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Dear Paul

Further to the publication of the CAA's August 2018.[1] technical note, I wanted to take the opportunity to share with you some initial thoughts. Firstly, we welcome the publication of the note which raises a number of interesting points. We note the CAA's comment that it would consult with interested parties in due course. Given the significance of some of the points raised we hope that our initial thoughts, set out below, are useful for a future discussion between Heathrow and the CAA.

The technical note "*seeks to provide clarity in relation to the CAA's regulatory powers and proposed approach in the event that, either by agreement with HAL, or through the planning process and any land or other rights acquired under it, an alternative operator is likely to have, or has, overall responsibility for a particular area of Heathrow airport alongside other areas operated by HAL.*" We have understood this to mean that through the note the CAA is seeking to give an indication of its view regarding its regulatory powers in relation to what is often referred to as 'inter-terminal competition'. The technical note makes clear, however, that "*any clarificatory guidance (including in this note) that the CAA can volunteer at this early stage is necessarily indicative and provisional.*"

Notwithstanding that this is an initial view, we are concerned that in one respect in particular, the approach set out in the technical note appears to disclose a fundamental error of law. In the second paragraph of section 2 of the technical note, headed "*power to modify HAL's licence to facilitate a successful third-party scheme*", the CAA states:

"… in principle, section 21 of the [Civil Aviation] Act [2012] permits the CAA, where it considers it necessary or expedient, to make provision in HAL's licence for the accommodation of an alternative operator which had been successful in obtaining a DCO to develop part of Heathrow airport, by requiring it to enter into contractual agreements or other arrangements for the delivery of capacity expansion. As indicated above, the CAA's exercise of its discretion in that regard would be conducted in line with its general duties and regulatory objectives as set out in section 1 of the Act as well as the requirements of sections 18 to 23 of the Act." (emphasis added)

This statement is wrong in law, insofar as it suggests the Civil Aviation Act 2012 ("**the 2012 Act**") gives the CAA the power to require Heathrow Airport Limited (HAL) to accommodate an alternative operator, thereby requiring access to HAL's assets or infrastructure.

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[1] *Technical information note on the CAA's approach to dealing with licensing issues raised by potential alternative developers of new capacity at Heathrow airport* ("**the technical note**")

It is accepted law that "*fundamental rights cannot be overridden by general or ambiguous words. This is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process.*"[2] The Courts have been clear that "*any intention to override such rights must be expressly stated or appear by necessary implication*"[3] in the statutory language.

In the present context, it is clear that the express wording of section 21 of the 2012 Act does not contemplate granting another operator mandatory access to HAL's property. Neither are such powers a necessary implication of the statutory language, whether in s 21(1)(b) of the 2012 or otherwise. In fact, to the extent inter-terminal competition is contemplated in the 2012 Act, Parliament intended this to be only on a voluntary basis, or where imposed through a full market investigation.[4] The House of Commons Transport Committee, considering the Draft Civil Aviation Bill, stated:[5]

"*Both Gatwick Airport Ltd and Manchester Airports Group, supported by the Airport Operators Association, expressed concerns about the provisions permitting inter-terminal competition to be introduced at airports. These enabling provisions have been included in the draft bill as a response to a recommendation from the Competition Commission that inter-terminal competition should not be precluded under any new regulatory regime. The clauses in the bill simply provide for the circumstance where there might be different operators of parts of an airport with different regulatory treatment. These circumstances could only arise if imposed through a market investigation or as a result of a decision by the airport operator itself. The bill does not mandate that inter-terminal competition should take place but merely ensures that the regulatory framework can accommodate it should the eventuality arise. In view of the lack of experience of inter-terminal competition in the UK to date, we think this is a reasonable provision to include in the bill.*" (emphasis added)

If Parliament had intended the CAA to have such powers, it would have expressly provided for this in the 2012 Act, as it has done in other regulated sectors. For example:

- In respect of electricity, the Electricity Act 1989 stipulates that the regulator has the power to include general conditions in licenses. Despite this, the Electricity Act 1989 also contains a detailed statutory scheme governing access by third party operators to the infrastructure of other operators.

- Similarly, in respect of gas, a broad general power to impose and modify license conditions on operators (under the Gas Act 1986, as amended) was supplemented with separate, more detailed, statutory provisions in order to provide for third party access to the transmission and distribution system, and LNG facilities (the Gas (Third Party Access) Regulations 2004).

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[2] *R v Home Secretary, ex p Simms* [2000] 2 AC 115, HL, p. 131, per Lord Hoffmann

[3] *R (Morgan Grenfell Ltd) v Special Commissioners* [2003] 1 AC 563, 607, paragraph 8, per Lord Hoffmann.

[4] As you are aware, the Competition Commission declined to order such a remedy: *BAA airports market investigation: A report on the supply of airport services by BAA in the UK*, 19 March 2009

[5] House of Commons Transport Committee, *Draft Civil Aviation Bill: Pre-legislative Scrutiny (thirteenth report of session 2010-12)*, HC 1694, 12 January 2012, §53 (emphasis added).

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- In respect of water, the Water Industry Act 1991, as amended by Water Act 2014, also provides a general power for the regulator to impose conditions as part of the appointment of any regulated water undertaker. In addition, however, it contains detailed provision regarding third party access to the relevant infrastructure.

- In respect of postal services, the Postal Services Act 2011 again makes separate provision for the regulator's more general powers and for its specific powers to require a company to give third parties access to its network.

- In respect of telecommunications, the power to mandate third party access to networks and facilities is once more expressly stated in the relevant statutory provisions (the Communications Act 2003), which contain a detailed framework governing such access requirements.

In contrast, there is nothing in the language of the 2012 Act that suggests the CAA's general powers under the Act could extend to mandating third-party use of, and access to, HAL's property. They do not.

The technical note acknowledges that the CAA's thinking on these issues "*will likely develop as circumstances evolve and as stakeholders engage with us as part of the ongoing process*". We would therefore welcome the opportunity to discuss this further with the CAA. Notwithstanding the legal difficulties outlined above we also have very real concerns that any attempt to force inter-terminal competition would have serious adverse effects on both passenger interests and on Heathrow's viability as a business.

We are grateful to the CAA for the opportunity to provide our initial thoughts on this matter and note that we have used this letter merely to set out our primary concerns following consideration of the technical note. We reserve our position in respect of the remainder of the technical note and any action taken by the CAA in this context more generally.

Yours sincerely

Andrew Macmillan
Chief Strategy Officer