

Consultation on right of appeal to Secretary of State in route licensing cases

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Issue

1. We are minded, subject to final agreement within Whitehall, to remove the existing statutory right of appeal to the Secretary of State for Transport in aviation route licensing cases. We would however be interested in your comments on this proposal.

Timing

2. We intend to include a provision to this effect in a Civil Aviation Bill when Parliamentary time allows. To enable us to expedite preparations, we invite comments on this consultation **by Friday 13 May**.

Current position

3. Aviation route licensing cases now usually concern *the distribution of scarce bilateral capacity* among competing British airlines¹.

4. In aviation route licensing cases there is currently a right of appeal to the Secretary of State for Transport, conferred by section 67 of the Civil Aviation Act 1982 and the Civil Aviation Authority Regulations 1991. These Regulations permit the Secretary of State to uphold the CAA's decision or to direct it to re-hear the case or to reverse or vary its decision. They do not specify how he should approach such cases, although section 67(5) of the Act provides that when considering whether to give a direction requiring the Authority to reverse or vary a decision, and the terms of any such direction, he shall have regard in particular to the duties imposed on the CAA by sections 4 and 68 of that Act.

5. The last Government statement on these matters was contained in the 1984 White Paper on airline competition policy (Cmnd 9366) which at paragraph 33 stated that: "Appeals from a licensing decision by the Authority are determined by the Secretary of State for Transport. Although he must recognise that the Authority has primary responsibility for licensing decisions, he will consider each case referred to him in this way on its merits. Before directing the Authority to reverse or vary any of its decisions, he is bound by the Civil Aviation Act 1982 to have particular regard to the Authority's own statutory duties. Nevertheless, he may form his own judgement of the merits of the issues facing the Authority in the light of his own responsibilities and against the background of this White Paper. He will not lightly substitute his own judgement for that of the Authority, but the Secretary of State is free to do so where, consistently with the statute, there is in his opinion a substantial reason for directing the Authority to reverse or vary any of its decisions."

Proposal for change

6. We are minded to remove in its entirety the facility for appeal to the Secretary of State in aviation route licensing cases. The aviation world has moved on in the more than two decades since the Civil Aviation Act came into force in 1982 and since the 1984 White Paper was drafted. The airline industry in the UK has long been a wholly private sector activity, and we consider that these essentially consumer-driven decisions should be entirely the province of the Civil Aviation Authority, which has the necessary expertise in matters of airline economics and consumer affairs to give them proper consideration. We consider that it is no longer appropriate for decisions affecting the interests of consumers and the commercial interests of airlines to be subject to political decisions by Ministers.

¹ The Government is currently taking steps to make this compatible with the requirements of Article 5 of Regulation 847/2004 EC, which requires a distribution of traffic rights among eligible Community air carriers on the basis of a non-discriminatory and transparent procedure.

7. We have considered carefully whether the possibility of appeal should be retained by a body other than the Secretary of State for Transport, but we see little advantage in this. The Civil Aviation Authority is the body in the UK with the greatest store of expertise in matters affecting airlines and their customers, and is widely respected here and overseas for its capacity to carry out in depth assessments of major issues affecting the aviation industry. We are confident that the CAA's administrative procedures for the conduct of hearings provide applicants with a fair opportunity which is sufficient to dispute the primary facts, and that following the removal of Ministers from the appeals process UK airlines will continue to have their proposals assessed rigorously and fairly by the Authority in the light of the overall consumer interest. Parties to an aviation route licensing case will be able to have decisions of the CAA reviewed in the Courts via the usual judicial review process. It is difficult to see how any other body could add value to this process, especially as it would be unable to seek expert advice from the CAA to help it in its deliberations.

8. It is now a requirement of European Community law, as set out in Article 5 of Regulation 847/2004 EC, that Member States should ensure a distribution of traffic rights among eligible Community air carriers on the basis of a non-discriminatory and transparent procedure. An explanatory note issued by the European Commission makes clear that Member States should ensure that a formal, effective and expeditious appeal mechanism is in place that would allow any party to appeal to an independent body other than that which took the decision. The Commission's note clarifies that the possibility of appeal to a court or other independent arbitrator could fulfil this role. We consider that the CAA's administrative procedures for hearing aviation route licensing cases, coupled with the possibility open to the parties of seeking to have the CAA's decisions reviewed in the Courts, fully meet the requirements of the Regulation.

9. Although the 1982 Act and the 1991 Regulations also confer the right of appeal to the Secretary of State in air transport licensing cases these are rare and, if they occur, may raise issues other than a dispute about which airline should operate which route. So we are minded to leave that appeal route intact.

Questions for consultation

10. For the reasons set out above we consider that the removal of Ministers from the appeals process in aviation route licensing cases is in the best interests of airlines and consumers in the UK. We are minded consequently to include provision in the forthcoming Civil Aviation Bill for this to be done, but before doing so we wish to hear the views of interested parties.

11. The questions on which we would welcome your views include, but are not limited to, the following:

- **Do you agree that it is appropriate to remove the Secretary of State for Transport from the appeal role in aviation route licensing cases? (Whether you agree or disagree, please set out your reasons as fully as possible.)**
- **Do you agree that CAA's administrative procedures for the conduct of hearings provide applicants with a fair opportunity to put their case and have it examined rigorously and that these procedures, coupled with the possibility of seeking judicial review of the CAA's decisions, render an alternative point of appeal unnecessary?**
- **If you agree with the first of these questions, but disagree with the second, which alternative body would you propose as point of appeal, and what value would such a body add to the process?**

Regulatory impact

12. We do not consider that this essentially deregulatory measure will have any significant adverse financial consequences for the industry. Scarce capacity cases are not frequent, occurring at the rate

of less than one a year during the last decade, so the overall cost implications are not large. A partial regulatory impact assessment setting out this conclusion in more detail is attached at Annex A.

13. We would however welcome any information you may have on the likely cost implications. This would help us very much in finalising the impact assessment.

14. We are confident that the overall decision process, allowing for the possibility of judicial review, will continue to satisfy the requirements of article 6 of the European Convention on Human Rights. The Secretary of State intends to make a statement of compatibility under Section 19 of the Human Rights Act. The policy has also been examined for race relevance and we have concluded that in this case a Race Impact Assessment is not necessary.

Conclusion

15. We should be grateful for responses to this letter **by 13 May**. Replies should be sent to John Shanley, 1/27 Great Minster House, London SW1P 4DR, telephone +44 (0) 20 7944 5895, fax number +44 (0) 20 7944 2192, email john.shanley@dft.gsi.gov.uk. This consultation has been produced in accordance with the Government's Consultation Code of Practice, a copy of which is attached at Annex B. The consultation period has however been reduced to approximately 6 weeks in order to allow sufficient time to prepare a suitable provision for inclusion in a draft Civil Aviation Bill, but also because this is a specialised area of work and the consultation paper is being sent to industry stakeholders who are well informed of the existing process. A list of the stakeholders to which this consultation paper is being sent directly is attached at Annex C.

Annex A - Partial Regulatory Impact Assessment

Title of proposal

1. Change in aviation route licensing procedure.

Purpose and intended effect

2. To add a clause to the forthcoming Civil Aviation Bill, removing the right of appeal to the Secretary of State in aviation route licensing cases. The aim is to lower the burden of regulation on the airline industry and streamline the aviation route licensing process by making the Civil Aviation Authority (CAA), which is the body with the necessary specialist expertise in aviation matters, airline economics and consumer affairs, solely responsible for the allocation of scarce bilateral capacity among British airlines.

Background

3. Aviation route licensing cases now usually concern the distribution of the route frequencies available to competing British airlines in situations where the available capacity is so constrained by the provisions of bilateral air services agreements between the UK and other countries that there are insufficient frequencies available to allow all British airlines to operate all the frequencies they would wish to operate. The UK has special procedures to govern the allocation of capacity in these circumstances.
4. The initial allocation of scarce capacity is made by the CAA. The process is triggered by a notification to the CAA by the Secretary of State for Transport that the UK's share of the capacity on a bilaterally constrained route will, within six months of the date of notification, be insufficient to enable all UK airlines who wish to operate the route to make available all the capacity which they plan to provide.
5. The capacity that actually is available is allocated by the CAA following a public hearing at which the airlines concerned, and other interested parties, are allowed to submit evidence in support of their proposals for services on the route or routes. The CAA will consider this evidence and decide between the applicants broadly on the basis of its view on which proposal will bring the greater benefits to consumers. The successful airline will be awarded the frequencies, and other airlines will have their route licences conditioned to prevent them operating more (or perhaps any) services on the same routes until bilateral circumstances change.
6. Section 67 of the Civil Aviation Act 1982 and the Civil Aviation Authority Regulations 1991 currently establish a right of appeal to the Secretary of State for Transport. These Regulations permit the Secretary of State to uphold the CAA's decision or to direct it to re-hear the case or to reverse or vary its decision. After appealing to the Secretary of State the parties have the option of seeking to have his decision reviewed in the Courts via the usual judicial review process.

Risk assessment

7. The current system effectively encourages airlines to appeal against CAA decisions, thus delaying the allocation of the capacity, to the ultimate detriment of consumers and the industry itself. It also provides for Ministers to determine appeals in particular cases on the basis of wider considerations of aviation policy, a facility which is no longer consonant with the thrust of Government policy, which is to leave decisions on competition and consumer matters in the hands of the bodies best equipped to deal with them, as exemplified by the recent reform of competition policy.

Options

8. There are three options available:

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- a) retain the current procedures;
- b) replace the Secretary of State for Transport's role as point of appeal with some other body; or
- c) remove the Secretary of State as point of appeal and leave parties with the sole option of seeking to have decisions of the CAA reviewed in the Courts via the usual judicial review process.

9. Option (a) would not achieve the objective of streamlining the current procedures and bringing them into line with wider Government policy on competition and consumer matters. It is not considered further.

10. Option (b) would in our view add insufficient value to the process compared with the monetary and other costs it would introduce. We have considered whether a body such as the Office of Fair Trading ("OFT") could form a point of appeal. However, while the OFT has expertise in the aviation field gained from considering competition issues relating to this sector, it is questionable what additional value a public body whose functions are not dissimilar to those of the CAA (i.e. investigatory and regulatory) could have in assessing the merits of a decision taken by the CAA. As a result, the natural flow for rights of appeal should be to a tribunal with functions more suited to reviewing a decision taken by a public body.

11. Our preference is therefore to proceed with option (c). Under this option the first stage of the process would stay the same: the CAA would hear the case and come to a decision in exactly the same way as it does now. The difference is that instead of being able to appeal to the Secretary of State, the parties would be left with the option of seeking judicial review in the Courts.

12. The reform could accordingly increase the chances of the parties seeking judicial review, as this would be the only appeal route open to them. However, the risk might not be great in practice. Appeal to the Secretary of State has become almost an automatic part of the process, with losing airlines appealing as a matter of course and the other parties having little choice but to become involved as counter-appellants. If the possibility of appeal to the Secretary of State is removed it should concentrate the minds of the parties more on whether an appeal is worthwhile in given circumstances.

Benefits

13. The reform should speed up the aviation route licensing process, thus allowing the extra frequencies to be taken up by airlines, and the benefits of new services to be enjoyed by consumers, earlier than is currently the case. It should also give greater certainty to the UK airline industry, which has long been a wholly private sector activity, as decisions affecting their commercial interests will no longer be subject to decisions by Ministers which may involve considerations of wider national aviation policy. The CAA has the necessary expertise in matters of airline economics and consumer affairs to give proper consideration to all relevant issues. The reform would be consonant with the general thrust of Government policy in this area, notably the recent reform of competition policy.

14. We do not foresee any social or environmental benefits

Costs

15. It is possible that more aviation route licensing decisions will be taken to judicial review, which would involve costs for the parties. The actual court fees are fixed and in the low hundreds of pounds, but the potential total costs are impossible to estimate, since they depend both on the level of legal representation chosen by the parties and by how long the actual court proceedings last. Aviation route licence cases are comparatively infrequent, however: there have been only eight in the last ten years, so the problem is not large in absolute terms. And a great deal of the costs to the airlines of seeking judicial review would be costs which they incur in any case in preparing their appeals to the Secretary of State under existing statutory procedures.

16. Were a case to go to the High Court, the CAA rather than the Department of Transport would be the defendants. Any costs the CAA incurred would be recovered from air transport users via the CAA's charges, instead of among tax-payers in general. Conversely, the CAA may be able to recover its costs in the event of an unsuccessful judicial review, whereas at present it cannot. As the CAA's charges fall on the industry in general, the reform may lead to a saving of industry costs, at the expense of unsuccessful appellate airlines.

17. At the moment, airlines are not charged for their appeal to the Secretary of State, although they already pay for their own legal representation and for the preparation of appeal materials. Judicial review could, therefore, prove to be marginally more expensive for them. On the other hand, the work undertaken by the Department in processing appeals and not charged to the parties is in practice a cost to the taxpayer which would no longer be incurred.

18. The normal remedy in a judicial review case where the applicant is successful is to have the decision quashed, and to award all or a substantial proportion of the costs to the losing party. There are already mechanisms to ensure that costs are reasonable. Damages are unlikely to be awarded in this kind of case, and, when appropriate, the parties can apply for a consent order and thereby limit costs by avoiding litigation.

19. We do not foresee any social or environmental costs

Equity and Fairness

20. The reform does not put any individual airline at a disadvantage, and consumers will continue to benefit as the frequencies will continue to be allocated by the CAA to the carrier that would make best use of them. We are confident that the overall decision process, allowing for the possibility of judicial review, will continue to satisfy the requirements of article 6 of the European Convention on Human Rights.

Small firms impact test

21. Aviation route licensing cases in the UK involve exclusively international airlines which are required to obtain airline operating licences involving rigorous financial fitness assessment by the CAA. We do not consider that a small firms' impact test is required.

Competition assessment

22. The CAA's scarce capacity procedures involve the application of a rigorous competition assessment in each case. This proposal does not affect those procedures, so there should be no adverse competition effects.

Enforcement

23. The CAA's allocation is enforced by adding conditions to aviation route licences. There is no proposal to change this.

Consultation

24. We will seek Ministerial policy clearance from the Domestic Affairs Committee. We will consult UK airlines, the CAA and the Air Transport Users Council, which represents the interests of air passengers.

Summary and recommendation

25. This proposal should streamline the process for allocating scarce bilateral capacity, to the benefit of airlines and consumers, and removes a Ministerial role in the process which is outdated and at odds with the general thrust of Government policy in competition and consumer matters. Additional costs

to industry, if any, would be marginal over costs currently incurred, and do not in our view outweigh the overall benefits of the proposal.

Contact point

Glenn Cronin
International Aviation and Safety Division
Department for Transport
Great Minster House

Annex B - Code of Practice on Consultation

The code of practice applies to all UK public consultations by government departments and agencies, including consultations on EU directives.

Though the code does not have legal force, and cannot prevail over statutory or other mandatory external requirements (e.g. under European Community Law), it should otherwise generally be regarded as binding unless Ministers conclude that exceptional circumstances require a departure.

The code contains six criteria. They should be reproduced in all consultation documents. There should be an explanation of any departure from the criteria and confirmation that they have otherwise been followed.

Consultation criteria

1. Consult widely throughout the process, allowing a minimum of 12 weeks for written consultation at least once during the development of the policy.
2. Be clear about what your proposals are, who may be affected, what questions are being asked and the time-scale for responses.
3. Ensure that your consultation is clear, concise and widely accessible.
4. Give feedback regarding the responses received and how the consultation process influenced the policy.
5. Monitor your department's effectiveness at consultation, including through the use of a designated consultation co-ordinator.
6. Ensure your consultation follows better regulation best practice, including carrying out a Regulatory Impact Assessment if appropriate.

A full version of the code of practice is available on the Cabinet Office web-site at:
<http://www.cabinet-office.gov.uk/regulation/consultation/code.asp>

The consultation period for this consultation has been reduced to 6 weeks as it deals with a specialised area of work and is being sent to industry stakeholders who are well versed in the existing process. Further, in order to allow the Department sufficient time to prepare a suitable provision for inclusion in a draft Civil Aviation Bill, responses are sought by 13 May 2005.

If you consider that this consultation does not comply with the criteria or have comments about the **consultation process** please contact:

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Annex C - List of consultees

Airlines

Air Atlanta Europe Ltd
Air Charter Scotland Ltd
Air Wales Ltd
Air Atlantique Ltd
Air Kilroe Ltd T/A Eastern Airways
Astraeus Ltd
Atlantic Air Transport Ltd
Bmibaby Ltd
British Airways PLC
British Midland Airways Ltd
British Midland Regional Ltd
Britannia Airways Ltd
British Airways Citiexpress Ltd
British Mediterranean Airways Ltd
British North West Airlines Ltd
Carill Aviation
Channel Express (Air Services) Ltd
DHL Air Ltd
EasyJet Airline Co. Ltd
Excel Charter Ltd
First Choice Airways Ltd
Flightline Ltd
Emerald Airways Ltd
European Aviation Air Charter Ltd
Excel Airways Ltd
Flybe
Flyjet Ltd
Global Supply Systems Ltd
Go One Airways Ltd
Globespan Airways Ltd
Gold Air International Ltd
Loganair Ltd
Monarch Airlines Ltd
Mytravel Airways Ltd
Northern Aviation Ltd
Suckling Airways (Cambridge) Ltd
Thomas Cook Airlines UK Ltd
Titan Airways Ltd
Trans Euro Air Ltd
Virgin Atlantic Airways Ltd

Government and industry representative bodies

Air Transport Users Council
Association of European Airlines
British Air Transport Association
Civil Aviation Authority
European Low Fares Airline Association
European Regions Airline Association
International Air Carrier Association
Office of Fair Trading

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Northern Ireland Office
Scottish Executive
Small Business Service
Welsh Assembly