

# CIVIL AVIATION ACT 2012

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## EXPLANATORY NOTES

### COMMENTARY

#### Part 1 – Airports

#### Chapter 2 – Competition

#### **Section 60: Functions under Part 4 of Enterprise Act 2002 and Section 61: Enterprise Act 2002: supplementary**

167. These sections provide for most of the functions of the Office of Fair Trading (OFT) under Part 4 of the Enterprise Act 2002 (market investigations) to be exercisable concurrently by the CAA, so far as those functions relate to the provision of airport operation services. “Airport operation services” is defined in section 68.
168. Part 4 of the Enterprise Act 2002 allows for the OFT to make a market investigation reference to the Competition Commission. These investigations are designed to complement the Competition Act 1998 by providing a means of addressing problems in markets where competition does not appear to be working well, but where there is no apparent breach of existing competition law. An example of the sort of circumstances in which a market investigation might take place would be a situation where a non-collusive, uncompetitive oligopoly existed. This would be characterised by a few large firms supplying almost the whole of the market (known as an oligopoly) and, without there being any agreement between them (collusion) or any concerted practice such as would infringe the Competition Act 1998, they all tended to follow parallel courses of conduct, while new competitors faced significant barriers to entry into the market, and there was little or no evidence of vigorous competition between the existing players.
169. The OFT is able to make a reference to the Competition Commission where it has reasonable grounds to suspect that any feature, or combination of features, of a market operating in whole or in part in the UK prevents, restricts or distorts competition in connection with the supply or acquisition of goods or services in the UK. Relevant market features are the structure of a market for goods or services, the conduct of persons supplying or acquiring goods or services in that market, and the conduct of their customers. Where the Competition Commission finds that such an adverse effect on competition exists, it is under a duty to take such remedial action within its powers as it considers reasonable and practicable.
170. **Section 60** enables the CAA to exercise the OFT's functions under Part 4 of the Enterprise Act 2002 in relation to airport operation services, except that, unlike the OFT, the CAA is neither obliged to keep a register of undertakings accepted and orders made (since this is the OFT's exclusive responsibility under section 166 of the Enterprise Act 2002) nor is it obliged to issue guidance on the making of market references (under section 171 of that Act).
171. **Subsections (1) and (2)** of section 61 are designed to prevent the exercise by both the CAA and the OFT of their concurrent powers under Part 4 of the Enterprise Act 2002 in relation to the same matter. These subsections place those bodies under a duty to

consult each other before exercising any of their concurrent functions and prohibit them from exercising these functions in a case where the other has already done so.

172. *Subsection (4)* of section 61 places the CAA under a duty, where it has referred a matter to the Competition Commission under the provisions of Part 4 of the Enterprise Act 2002, to provide the Competition Commission with any information relevant to the investigation in the CAA's possession or control which is requested by the Competition Commission or which the CAA considers appropriate. *Subsection (6)* places a duty on the Competition Commission to take this information into account.
173. *Subsection (5)* of section 61 places the CAA under a duty to provide any other assistance requested by the Competition Commission for the purpose of such a reference and which it is in the CAA's power to give.
174. *Subsection (7)* of section 61 gives the Secretary of State the power to determine any question that arises as to whether the CAA must or may carry out any concurrent function under the Enterprise Act 2002. However, *subsection (8)* also makes clear that no action taken by the CAA under Part 4 of the Enterprise Act 2002 is open to challenge on the grounds that such action should have been taken by the OFT (other than in relation to sections 166 and 171 of that Act).
175. *Subsection (9)* of section 61 enables the CAA, when carrying out its concurrent functions under Part 4 of the Enterprise Act 2002, to have regard to matters mentioned in subsections (1) to (3) of section 1 (the CAA's general duty when exercising functions under Chapter 1 of Part 1). *Subsection (10)* disapplies the CAA's general objectives in section 4 of the CAA 1982 when carrying out concurrent functions under the Enterprise Act 2002.

***Section 62: Functions under Competition Act 1998 and Section 63: Competition Act 1998: supplementary***

176. These sections provide for most of the functions of the OFT under Part 1 of the Competition Act 1998 (competition) to be held concurrently by the CAA, so far as they relate to the provision of airport operation services and to the things listed in *subsection (3)* of section 62. These things are restrictive agreements, concerted practices or decisions of associations of undertakings and abuse of a dominant position as prohibited by the Competition Act 1998 and/or Articles 101 and 102 of the Treaty on the Functioning of the European Union of 30 March 2010 (the "TFEU"). This means that the CAA is able to exercise almost all of the functions of the OFT under Part 1 of the Competition Act 1998 in so far as they relate to the provision of airport operation services.
177. The functions under Part 1 of the Competition Act 1998 which the CAA is not able to exercise are functions under:
  - section 31D, which requires the OFT to prepare and publish guidance as to the circumstances in which it may be appropriate to accept commitments from such person (or persons) concerned as it considers appropriate when the OFT has begun an investigation;
  - section 38, which requires the OFT to prepare and publish guidance as to the appropriate amount of any penalty under Part 1 of that Act;
  - section 51, which allows the OFT to make rules (currently in the form of the Competition Act 1998 ([Office of Fair Trading's Rules](#)) Order 2004 (SI 2004/2751)) setting out the procedures to be followed by the OFT, the sectoral regulators and third parties under Part 1 of that Act.
178. The Competition Act 1998 contains statutory prohibitions on anti-competitive behaviour applicable in the UK which are modelled on Articles 101 and 102 of the TFEU. It contains two prohibitions: first, it prohibits agreements which prevent, restrict

or distort competition and which may affect trade within the United Kingdom ('the Chapter I prohibition'); secondly, it prohibits conduct which amounts to an abuse of a dominant position in a market which may affect trade within the United Kingdom ('the Chapter II prohibition'). The Competition Act 1998 confers on the OFT powers to investigate and enforce against infringements of both the Chapter I and Chapter II prohibitions and the prohibitions set out in Articles 101 and 102 TFEU.

179. Examples of the functions in respect of which section 62 gives the CAA concurrent jurisdiction include:
- to investigate possible infringements of the Chapter I or II of the Competition Act 1998 or Article 101 or 102 prohibitions of the TFEU, either on their own initiative or in response to complaints;
  - to impose financial penalties and/or to give directions to bring an infringement of any of the prohibitions to an end; and
  - to issue general advice and information on how the Competition Act 1998 applies to the airport operation services sector.
180. Further provision for the co-ordination of the performance by the OFT and sectoral regulators of concurrent functions under the Competition Act 1998 is contained in the Competition Act 1998 ([Concurrency](#)) [Regulations 2004 \(SI 2004/1077\)](#).
181. The OFT and each regulator are also represented on the Concurrency Working Party which was formed in 1997 to ensure full co-ordination between regulators and the OFT and to ensure consistency of approach to casework.
182. The CAA and the OFT would be expected to consult each other before a decision is made as to who will deal with a case in respect of which there is concurrent jurisdiction. In general, anti-competitive agreements or abusive conduct that relate to airport operation services will be dealt with by the CAA (unless the OFT is better placed to do so).
183. *Subsection (1)* of section 63 makes clear that no action taken by the CAA under Part 1 of the Competition Act 1998 is open to challenge on the grounds that such action should have been taken by the OFT.
184. *Subsection (2)* of section 63 enables the CAA, when carrying out relevant functions under the Competition Act 1998, to have regard to matters mentioned in subsections (1) to (3) of section 1 (the CAA's general duty when exercising functions under Chapter 1 of Part 1). *Subsection (3)* disapplies the CAA's general objectives in section 4 of the CAA 1982 when carrying out relevant functions under the Competition Act 1998.

#### ***Section 64: Review etc of airport operation services***

185. This section contains provisions designed to ensure that the markets relevant to airport operation services are kept under review by the CAA, and that the CAA has appropriate mechanisms to provide advice and assistance to the OFT, the Secretary of State and the wider public.
186. *Subsection (1)* places a qualified duty on the CAA to keep the provision of airport operation services in the UK under review and also to collect information about such provision to facilitate the CAA in carrying out its concurrent competition functions set out in this Chapter.
187. *Subsection (2)* places a duty on the CAA to provide information, advice and assistance to the Secretary of State and the OFT about any matter relating to its concurrent competition functions if it is requested to do so or thinks it is expedient to do so. *Subsection (3)* states that the CAA must supply information, advice or assistance, when requested by the Secretary of State or the OFT, only where it appears practicable to the CAA to do so.

*These notes refer to the Civil Aviation Act 2012 (c.19)  
which received Royal Assent on 19 December 2012*

188. *Subsection (4)* provides a power for the CAA to prepare and publish reports relating to airport operation services, which is intended to enable the CAA to publish market studies where it considers it appropriate. *Subsection (5)* gives the CAA the discretion to exclude commercial information or information relating to private affairs from the published document in certain circumstances.
189. *Subsection (6)* enables the CAA to carry out, commission or provide financial or other support for research related to the carrying out of its functions under this section.

***Section 65: Power to modify CAA's competition powers***

190. The CAA only has concurrent functions in relation to “airport operation services”, which are defined in section 68. Section 65 enables the Secretary of State, by regulations made by a statutory instrument that has been laid before, and approved by a resolution of, each House of Parliament, to modify the scope of the CAA's concurrent powers; specifically, to narrow the scope by excluding certain types of airport operation services or to expand the scope by including particular services at an airport that are not airport operation services. Regulations under section 65 may also make consequential amendments to Chapter 2 of Part 1 of the Act.
191. Although the definition of “airport operation services” is also subject to changes in scope by regulations under section 68, the power under section 65 allows for some divergence between the coverage of economic regulation under Chapter 1 of Part 1 and concurrent competition powers under Chapter 2 of that Part.