agreements or practices.

1.20 More information on compliance can be found in the CMA guidance

¹⁰ This period may be extended, by no more than six months, if the CMA considers that there are special reasons for doing so.

¹¹ See chapter 5 below for the definition of a business in the context of the application of EU and UK competition law.

'How your business can achieve compliance with competition law'.¹²

Structure of this Guidance

1.21 The Guidance is divided into the following chapters:

- Chapter 2 – Overview of CAA's powers.
- Chapter 3 – Complaints and early stage analysis.
- Chapter 4 – Information gathering and disclosure.
- Chapter 5 – Competition prohibitions.
- Chapter 6 – Market oversight provisions.
- Chapter 7 – Super-complaints.

¹² This guidance is available from: <https://www.gov.uk/government/organisations/competition-and-markets-authority>

CHAPTER 2**Overview of CAA's powers**

Overview of CAA's powers

We are the UK's independent specialist regulator in the aviation sector and have a range of sectoral regulatory powers and duties under the Civil Aviation Act 1982, the Transport Act 2000 (TA00), the Civil Aviation Act 2012 (CAA12) and the instruments made under them.

CAA's sectoral powers

CAA12 requires us to regulate certain airports directly via a licence if we judge that they have substantial market power and were we believe direct regulation will work better than using competition law.

Under TA00 the Government issued a licence to NATS (En Route) plc (NERL) to provide en route air traffic services in UK airspace and in parts of the Eastern Atlantic. Under TA00, the CAA is the economic regulator of NERL.

The Airport Charges Regulations 2011 (ACRs) cover all airports handling over 5 million passengers and provide airlines with a number of protections. For example, it requires airports to provide information to and consult with airlines when changing airport charges, and not to discriminate between airlines without relevant, transparent and objective justification.

The Airports (Groundhandling) Regulations 1997 (AGRs) place some limitations on airport operators at airports with more than 2 million passengers annually, if they want to restrict the number of self handling airlines or third-party groundhandlers that operate at the airport.

We have powers to enforce consumer protection law in the aviation sector through European legislation providing rights to air passengers and consumer protection legislation covered by Part 8 of the Enterprise Act 2002 (EA02).

CAA's competition law powers

We are one of the sectoral regulators in the UK with certain concurrent competition law powers.

The arrangements, by which the CMA and the sectoral regulators apply competition law in the regulated sectors, are often known as 'concurrency' arrangements.

This means that, alongside the CMA, we can:

- Enforce the UK competition prohibitions in Chapters I and II of CA98 and, where trade between Member States of the EU may be affected, the equivalent EU competition prohibitions in Article 101 and Article 102 of the Treaty on the Functioning of the EU (TFEU). (See chapter 5).
- Undertake market studies under Part 4 (market investigations) of the Enterprise Act 2002 (EA02). (See chapter 6).
- Make market investigation references under Part 4 of EA02. (See chapter 6).
- Undertake investigations into super-complaints under Part 1 of EA02. (See chapter 7).

As a designated national competition authority (NCA) with responsibility to apply the EU competition prohibitions in relation to AOS and ATS, we consult and liaise closely with the European Commission and the network of Member State NCAs in matters relating to the enforcement of the EU competition prohibitions in the aviation sector. Where a potential case involves the application of the EU competition prohibitions, we also have regard to the case allocation principles and duties of consistency and cooperation as part of the European Competition Network (ECN).

Introduction

- 2.1 This chapter outlines the range of sectoral powers which fall exclusively to us and the competition law powers that we exercise concurrently with the CMA.

CAA's sectoral powers

- 2.2 We are the UK's independent specialist regulator in the aviation sector and have a range of sectoral regulatory powers and duties under the Civil Aviation Act 1982, the Transport Act 2000 (TA00), the Civil Aviation Act 2012 (CAA12) and the instruments made under them. We are also:

- responsible for the application and enforcement of various regulations which derive from EU law, specifically the Airport Charges Regulations 2011 (ACRs) and the Airports (Groundhandling) Regulations 1997 (AGRs); and
- the designated enforcer in respect of consumer protection legislation, including passengers' rights during flight disruption, reduced mobility access and unfair trading practices.

2.3 We have issued separate guidance on how we carry out these sectoral powers.¹³

Regulation of airports with substantial market power

2.4 CAA12 requires us to regulate certain airports directly via a licence if we judge that they have substantial market power and we assess that licence-based regulation will work better than using competition law and is proportionate. We make these decisions as a "Market Power Test" (MPT), which is published as a market power determination (MPD).

2.5 As a result of our MPDs in January and March 2014¹⁴, we now regulate Heathrow and Gatwick airports through licences. These licences came into effect on 1 April 2014.¹⁵

2.6 In 2015, we plan to issue guidance on how we will assess the MPT for future determinations. Until this guidance is issued, stakeholders are referred to the CMA Guidance on Market Definition and Market Power (OFT403 and OFT415)¹⁶ as well as our 2014 MPD decisions, for the latest approach we will take into account in assessing market power of

¹³ Guidance on the CAA's sectoral powers in relation to ACRs, AGRs and consumer protection are available from: <http://www.caa.co.uk/default.aspx?catid=5&pagetype=90&pageid=14467>
<http://www.caa.co.uk/default.aspx?catid=78&pagetype=90&pageid=69>
<http://www.caa.co.uk/default.aspx?catid=2211&pageid=13319>

¹⁴ The MPDs we have undertaken are available from:
<http://www.caa.co.uk/default.aspx?catid=78&pagetype=90&pageid=12275>

¹⁵ The licences for Heathrow and Gatwick are available from:
<http://www.caa.co.uk/default.aspx?catid=78&pagetype=90&pageid=67>

¹⁶ The CMA guidance is available from:
<https://www.gov.uk/government/organisations/competition-and-markets-authority>

airports.¹⁷

- 2.7 Although there are some parallels between making MPDs and in investigating complaints under the competition prohibitions, there are also some important differences between them. For instance, when assessing market power at an airport as a whole, we will usually consider the overall bundle of AOS services and then determine the relevant market in which the airport offers those services. In comparison, when assessing complaints under the competition prohibitions, we need to start by determining a product market relevant to the complaint in question. This may be much narrower than the total range of services offered at an airport e.g. it could relate to groundhandling or forecourt access at an airport or airports.

Regulation of Air Traffic Services

- 2.8 Under TA00, the Government issued a licence to NATS (En Route) plc (NERL) to provide en route air traffic services in UK airspace and in parts of the Eastern Atlantic. Under TA00, the CAA is the economic regulator of NERL. We exercise this role mainly through monitoring and enforcing the conditions in the Licence and through modifications to NERL's Licence.¹⁸
- 2.9 En Route and Terminal Air Navigation Services (TANS) operators at airports over a certain size are subject to the Single European Sky Performance scheme set out in Regulations EU 2013/390 and EU 2013/391. For En Route, this is applied through the NERL licence. For other operators, the regulation applies directly.

Airport Charges Regulations

- 2.10 The Airport Charges Regulations 2011 (ACRs)¹⁹ came into effect in November 2011 and transposed into UK law Directive 2009/12/EC of the European Parliament and of the Council of 11 March 2009 on

¹⁷ The CAA's Guidance on the assessment of airport market power (April 2011) has been withdrawn.

¹⁸ Further information on the regulation of National Air Traffic Services is available from: <http://www.caa.co.uk/default.aspx?catid=5&pagetype=90&pageid=585>

¹⁹ The airport charges directive is available from: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:070:0011:0016:EN:PDF>
The airport charges regulations can be found at: http://www.legislation.gov.uk/ukxi/2011/2491/pdfs/ukxi_20112491_en.pdf

airport charges. The ACRs cover all airports handling over 5 million passengers and provide airlines with a number of protections. For example, it requires airports to provide information to and consult with airlines when changing airport charges, and to not discriminate between airlines without relevant, transparent and objective justification.

- 2.11 The CAA must investigate complaints by an airline on which airport charges have been levied, or by another airport that considers its business has been harmed by the airport not complying with the ACRs. The CAA also may investigate on its own initiative under the ACRs for an apparent breach of its requirements.
- 2.12 More information on the ACRs can be found on our website.²⁰ We plan to update our guidance on how we implement the ACRs in 2015.

Airports (Groundhandling) Regulations

- 2.13 The Airports (Groundhandling) Regulations 1997 (AGRs) transpose the European Groundhandling Directive into UK law.²¹ Groundhandling covers a multitude of activities including check-in, handling baggage, cargo and mail, re-fuelling aircraft, and transporting passengers and crew to aircraft. The AGRs place some limitations on airport operators at airports with more than 2 million passengers annually, if they want to restrict the number of self handling airlines or third-party groundhandlers that operate at the airport. If an airport operator at an airport with more than 2 million passengers annually wants to restrict the number of self-handling airlines or third-party groundhandlers that operate at the airport, it requires a determination from the CAA to be able to do so.
- 2.14 There are currently no legal restrictions on the number of handlers at airports in the UK. Where handlers use aircraft facilities, such as check-in desks, baggage belts and fuel hydrant systems, the airport operator must set its charges according to relevant, objective,

²⁰ More information on the ACRs is available from:

<http://www.caa.co.uk/default.aspx?catid=5&pagetype=90&pageid=14467>

²¹ Airport Groundhandling Regulations – The airport groundhandling directive can be found at:

<http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:31996L0067>

The airport groundhandling regulations can be found at:

<http://www.legislation.gov.uk/ukxi/1997/2389/made>

transparent and non-discriminatory criteria. The CAA must investigate alleged breaches of the AGRs.

2.15 More information on the AGRs can be found on our website.²²

Consumer and Information Powers

2.16 We have powers to enforce consumer protection law in the aviation sector through European legislation providing rights to air passengers; and consumer protection legislation covered by Part 8 of the Enterprise Act 2002 (EA02). This includes:

- access to air travel for disabled and reduced mobility passengers;
- informing passengers of the identity of their airline;
- rights to compensation and assistance for denied boarding, cancellation and long delays;
- transparent pricing;
- unfair terms in consumer contracts;
- the Electronic Commerce Directive;
- consumer protection from unfair trading;
- the Package Travel, Package Holiday and Package Tours Regulations;
- the Consumer Rights (Payment Surcharges) Regulations;
- the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations; and
- regulations on co-operation between national authorities responsible for the enforcement of consumer protection laws.

2.17 Our licensing of travel firms, stewardship of the ATOL (Air Travel Organisers' Licensing) scheme and management of repatriation, refund and fulfilment activities are intended to give effect to European and UK government policy ensuring consumers of air holidays are protected from the adverse effects of travel firms becoming insolvent.

²² More information on the AGRs is available from:
<http://www.caa.co.uk/default.aspx?catid=78&pagetype=90&pageid=69>

We maintain an effective scheme of consumer protection by:

- licensing market entrants;
- limiting and reducing the impact on consumers of insolvencies that occur;
- ensuring sufficient security is in place to cover the liabilities of failed firms;
- making sure that businesses pay correct levels of ATOL Protection Contributions (APC) in a timely fashion;
- ensuring that consumers know when they are protected and when they are not; and
- by taking steps to ensure that repatriation and refund activities can be handled effectively and effectively.

2.18 A key element of our strategy to protect consumers is enforcement action against firms making licensable sales without holding an ATOL.

2.19 Our airline operating licensing activity ensures that we meet our obligations under European and UK law for the licensing of all aspects of UK carriers with the exception of finance and safety (although finance and safety are pre-conditions for the retention of such licences). By doing so, we ensure that those carrying passengers, cargo or mail for payment meet a number of requirements including insurance, ownership and control, and fitness (of accountable managers and shareholders).

2.20 Guidance on our consumer enforcement powers is available on our website.²³

CAA's competition law powers

Concurrent jurisdiction between the CAA and the CMA

2.21 We are one of the sectoral regulators in the UK with certain concurrent competition law powers.²⁴ The arrangements by which the

²³ <http://www.caa.co.uk/enforcement>

²⁴ The other sectoral regulators are Ofcom (Office of Communications), Ofgem (the Gas and Electricity Markets Authority), ORR (the Office of Rail Regulation), Ofwat (the Water Services Regulation Authority) and NIAUR (Northern Ireland Authority for Utility Regulation). Monitor

CMA and the sectoral regulators apply competition law in the regulated sectors are often known as 'concurrency' arrangements.

2.22 Since 2001, we have had concurrent competition powers with the CMA²⁵ under both the UK and EU competition prohibitions and the market provisions in respect of the supply of ATS. We were given the same powers in respect of the provision of AOS in April 2013.

2.23 This means that, alongside the CMA, we can:

- enforce the UK competition prohibitions in Chapters I and II of CA98 and, where trade between Member States of the EU may be affected, the equivalent EU competition prohibitions in Article 101 and Article 102 of the Treaty on the Functioning of the EU (TFEU). (see chapter 5);
- undertake market studies under Part 4 (market investigations) of the Enterprise Act 2002 (EA02)²⁶ (see chapter 6);
- make market investigation references under Part 4 of EA02. (see chapter 6); and
- undertake investigations into super-complaints under Part 1 of EA02 (see chapter 7).

2.24 All other competition law powers in the aviation sector are exercised by the CMA (and, in respect of the EU competition law prohibitions and EU merger control, by the European Commission). The CMA therefore has general oversight for air transport services provided by airlines and other commercial services provided at airports, such as retail sales. The table in the next section outlines the different powers, and who can exercise them, in the aviation industry.

2.25 The intention of the most recent competition legislation²⁷ is to

has had concurrent powers in respect of healthcare services in England since April 2013. The FCA (the Financial Conduct Authority) and the PSR (the Payment Systems Regulator) will acquire concurrent powers from 1 April 2015.

²⁵ Prior to 1 April 2014, the competition prohibitions and the market provisions were applied and enforced in the UK by the CMA's predecessors, the OFT (Office of Fair Trading) and the Competition Commission (CC).

²⁶ The CAA does not have powers under section 166 (register of undertakings and orders: Part 4) and section 171 (advice and information: Part 4) of the Enterprise Act.

²⁷ Enterprise and Regulatory Reform Act 2013 (ERRA13) and 'The Competition Act 1998

strengthen the use of competition law and improve coordination between CMA and concurrent regulators such as the CAA. Where a matter raises issues that fall within both our and the CMA's concurrent jurisdiction, we and the CMA will closely cooperate to avoid duplication, ensure transparency and maximise our complementary skills and expertise whilst promoting competitive outcomes in the aviation sector for the benefit of consumers.

- 2.26 We have powers, which we do not share with the CMA, to undertake sector reviews under CAA12 (see chapter 6).

Airport operation services

- 2.27 Airport operation services (AOS) are defined in CAA12 as services provided at an airport for the purposes of:

- the landing and taking off of aircraft;
- the manoeuvring, parking or servicing of aircraft;
- the arrival or departure of passengers and their baggage;
- the arrival or departure of cargo;
- the processing of passengers, baggage or cargo between their arrival and departure; and
- the arrival or departure of persons who work at the airport.

- 2.28 Airport operation services (AOS) also include provision at an airport of:

- groundhandling services described in the Annex to Council Directive 96/67/EC of 15 October 1996 on access to the groundhandling market at Community airports;
- facilities for car parking and allowing access to and/or use of them; and
- facilities for shops and other retail businesses and allowing access to and/or use of them.

- 2.29 Airport operation services (AOS) do not include:

- air transport services for the carriage of passengers or cargo by air;

(Concurrency) Regulations 2014' (Concurrency Regulations).

- air traffic services; or
- services provided in shops or as part of other retail businesses.

Air traffic services

2.30 Air traffic services (ATS) are defined in TA00 as:

- providing instructions, information or advice with a view to preventing aircraft colliding with other aircraft or with other obstructions (whether in the air or on the ground);
- providing instructions, information or advice with a view to securing safe and efficient flying;
- managing the flow of air traffic with a view to ensuring the most efficient use of airspace;
- providing facilities for communicating with aircraft and for the navigation and surveillance of aircraft; and
- notifying organisations of aircraft needing search and rescue facilities, and assisting organisations to provide such facilities.

Who can apply competition law in the aviation sector

2.31 The competition law functions and which body has the power to apply them in the aviation sector are set out in the following table.

Figure 2.1: Main areas of competition law and which body or bodies apply them in the aviation sector

Aviation sector	Sector review under CAA12 and TA00 and EA02	General review powers under EA02	Market studies and market investigation references	Anti-competitive agreements and abuses of a dominant position	Super-complaints
Airlines and other providers of air transport	CMA	CMA*	CMA*	CMA*	CMA*
Airport operation service ²⁸ providers	CAA	CMA*	CAA or CMA*	CAA or CMA*	CAA or CMA*
Air traffic service ²⁹ providers	CAA	CMA*	CAA or CMA*	CAA or CMA*	CAA or CMA*
Other providers of retail services at airports	CMA	CMA*	CMA*	CMA*	CMA*
Tour operators	CMA	CMA*	CMA*	CMA*	CMA*

* Where the agreement or conduct concerned may affect trade between Member States of the EU, the European Commission may apply the EU competition prohibitions.

Effective cooperation between the CMA and the sectoral regulators

2.32 The CMA and the sectoral regulators have demonstrated their commitment to making the concurrency framework more effective through the establishment of the UK Competition Network (UKCN).

²⁸ Airport Operation Services are defined earlier in this chapter.

²⁹ Air Traffic Services are defined earlier in this chapter.

This is an enhanced forum for cooperation to enable them to work together to ensure the consistent and effective use of competition powers across all sectors.

- 2.33 We discuss issues of mutual interest with the CMA as part of the UKCN and bilaterally, and we engage with each other not just in the exercise of our concurrent competition powers but also with a view to promoting competition for the benefit of users of AOS and ATS. To the extent permitted by law, we engage in broad strategic dialogue, share relevant information, best practice and cooperate closely to ensure the consistent application of competition law in the UK. We also consult one another on any issues that may have significant implications for the other.
- 2.34 The Competition Act 1998 (Concurrency) Regulations 2014 (Concurrency Regulations) set out mechanisms for allocation of cases, require the establishment of information sharing arrangements, and facilitate the secondment of staff for competition case work as between the CMA and sectoral regulators.³⁰

Who is best placed to take action

- 2.35 Where there is a suspected infringement of the competition prohibitions, we will liaise and cooperate closely with the CMA. This includes the two authorities exchanging information in their possession about the potential infringement, subject to the relevant legal requirements, including for the purposes of determining jurisdiction as set out in the Concurrency Regulations and the 'Guidance on concurrent application of competition law to regulated industries'.³¹
- 2.36 We will reach agreement on which authority is better placed or best placed to take responsibility for the case. The factors for determining allocation will include as appropriate:
- the sectoral knowledge of the CAA and the CMA;

³⁰ Respectively, articles 4 to 8, 9 and 10 of the Regulations.

³¹ 'The Competition Act 1998 (Concurrency) Regulations 2014' are available from:

<http://www.legislation.gov.uk/uksi/2014/536/contents/made>

The 'Guidance on concurrent application of competition law to regulated industries' (CMA10) is available from: <https://www.gov.uk/government/publications/guidance-on-concurrent-application-of-competition-law-to-regulated-industries>

- whether the case affects more than one regulated sector and/or non-regulated sectors not subject to concurrent competition law;
- previous contacts between the parties or complainants and the CAA or the CMA;
- experience in dealing with any of the companies which may be involved in the proceedings;
- experience in dealing with any similar issues which may be involved in the proceedings;
- whether the CMA considers it necessary to exercise its functions under the competition prohibitions in relation to a case in order to develop United Kingdom competition policy or to provide greater deterrent and precedent effect for the benefit of competition and consumers, either within the relevant regulated sector, or more widely; and
- whether the case being allocated to the CMA and supported by the CAA (or vice versa) will provide the best combination of competition and sector-specific expertise.

2.37 If a suspected competition prohibition infringement is drawn to the attention of the CAA or the CMA by way of a complaint, it is expected that an agreement on case allocation will take no more than two months after the receipt of the complaint by the authority that first received it. However, if agreement cannot be reached within a reasonable time, the CMA has the final decision on how to allocate the case. The complainant will be informed, as a matter of policy, as to which authority is handling the complaint.

2.38 The Concurrency Regulations³² provide for a 'standstill obligation' so that, once it has been decided which competition authority will deal with a particular case, no other authority can deal with individual 'prescribed functions' in relation to that same case. These are:

- the opening of a formal investigation under section 25 of CA98;

³² The Competition Act 1998 (Concurrency) Regulations 2014' are available from:
<http://www.legislation.gov.uk/ukxi/2014/536/contents/made>

- the withdrawal of an exclusion from the Chapter I prohibition in relation to an individual agreement; and
- the making of certain formal decisions, including finding of an infringement, requiring that an infringement be brought to an end, ordering interim measures, accepting commitments by decision and imposing fines.

2.39 In effect, this means that a case will be dealt with by only one organisation. However, the 'standstill obligation' does not prevent us from liaising with other authorities within the UKCN and cooperating with them as appropriate in respect of a case.

2.40 Once jurisdiction in relation to a case has been allocated to us, the only way in which another authority can take action in relation to that case is where the case is formally transferred to that authority or the CMA decides to take over a case from us.

2.41 Further information regarding the concurrent competition powers and concurrency arrangements are set out in:

- The Competition Act 1998 (Concurrency) Regulations 2014³³;
- The CMA's 'Guidance on concurrent application of competition law to regulated industries' (CMA10)³⁴; and
- The Memorandum of Understanding between the CMA and the CAA on concurrent competition powers (the MOU).³⁵

Effective cooperation within the European Union

2.42 As a designated national competition authority (NCA) with responsibility to apply the EU competition prohibitions in relation to AOS and ATS, we consult and liaise closely with the European Commission and the network of Member State NCAs in matters relating to the enforcement of the EU competition prohibitions in the

³³ 'The Competition Act 1998 (Concurrency) Regulations 2014' are available from: <http://www.legislation.gov.uk/ukxi/2014/536/contents/made>

³⁴ The 'Guidance on concurrent application of competition law to regulated industries' (CMA10) is available from: <https://www.gov.uk/government/publications/guidance-on-concurrent-application-of-competition-law-to-regulated-industries>

³⁵ The Memorandum of Understanding between the CMA and the CAA on concurrent competition powers is available at: <http://www.caa.co.uk/docs/5/MoUCAAandCMA.pdf>

aviation sector. Where a potential case involves the application of the EU competition prohibitions, we also have regard to the case allocation principles and duties of consistency and cooperation as part of the European Competition Network (ECN).³⁶ Further details on the ways in which we can participate in the work of the ECN can be found in the Commission's Notice on Cooperation within the Network of Competition Authorities.³⁷

Interplay between the CAA's sectoral powers and competition law powers

2.43 As noted above, the CAA regulates some businesses directly through their licences as well as being a competition authority. The objectives of our sector-specific regulatory powers may overlap with the aims of competition law to a certain extent but they are not identical.

2.44 For example, when we are regulating airports with substantial market power under CAA12³⁸ we have to:

"carry out our functions under this Chapter – the regulation of operators of dominant airports – in a manner which we consider will further the interests of users of air transport services regarding the range, availability, continuity, cost and quality of airport operation services. We must carry out the functions, where appropriate to do so, in a manner which we consider will promote competition in the provision of airport operation services."

2.45 Likewise, when regulating ATS under TA00³⁹ we must:

³⁶ The European Competition Network (ECN) is a forum for discussion and cooperation of European competition authorities in cases where Articles 101 and 102 of TFEU are applied. Its aim is to ensure an efficient division of work and an effective and consistent application of EC competition rules. The EU Commission and competition authorities from EU member states cooperate with each other through the ECN by: informing each other of new cases and envisaged enforcement decisions; coordinating investigations, where necessary; helping each other with investigations; exchanging evidence and other information; and discussing various issues of common interest.

³⁷ OJ C 101, 27.04.2004, p43

³⁸ Section 1 of CAA12.

³⁹ Section 2 of TA00.

"exercise our functions under this Chapter – air traffic services – so as to maintain a high standard of safety in the provision of air traffic services. We must exercise our functions, subject to the above overriding duty, in the manner we think is best calculated to:

- a) further the interests of operators and owners of aircraft, owners and managers of aerodromes, persons travelling in aircraft and persons with rights in property carried in them, including by promoting competition in the provision of air traffic services;*
- b) promote efficiency and economy on the part of licence holders;*
- c) secure that licence holders will not find it unduly difficult to finance activities authorised by their licences;*
- d) take account of any international obligations of the United Kingdom notified to the CAA by the Secretary of State;*
- e) take account of any guidance on environmental objectives given to the CAA by the Secretary of State."*

2.46 At the same time, we are required to consider whether it would be more appropriate to use our powers to apply the UK and EU competition prohibitions before we take enforcement action against an airport operator or an air traffic service provider for breach of a licence condition. We may not take such licence enforcement action to the extent that we consider it would be more appropriate to proceed under the competition prohibitions.⁴⁰ Separate guidance⁴¹ covers how we will act if there is a suspected breach of licence conditions in the licences for the economic regulation of AOS and ATS.

2.47 Many of our regulatory objectives set out above are consistent with the aims of competition law, which seeks to improve choice, quality and value for aviation consumers⁴². However, as noted above, if we were acting under our competition powers we could only take into

⁴⁰ Section 46 of CAA12 and Schedule 14 paragraph 15 of ERA13..

⁴¹ This guidance is 'CAA Guidance on the enforcement of economic licences', which is available from: <http://www.caa.co.uk/default.aspx?catid=78&pagetype=90&pageid=67> and <http://www.caa.co.uk/default.aspx?catid=2516&pagetype=90>

⁴² In this guidance, an 'aviation consumer' is a user of an airport operation service (as defined in the Civil Aviation Act 2012), or an air traffic service (as defined in the Transport Act 2000).

account the sectoral objectives set out above where the CMA would be able to have regard to those same matters when exercising its competition law functions. So some matters, for example environmental effects and financeability, may not be relevant considerations when we apply our competition law powers.

- 2.48 In some situations, we may be able to choose between the powers available to us to address a particular matter and there may be similarly overlapping objectives of different powers. Where we are able to choose between the powers available to us to address a particular matter, we will select the one we consider is the most appropriate in the specific case. However, as noted above, we are required to consider whether to use competition powers in preference to taking enforcement action against an airport operator under CAA12 or against a provider of ATS under TA00.

CHAPTER 3**Complaints and early stage analysis**

Complaints and early stage analysis

You can contact us to share information with us and discuss any concerns you may have relating to the aviation sector.

We encourage those with concerns to read this Guidance and consider the following suggestions:

- try and resolve matters through discussions;
- speak to us;
- consider any relevant decisions; and
- gather as much evidence and information as possible.

We aim to address concerns and complaints in the most efficient and effective way. In some cases, we may be able to resolve an issue through informal advice to complainants and whistleblowers.

Before we commence an investigation, a sector review or a market study, we carry out an initial enquiry to determine whether there is an issue to address.

When we have a complaint or an issue arising from other sources, we will consider which of our powers is most appropriate to consider the complaint.

As well as deciding which power to use, we also assess issues (complaints as well as possible sector reviews or market studies and super-complaints) against our prioritisation framework for consumer protection, competition and economic regulation issues.

Introduction

- 3.1 This chapter explains how you can tell us about any concerns you may have and, if appropriate, how we will carry out any early stage analysis and, where appropriate, proceed to a formal complaint.

Telling us about your concerns

- 3.2 You can contact us to share information with us and discuss any

concerns you may have relating to the aviation sector.

3.3 We encourage those with concerns to read this Guidance and consider the following suggestions:

- **Try and resolve matters through discussions.** Not every matter of disagreement is suitable for resolution through an investigation. If it is appropriate, there may be benefits in trying to resolve problems directly with the target of your complaint before asking us to take action.
- **Speak to us.** We are always prepared to discuss emerging issues. We will not give a view on the merits of a complaint but may be able to refer you to previous policy decisions or investigations that have dealt with similar issues. If you would like to share any information or raise any concerns, please email economicregulation@caa.co.uk.
- **Consider any relevant decisions.** The issue that concerns you may have been the subject of a previous sector review, market study or decision. Details of previous reviews, studies and decisions are available on our website.⁴³
- **Gather as much evidence and information as possible.** We realise that, in some cases, complainants may not have access to all relevant information (for example information that is in the possession of the business whose conduct you are concerned with or of a competitor). However, you should provide as much evidence as possible to support your complaint.

3.4 Once you have talked to us, we may ask you to send us supporting information or invite you to submit a formal complaint as explained in the relevant chapters of this Guidance.

Early stage analysis

Pre-complaint stage

3.5 We aim to address concerns and complaints in the most efficient and effective way. In some cases, we may be able to resolve an issue through informal advice to complainants and whistleblowers.

⁴³ <http://www.caa.co.uk/default.aspx?catid=5&pagetype=90&pageid=14523>

The enquiry phase

- 3.6 Before we commence an investigation, a sector review or a market study, we carry out an initial enquiry to determine whether there is an issue to address.
- 3.7 We may gather further information (usually without using any formal information gathering powers) to help us decide whether to undertake any subsequent work.
- 3.8 We generally do not publish details of enquiries, or comment publicly on enquiries. To the extent we are permitted to do so, we may discuss enquiries with other stakeholders where we believe that they may be able to provide information or other assistance to help us decide whether to undertake any subsequent work. For example, we may request factual information from or seek the views of the CMA in the light of its expertise and experience.
- 3.9 Following these initial enquiries, we may request that the complainant submit to us a written reasoned complaint to form the basis for further action. The types of information that we may ask for are explained in the relevant chapters of this Guidance.
- 3.10 Once we have any further information we can gather at this stage we will consider what action to take next. In addition to the powers set out in the chapters of this Guidance, we will consider whether informal advice and action may be appropriate. Details of what we would expect to see in a reasoned complaint and explanation of our competition law investigation procedures are explained further in Chapter 5.

Prioritisation principles

- 3.11 When we have a complaint or an issue arising from other sources, we will consider which of our powers is most appropriate to consider the complaint.
- 3.12 As well as deciding which power to use, we also assess issues (complaints as well as possible sector reviews or market studies and super-complaints) against our prioritisation framework for consumer protection, competition and economic regulation issues.
- 3.13 The framework enables the CAA to make the best use of resources to address issues in the interests of aviation consumers and to produce