

Market Power Test Guidance

CAP 1433



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Contents

Contents.....	1
Chapter 1.....	5
Introduction	5
Chapter 2.....	7
Legal framework.....	7
Relevant definitions	7
Airport operation services.....	7
Airport area	8
Core area	8
Dominant airport.....	9
Operator determination	9
The MPT	10
Test A.....	11
Test B.....	11
Test C.....	12
Application of the tests	13
Our general duty	13
Regulatory principles.....	14
Standard of proof	14
Process for appeals.....	16
Once an MPD has been made	16
Chapter 3.....	17
Market power determination process	17
Initiating an MPD	17

Material change of circumstances	18
Requesting an MPD	18
Timetable and stages	21
Notice of commencement.....	21
Timetable	21
Stages	21
Powers to gather information	24
Confidentiality.....	24
Requirements under CAA12	24
Data Protection Act 1998 principles	25
Freedom of Information Act 2000.....	26
Our internal processes	26
Chapter 4.....	28
Test A: Market definition and market power	28
Our general approach	28
How Test A is met	29
Our approach to market definition for MPDs	30
Defining the relevant market	31
General	31
The Hypothetical Monopolist Test	32
Product and geographic market	34
Assessing market power	35
Summary	38
Chapter 5.....	39
Test B: Adequacy of competition law	39
Our general approach	39
Competition law.....	40

The concept of abuse.....	41
Types of abuse most relevant to the assessment of Test B	42
Competition law remedies	44
Summary	44
Chapter 6.....	46
Test C: Adverse effects/benefits of regulation	46
Our general approach	46
<i>Ex-ante</i> licence regulation and <i>ex-post</i> powers	47
<i>Ex-ante</i> licence regulation	47
<i>Ex-post</i> powers	49
Making the comparison	52
Airport operator that does not hold an economic licence.....	53
Airport operator that holds an economic licence	53
Areas considered under Test C.....	54
Benefits of economic regulation	54
Adverse effects of economic regulation.....	55
Assessing <i>ex-ante</i> licence regulation and <i>ex-post</i> powers	57
Summary	58
Chapter 7.....	60
Once an MPD has been made	60
Introduction	60
Once an MPD has been made	60
If the MPT is met by an operator without a licence.....	60
If the MPT is met by an operator with a licence.....	61
If the MPD concludes that the MPT is not met	63
Sectoral regulation and subsequent MPDs	63
Appendix A	65

Possible initial evidential requirements.....	65
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Chapter 1

Introduction

- 1.1 The Civil Aviation Act 2012 (CAA12) requires that we, the CAA, regulate an airport operator by means of an economic licence if the Market Power Test (MPT) set out in section 6 of CAA12 is met. This document sets out how we intend to apply 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 and referred to in this Guidance as ODs).¹
- 1.3 We are providing this Guidance to illustrate how we are likely to proceed in conducting MPDs and ODs. It provides a framework of relevant considerations we are likely to take into account. We will have regard to this Guidance when carrying out ODs and MPDs. However, it is not intended to be applied rigidly. We must assess each case on its own facts and, where appropriate, we will explain why we have adopted a specific approach which may deviate from this guidance.
- 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 Markets Authority (CMA) and European Commission (EC) competition law notices and guidance. We will amend and update this Guidance, as appropriate, to reflect learning and changes in best practice.

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: www.caa.co.uk/Commercial-industry/Airports/Economic-regulation/Licensing-and-price-control/Airport-Market-Power-Assessment/

We now regulate Heathrow and Gatwick airports through licences. These licences came into effect on 1 April 2014. The licences are available from: www.caa.co.uk/Commercial-industry/Airports/Economic-regulation/Licensing-and-price-control/Airport-economic-licensing-and-price-control/

- 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.
- 1.6 Earlier guidance that we published in 2011, on assessing market power of airports³, prior to the enactment of CAA12 has been withdrawn.⁴
- 1.7 This document is structured as follows:
- Chapter 2 sets out the high level test and process for appeals;
 - 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: www.caa.co.uk/CAP1235

Chapter 2

Legal framework

2.1 This chapter explains the legal framework for MPDs and 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 are set out below.

Airport operation services

2.3 “*Airport operation services*” (AOS) refers to a group of services provided at an airport for a variety of purposes including⁵:

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

⁵ Section 68(1) CAA12 and 68(5) CAA12

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 bounds 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 physically separated from the 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 we have made a determination that all or part of its core area is considered to be dominant.⁹

Operator determination

2.9 The operator of an airport area is the entity with overall responsibility for the management of all of the airport 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.

2.11 We must make an OD if we are asked to do so by the entity that has control over the area.¹⁰ However, we do not have to do so 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.¹¹

2.12 The requirement also does not apply 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.¹²

⁹ Section 5(1) and 5(2) CAA12

¹⁰ Section 10(5) CAA12

¹¹ Section 10(6) CAA12

¹² Section 10(7) CAA12

- 2.13 In circumstances where we have discretion, we will only undertake such a determination where we consider the situation as presented is not clear.
- 2.14 We may treat a request for an OD in respect of an airport area as if it were:
- a number of requests in respect of a number of airport areas that consist of or include different parts of that area; or
 - a request in respect of an area that includes all of that area.¹³
- 2.15 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.¹⁴
- 2.16 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.¹⁵

The MPT

- 2.17 CAA12 prohibits the operator of a “*dominant airport*” from levying charges for the use of its facilities without an economic licence issued by us.¹⁶ An airport operator is considered dominant if we make a determination that

¹³ Section 10(8) CAA12

¹⁴ Section 104(4) CAA12

¹⁵ Section 11 CAA12

¹⁶ Section 3 CAA12

the MPT is met in relation to the airport or part of the airport (the airport area) and publish a notice of that determination.¹⁷

- 2.18 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

- 2.19 Test A requires that we consider 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.¹⁸

- 2.20 Test A is met if¹⁹:

- 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.

- 2.21 The test must be conducted on the basis of the prevailing regulatory regime absent any licence regulation imposed by us. 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

- 2.22 Test B requires that we consider whether 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.²⁰

¹⁷ Section 5 CAA12

¹⁸ Sections 6(3), 6(6), and 6(7) CAA12

¹⁹ Section 6(6) CAA12

- 2.23 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 1998.²¹
- 2.24 In Test B, “*competition law*” means²²:
- 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).
- 2.25 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

- 2.26 Test C requires that we consider whether, 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.²³ 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.
- 2.27 As with Test A, we will assume the prevailing regulatory regime is in place.
- 2.28 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

²⁰ Section 6(4) read together with sections 6(8) and 6(9) of CAA12

²¹ Section 6(4) and Section 6(8) CAA12

²² Section 6(9) CAA12

²³ Section 6(5) CAA12

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

2.29 In applying tests A to C, we must have regard to²⁴:

- relevant notices and guidance published by the EC 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).

2.30 The case law referred to in this Guidance is that which existed at the time this Guidance was prepared. However, we would take into account both existing case law and expectations around future developments in terms of competition law enforcement.

2.31 Each of these tests is discussed in the following chapters. However there are a few points in common that require clarification.

Our general duty

2.32 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 users²⁵ regarding the range, availability, continuity, cost and quality of AOS, including any guidance issued by the Secretary of State. We will

²⁴ Section 6(10) CAA12

²⁵ Taken to mean users of air transport services including passengers and those with rights in cargo

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

- 2.33 We must also have regard to the regulatory principles in section 1(4) of CAA12, namely that our regulatory activities should be transparent, accountable, 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 on operators of dominant airports of regulatory burdens that we consider to be unnecessary.

Standard of proof

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

- 2.35 The CAT has defined the standard of proof in competition cases 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.”*^{26,27}

²⁶ Makers UK Limited v Office of Fair Trading [2007] CAT 11, paragraph 46

²⁷ 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 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

- 2.36 While the assessment that we make in preparing an MPD does not imply any finding of “*guilt*”, we consider that this approach to the civil standard of proof is appropriate given that imposing the obligation to hold an economic licence in order to be able to charge for services is clearly a serious matter that restricts the commercial freedom of the airport in question. As such, an MPD should only be made on the basis of sufficient and convincing evidence.
- 2.37 This approach is consistent with our duty under Section 1 (4) of CAA12 that our:
- regulatory activities should be carried out in a way which is transparent, accountable, proportionate and consistent; and
 - (particularly), regulatory activities should be targeted only at cases in which action is needed.
- 2.38 This is also consistent with the Government’s Principles for Economic Regulation, which reflect that:
- “Economic regulation, as with most forms of regulation, imposes costs on regulated companies. These costs derive from the regulatory cost the regulators impose on their sectors and the administrative cost of running the regulatory institutions. Costs in these sectors tend to be passed through to end consumers. It is important that they are proportionate and outweighed by the benefits achieved for consumers. Cost minimisation might, however, not always be efficient, as lowering costs can sometimes lead to foregoing bigger benefits to consumers.”²⁸*
- 2.39 Having said that, as a specialist investigative body, we have a broad discretion over the use of our internal resources and the handling of various aspects of our work.

²⁸ Paragraph 40 of ‘Principles for Economic Regulation’, April 2011, which is available from: www.gov.uk/government/publications/principles-for-economic-regulation

Process for appeals

- 2.40 Schedule 1 of CAA12 sets out the process for appeals against MPDs and ODs.
- 2.41 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.
- 2.42 Appeals may be made to the CAT against an OD by a person who is the subject of an OD.

Once an MPD has been made

- 2.43 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.
- 2.44 Establishing and modifying licence conditions is a separate process from an MPD. We will develop and consult on licence conditions in line with Better Regulation principles. However this does not form part of the MPD process.
- 2.45 Further details on what happens after an MPD has been made are outlined in Chapter 7, and when a future MPD could be considered is outlined in the next Chapter.

Chapter 3

Market power determination process

3.1 This chapter outlines our general process and approach to conduct an MPD. It is set out in four sections:

- initiating an MPD;
- timetable and stages;
- powers to gather information; and
- confidentiality.

Initiating an MPD

3.2 We have discretion to conduct an MPD whenever we consider it appropriate to do so.²⁹ This means that we can initiate an MPD at any time.

3.3 In addition, we are required to make an MPD and therefore apply the MPT³⁰ where all of the following factors are met:

- we are asked to do so either by the operator of the airport area or another person whose interests are likely to be materially affected by the determination³¹;
- the area is located at an airport that has over 5 million annual passengers³² at the time the request is made; and
- the area consists of or includes all or part of the core area of the airport.³³

²⁹ Section 7(1) CAA12

³⁰ Section 7(2) CAA12

³¹ Section 7(2) CAA12

³² Sections 7(4) CAA12 which states that an airport is a large airport during a calendar year if, in the previous calendar year, the number of passenger movements at the airport exceeded 5 million

³³ Section 7(1)-(4) CAA12

- 3.4 However, we may decide not to apply the MPT and make an MPD even if these factors are met. This course of action is open to us in circumstances where we have previously made an MPD and consider that there has not been a material change of circumstances since that MPD.³⁴

Material change of circumstances

- 3.5 Material change of circumstances is not defined in the legislation. We consider that a change of circumstances would be more likely to be found where the change is, or the changes in aggregate are material in areas that are likely to be relevant to Tests A to C. Several relevant changes could be considered together with pre-existing circumstances when determining whether or not a new MPD should be completed.³⁵
- 3.6 Determining whether there has been a material change of circumstances is matter of regulatory judgement based on the specific circumstances under consideration. In making such a judgement, we will refer to decisions made by other UK competition authorities where they have assessed whether a material change of circumstances has occurred in other circumstances.

Requesting an MPD

- 3.7 As noted, interested parties have the ability to request an MPD.
- 3.8 In requesting an MPD, we expect the parties to be able to provide a well reasoned request containing information relevant to the analysis that we will have to undertake. This is especially the case where a request is being made for an MPD of an airport area where we have previously made a determination. In these cases, we would expect, in particular, information to be provided that demonstrates why a material change of circumstances has taken place. To facilitate this, we welcome early contact from a party considering making such a request.

³⁴ Section 7(5) CAA12

³⁵ In our 'Discussion paper on the regulatory treatment of issues associated with airport capacity expansion' CAP 1195 in June 2014, we considered some capacity expansion related events that could, at first glance, suggest a material change of circumstances may have occurred. This is available from: www.caa.co.uk/CAP1195

- 3.9 A well reasoned request should contain the following information:
- the name of the airport operator and airport in question;
 - the services provided that are relevant to the request;
 - the likely scope of the market, which, as a minimum, is the list of the assumed competitors and/or competing products;
 - where requesting a further determination, the nature and scope of the material change of circumstances and how this may have an impact on the conclusions previously reached; and
 - any issues that the airport operator or interested party considers are relevant to their request.
- 3.10 We will be available to discuss any potential request that an airport operator or an interested party may have.

Where we have discretion about whether to undertake an MPD

- 3.11 As explained in the earlier section 'Initiating an MPD', there are circumstances where we have discretion about whether or not to undertake an MPD.
- 3.12 In those circumstances, following the receipt of the request and a review of any further relevant information, we will within six months of the receipt of the final submission by the party concerned, issue our response. We will complete our consideration of the request as quickly as possible, and where it can be completed in less than six months, we will do so.
- 3.13 Our consideration of the request will include applying prioritisation framework to decide whether undertaking an MPD would fit within our administrative priorities. The prioritisation framework enables us to make the best use of resources to address issues in the interests of aviation consumers and to produce the greatest benefits for consumers. Details of our framework are explained in the 'CAA's prioritisation framework for consumer protection, competition and economic regulation issues'.³⁶

³⁶ The 'CAA's prioritisation framework for consumer protection, competition and economic regulation issues', which is available from: www.caa.co.uk/cap1233