

Market Power Test Guidance – Draft for Consultation

CAP 1354

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Chapter 1

Introduction

- 1.1 The Civil Aviation Act 2012 (CAA12) requires that we, the CAA, regulate certain airport operators directly by means of a licence if they meet the Market Power Test (MPT). This document sets out how we intend to approach applying the MPT and make Market Power Determinations (MPDs) under sections 6 and 7 of CAA12.
- 1.2 This guidance also outlines our powers under CAA12 to make determinations on which entity has overall responsibility for the management of an airport area (called “operator determinations”)¹.
- 1.3 We are providing this guidance to illustrate how we are likely to proceed in conducting MPDs. From time to time, given the specific circumstances of a particular case, we may need to deviate from this guidance. We will explain the rationale for deviating from the guidance in any report we publish.
- 1.4 This guidance is based on the practical understanding that we have gained from the MPDs we made in 2014², and applicable Competition and Market Authority (CMA) and European Commission (EC) competition law notices and guidance. As such, from time to time, we will amend and update this guidance to reflect learning and changes in best practice.
- 1.5 This guidance is not a definitive statement of the law, nor is it a substitute for individual parties seeking their own legal advice on the application of CAA12.

¹ The CAA can make an operator determination to determine whether an operator of an airport area has or does not have overall responsibility for the management of all of that area, pursuant to sections 9-11 of the Civil Aviation Act 2012.

² We published four MPDs in January and March 2014. The MPDs we have undertaken are available from: <http://www.caa.co.uk/default.aspx?catid=78&pagetype=90&pageid=12275>.

We now regulate Heathrow and Gatwick airports through licences. These licences came into effect on 1 April 2014. The licences are available from:

<http://www.caa.co.uk/default.aspx?catid=78&pagetype=90&pageid=67>.

Consultation

- 1.6 Earlier guidance that we published in 2011, on assessing market power of airports³, prior to the enactment of CAA12 has been withdrawn⁴, along with other earlier papers on market power.
- 1.7 We are consulting on this draft guidance to gain stakeholders' views on how we propose to apply the MPT in future. Stakeholders' comments will allow us to ensure that this guidance is useful to them in explaining how we will apply our powers.
- 1.8 We welcome views on this draft guidance no later than 12 February 2016. We cannot commit to taking into account representations received after this date. Please send any representations to economicregulation@caa.co.uk
- 1.9 We will publish responses to this consultation on our website shortly after the close of the consultation period. If there are parts of your response that you consider commercially confidential, please mark them clearly as such.
- 1.10 If you would like to discuss any aspect of this guidance, please email economicregulation@caa.co.uk or telephone 020 7453 6217.

Structure of this guidance

- 1.11 This document is structured as follows:
- Chapter 2 sets out the high level test and the appeal rights of parties involved;
 - Chapter 3 outlines the process we intend to apply to undertaking an MPD;
 - Chapter 4 sets out particular issues relating to Test A of the MPT;
 - Chapter 5 sets out particular issues relating to Test B of the MPT;
 - Chapter 6 sets out particular issues relating to Test C of the MPT; and
 - Chapter 7 explains what happens after an MPD has been made.

³ 'Guidance on the assessment of airport market power' April 2011

⁴ See paragraph 2,6 of the CAA's 'CAP 1235 Guidance on the Application of the CAA's Competition Powers', published in May 2015, which is available from:
<http://www.caa.co.uk/default.aspx?catid=5&pagetype=90&pageid=14523>

Chapter 2

Legal framework

2.1 This chapter explains the legal framework for MPDs and Operator Determinations (ODs), and the process for appealing those determinations. It is set out in the following sections.

- Relevant definitions;
- Operator determination;
- The MPT;
- Application of the tests;
- Process for appeals; and
- Once an MPD has been made.

Relevant definitions

2.2 There are a number of phrases used within this document that are drawn directly from the legislation. These definitions, which form the bounds of the determinations, are set out below.

Airport operation services

2.3 "Airport operation services" (AOS) refers to a group of services provided at an airport for the purposes⁵:

- 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;

⁵ Sections 1(3) and (4) CAA12.

⁵ Section 68(1) CAA12 and 68(5) CAA12.

- the arrival or departure of persons who work at the airport; or
- permitting a person to access or use land that forms part of an airport or facilities at an airport for any of the above.

2.4 In particular, AOS includes⁶:

- 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 (as amended from time to time);
- facilities for car parking; and
- facilities for shops and other retail businesses.

2.5 AOS does not include⁷:

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

Airport area

2.6 The "airport area" means an area that consists of or forms part of an airport.⁸ The airport area binds the scope of an MPD finding and feeds through to any licence imposed in the light of it. Broadly speaking, an airport area is the physical area of the airport. This may consist of all or part of the airport campus and potential sites that are removed from the physical airport campus. It includes areas of land and buildings or other structures in part or as a whole.

Core area

2.7 The "core area", is a subset of the wider airport area and effectively covers the facilities that are essential to the operation of an airport in relation to an airport. It means:

- the land, buildings and other structures used for the purposes of the landing, taking off, manoeuvring, parking and servicing of aircraft at the airport;
- the passenger terminals; and
- the cargo processing areas.

⁶ Section 68(3) CAA12.

⁷ Section 68(4) CAA12.

⁸ Section 6(7) CAA12.

Dominant airport

- 2.8 A "dominant airport" means an airport where the CAA has made a determination that all or part of its core area is considered to be dominant⁹.

Operator determination

- 2.9 The operator of an airport area is the entity with overall responsibility for the management of all of the area.
- 2.10 Section 10 of CAA12 set outs how we may make an OD to determine whether, in a particular case, a person has overall responsibility for the management of an airport area. We will only undertake such a determination where we consider the situation as presented is not clear.
- 2.11 In making an OD, we must have regard to:
- any regulations made about ODs; and
 - the extent of control the entity has over the types of services that are or may be provided in the area, the prices that are or may be charged for services provided in the area, the quality of services provided in the area, access to the area, and the development of the area.
- 2.12 We must make an OD if we are asked to do so by that entity that has control over the area.¹⁰ The exceptions to this requirement are:
- if we have previously made an OD to the effect that the entity requesting the determination does or does not have overall responsibility for the management of the airport area;
 - we have not published a notice withdrawing that determination; and
 - we consider that there has not been a material change of circumstances since that determination; or
 - if we consider that it is possible to ascertain whether the entity has overall responsibility for the management of the area from:
 - information that is in the public domain; and
 - information that is in the entity's custody or under the entity's control.
- 2.13 We may treat a request for an OD as if it were:

⁹ Section 5(1) and 5(2) CAA12.

¹⁰ Section 10(5) CAA12.

- a number of requests in respect of a number of airport areas that consist of or include different parts of area; or
- a request in respect of an area that includes all of that area.

2.14 As soon as practicable after making an OD, we must:

- publish a notice of the determination; and
- send a copy of the notice to the entity in respect of whom the determination was made, and to such bodies representing airport operators or providers of air transport services as we consider appropriate.¹¹

The MPT

2.15 CAA12 prohibits the operator of a "dominant airport" from levying charges for the use of its facilities without an economic licence issued by us.¹² An airport operator is considered dominant if we make a determination that the MPT is met in relation to the airport or part of the airport ('the airport area') and publish a notice of that determination.¹³

2.16 There are three components of the MPT - Test A, Test B, and Test C. These are set out in section 6 of CAA12. Each component must be met for us to make a determination that an airport operator is the operator of a dominant airport.

Test A

2.17 Test A requires that we establish whether the relevant operator, either alone, or taken with such other persons as we consider appropriate, has, or is likely to acquire, substantial market power (SMP) in a market for one or more types of AOS provided within all or part of the airport area.¹⁴

2.18 Test A can only be met only if¹⁵:

- the market is for one or more of the types of AOS provided in the airport area (or for services that include one or more of those types of service); and
- geographically the market consists of, or includes all or part of, the airport area.

¹¹ Section 11 CAA12

¹² Section 3 CAA12

¹³ Section 5 CAA12

¹⁴ Section 6(3) read together with sections 6(6) and 6(7) of CAA12.

¹⁵ Section 6(6) CAA12.

- 2.19 The test shall be conducted on the basis of the prevailing regulatory regime absent any licence regulation imposed by the CAA. Presently we would, therefore, not attempt to remove any effects from the Airport Charges Regulations 2011 (ACRs) or the Airport (Groundhandling) Regulation 1997 (AGRs) or other general legislation that is applicable to the operation of an airport when conducting the test.

Test B

- 2.20 Test B requires that we establish that competition law does not provide sufficient protection against the risk that the relevant operator may engage in conduct that amounts to an abuse of that SMP.¹⁶
- 2.21 For the purposes of Test B, conduct may, in particular, amount to an abuse of SMP if it is conduct described as an abuse of a dominant market position in section 18(2)(a) to (d) of the Competition Act 1998.¹⁷
- 2.22 In Test B, “competition law” means¹⁸:
- Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU);
 - Part 1 of the Competition Act 1998 (CA98); and
 - Part 4 of the Enterprise Act 2002 (EA02) (market investigations).
- 2.23 Although Test B is a separate test, it cannot be divorced from Test A, because, to apply it, we must have already determined that the relevant operator has or is likely to acquire SMP in the relevant market under Test A. If the operator does not have and is not likely to acquire SMP, there can be no risk that the operator will abuse it.

Test C

- 2.24 Test C requires that we establish that, for current and future users of air transport services, the benefits of regulating the relevant operator by means of a licence are likely to outweigh the adverse effects.¹⁹ For the purposes of this test:
- the relevant operator is *‘the person who is the operator of the airport area at the time the test is applied.’*; and
 - *‘users of air transport services’* (users) are passengers or those with a right in cargo and include future users of such services.

¹⁶ Section 6(4) read together with sections 6(8) and 6(9) of CAA12.

¹⁷ Section 6(4) and Section 6(8) CAA12

¹⁸ Section 6(9) CAA12.

¹⁹ Section 6(5) CAA12.

- 2.25 Test C requires that we assess whether the benefits of regulating the relevant operator, by means of a licence, are likely to outweigh the adverse effects. As with Test A, we will assume the prevailing regulatory regime is in place.
- 2.26 Test C does not expressly require that we apply this test by reference to a specific set of regulatory licence conditions. Such a requirement would reverse the logical structure of CAA12 and would require the determination of individual licence conditions before the decision on whether to grant a licence is made.

Application of the tests

- 2.27 In applying tests A to C, we must have regard to²⁰:
- relevant notices and guidance published by the European Commission about the application and enforcement of the prohibitions in Articles 101 and 102 of the TFEU;
 - relevant advice and information published under section 52 of the CA98 (advice and information about the application and enforcement of the prohibitions in Part 1 of CA98 and Articles 101 and 102 of the TFEU); and
 - relevant advice and information published under section 171 of the EA02 (advice and information about the operation of Part 4 of that Act).
- 2.28 The case law referred to in this guidance is that which existed at the time this guidance was prepared.
- 2.29 Each of these tests is discussed in the following chapters. However there are a few points in common that require clarification.

Our general duty

- 2.30 In carrying out our assessment, we will act under our general duty to carry out our functions in a manner which we consider will further the interests of users regarding the range, availability, continuity, cost and quality of AOS, including any guidance issued by the Secretary of State. We will also carry out this function in a manner that we consider will promote competition in the provision of AOS (and have regard to the matters that we are required to by section 1 of CAA12).

Regulatory principles

- 2.31 We must also have regard to the regulatory principles in section 1(4) of CAA12, namely that our regulatory activities should be transparent, accountable,

²⁰ Section 6(10) CAA12.

proportionate and consistent, and targeted only at cases where action is needed. In addition, it must also comply with our statutory duty under section 73 of the Regulatory Enforcement and Sanctions Act 2008 to avoid the imposition of regulatory burdens which we consider to be unnecessary on operators of dominant airports.

Competition law in Test B and Test C

2.32 Competition law is a key element in the assessment of Test B and Test C, although each Test has a different focus:

- Test B focuses on the effectiveness of competition law to address potential abuses of an airport operator's SMP, when we have found that an airport operator has SMP at an airport. It assesses the risk of addressing various forms of anti-competitive behaviour by referring to case law. Case law illustrates how competition law has been used and how effective it has been. By definition in CAA12, the test does not consider the effect of either the ACRs or the AGRs.²¹#
- Test C focuses on whether an economic operating licence has more benefits than our non-licence powers (competition law, the ACRs and the AGRs), for users of air transport services at a specific airport. It compares these non-licence powers with the effectiveness of the use of our licensing powers that specifies ex ante what an individual airport operator can or must do and what it must not or cannot do.

Standard of proof

2.33 We are required to make our assessment on the balance of probabilities. However, the weight of evidence required to satisfy this standard will depend on the particular circumstances of each MPD.

2.34 The CAT has defined the relevant standard of proof as follows:

- *"the standard of proof is the civil standard, the balance of probabilities, taking into account the gravity of what is alleged ... The standard is not akin to the criminal standard but the evidence must be sufficient to convince the Tribunal in the circumstances of the particular case, and to overcome the presumption of innocence to which [the parties are] entitled."*^{22, 23}

²¹ Section 6(9) CAA12.

²² Makers UK Limited v Office of Fair Trading [2007] CAT 11, paragraph 46.

²³ In a more recent judgement by the CAT, the CAT considered how far the Competition and Markets Authority (CMA) ought to pursue any particular aspect of its two year market investigation into the supply of private medical healthcare. The CAT found that the weight to be given to an aspect of the investigation in a particular context was very much a matter for the CMA, as the expert investigating body. It stated that

- 2.35 Overall, the judgment reaffirms that a specialist investigative body has a broad discretion over the use of its internal resources and the handling of various aspects of its investigations.

Process for appeals

- 2.36 Schedule 1 of CAA12 sets out the process for appeals against MPDs and ODs. Appeals may be made to the Competition Appeal Tribunal (CAT) against an MPD in respect of an airport area by:
- a person who is the operator of the area at the time the determination is made; and
 - any other person whose interests are materially affected by the determination.
- 2.37 A person who is the subject of an OD may appeal against that determination.
- 2.38 An appeal against a determination²⁴ must be made by sending a notice of appeal to the Registrar of the CAT. The notice must be received by the Registrar within 60 days of the publication of the determination.
- 2.39 An appeal against a determination does not suspend the effect of the determination, unless the CAT orders otherwise.
- 2.40 The CAT may allow an appeal if it is satisfied that the MPD or OD appealed against was wrong on one or more of the following grounds:
- that the determination was based on an error of fact;
 - that the determination was wrong in law; or
 - that an error was made in the exercise of a discretion.
- 2.41 The CAT may:
- confirm or set aside all or part of the MPD or OD;
 - direct us to make a further determination; or

the CMA was lawfully entitled, in the exercise of its investigative discretion, to decide not to pursue a particular dimension of its market investigation any further. To have done so might have jeopardised its ability to comply with its legal duty to produce its report within the statutory timetable. The CMA was entitled to have regard, as it did to 'the constraints on time and resources available for investigation overall.' The CAT also considered the weighing of evidence, which may point in different directions.

1228/6/12/14 AXA PPP Healthcare Limited - Judgment [2015] CAT 5 13 March 2015.

²⁴ An MPD or an OD

- give us such other directions as it considers appropriate, including directions about the time within which we must act.

- 2.42 We must comply with directions from the CAT. If we fail to comply with a direction to make a further MPD in respect of an airport area within the time specified by the CAT, the CAT may make the determination. If the CAT makes such an MPD the determination has effect as if we made it.
- 2.43 If we fail to comply with a direction to make a further OD in respect of a person and an airport area within the time specified by the CAT, the CAT may itself make the determination. If the CAT makes such an OD, the determination has effect as if we made it.

Once an MPD has been made

- 2.44 If an MPD determines that the MPT is met by an airport operator in relation to an airport area, then that airport operator will require an economic licence in order to be able to levy charges.
- 2.45 In some cases, we may decide to begin the process of developing a licence alongside the MPD.