

CIVIL AVIATION ACT 2012

EXPLANATORY NOTES

COMMENTARY

Part 1 – Airports

Chapter 1 – Regulation of Operators of Dominant Airports

General duties

Section 1: CAA’s general duty

32. *Subsection (1)* provides that the CAA must carry out its functions under Chapter 1 of Part 1 of the Act in a way which it thinks will further the interests of users of *air transport services* regarding the range, availability, continuity, cost and quality of *airport operation services* (the “primary duty”). The CAA must do so, where appropriate, by promoting competition in the provision of airport operation services (*subsection (2)*).
33. “Airport operation services” are defined in section 68 and “air transport services” are defined in section 69.
34. The primary duty refers specifically to the interests of users of air transport services in respect of airport operation services: it does not empower the CAA to take into account whatever general interests these persons might have in other capacities (for example as a local resident).
35. There may be conflicts between the interests of users of air transport services. For example, current users may not want to pay for investment that benefits future users. *Subsection (5)* empowers the CAA to determine how to fulfil its primary duty in cases where such conflicts arise.
36. *Subsection (3)* lists a number of matters to which the CAA must have regard in performing its duties under subsections (1) and (2). The duty to have regard to these matters does not, individually or collectively, override the section 1(1) and (2) duty. The matters to which the CAA must have regard under subsection (3) include:-
 - a) the need to secure that each licence holder is able to finance its provision of airport operation services (subsection (3)(a)). Whilst this should require the CAA to encourage efficient and economic investment by allowing a reasonable return over time, the financing duty does not require the CAA to ensure the financing of regulated airports in all circumstances, for example the CAA would not be required to adjust regulatory decisions in order to take account of an operator’s particular financing arrangements or put the interests of users at risk by making them pay for an inefficient operator’s financing decisions.
 - b) the need to secure that reasonable demands for airport operation services are met and the need to promote economy and efficiency in the provision of such services (subsection (3)(b) and (c)). One would expect both of those needs to be

met in a competitive airports market where airport operators provide the services demanded by passengers at minimum cost. The requirement to have regard to those needs reflects the fact that the ultimate aim of economic regulation is, as far as is possible, to replicate the outcomes of a competitive market.

- c) the need to secure that each licence holder is able to take reasonable measures to address the adverse environmental effects of the licensed airport to which the licence relates, including aircraft using that airport (subsection (3)(d)). Environmental effects includes (amongst other matters listed in *subsection (6)*) substances, noise, vibration and emissions and the effect of works carried out at the airport. For example, having regard to this need, the CAA may decide that the costs of relevant environmental measures should be included in an airport operator's regulatory settlement¹.
- d) guidance issued to the CAA by the Secretary of State on how it carries out its functions under Chapter 1 (subsection (3)(e)). For example the Secretary of State may issue guidance to the CAA on the Secretary of State's preferred approach to resilience licence conditions.
- e) any international obligations notified to the CAA by the Secretary of State to the CAA (subsection (3)(f)).

Section 2: Secretary of State's general duty

- 37. In exercising any function under Chapter 1 or Chapter 3 of Part 1 of the Act (other than the functions under sections 66(3) and 68(6)) the Secretary of State is subject to similar duties to those to which the CAA is subject under section 1.

Prohibition

Section 3: Prohibition

- 38. If an operator of a dominant airport area located at a dominant airport does not have a licence for the dominant airport area, then section 3 states the operator is prohibited from levying charges for airport operation services.
- 39. "Dominant airport area" and "dominant airport" are defined in section 5.
- 40. The prohibition applies to all charges for airport operation services at the airport (other than those in respect of an area for which the operator has a licence), not just those levied in respect of the dominant airport area for which the licence is required. So, for example, if there was one operator of the entire airport but the area comprising the runway was the only dominant area, the operator could not levy charges for any airport operation services at the entire airport without a licence which covered the runway.
- 41. The licence must include a provision specifying the area covered by the licence (see section 17(1)). Therefore if a licensed operator of one dominant area at an airport became the operator of another dominant area which is not covered in its existing licence, the prohibition would apply to the newly acquired dominant area and any other area within the airport operated by that person not covered by its original licence.

Section 4: Prohibition: exemption

- 42. The effect of section 4 is that if a person is the operator of an airport area on the day on which the area becomes a dominant area, or on which the airport becomes a dominant airport, and the operator does not have a licence on that day, then the operator is exempt from the prohibition until a licence for that airport area is granted (or the operator's application for such a licence is refused). Under section 14, such an operator is treated as having made and published an application for a licence. This is designed to protect

¹ The *regulatory settlement* is a term used to embrace the setting of a price control condition and associated obligations.

existing operators of airport areas who would otherwise subsequently become subject to the prohibition.

43. **Section 4** does not protect new operators of airport areas which are already dominant areas located at dominant airports (for example, an area comprising the terminals and runways at London Heathrow); otherwise a change in management control would result in the new operator of the dominant airport area not being subject to regulation.

Dominant airports

Section 5: Dominant areas and dominant airports

44. **Section 3** has the effect that operators of dominant airport areas located at dominant airports require a licence to levy charges for airport operation services. This section explains what comprises a dominant airport area and a dominant airport.
45. This section introduces the concept of an ‘airport area’ (and therefore a ‘dominant airport area’) to allow for the possibility of there being more than one operator at an individual airport. This could be the case, for example, if an airline acquired or leased a terminal building. As there can be more than one ‘airport area’ at an airport, it follows that there can be more than one ‘operator of an airport area’ at an airport.
46. This differs from the approach used in the AA 1986, which refers to an airport operator as “the person for the time being having the management of an airport, or, in relation to a particular airport, the management of that airport”. That Act does not include provision about cases in which there is more than one operator of an airport.
47. **Section 5** states that an airport area is dominant if the CAA makes a determination that the market power test is met in relation to the area and publishes a notice to that effect.
48. This section also introduces the concept of a ‘core area’ and states that an airport is dominant only if there is some overlap between one or more dominant airport areas and all or some of the airport’s core area. Non-core airport areas include car parks with pedestrian access to the passenger terminal building or pick-up and drop-off points. Therefore if the only dominant airport area at airport X comprised the pick-up and drop-off points, airport X would not be a dominant airport.

Section 6: Market power test

49. **Section 5** states that an airport area is dominant if the CAA publishes a determination that the market power test is met in relation to the area. This section states that the market power test is met in relation to the airport area only if the CAA is satisfied that tests A, B and C are all met by the operator of that airport area.
50. There is an important distinction: tests A, B and C are applied to the *operator* of the airport area; in contrast the market power determination is made in relation to an airport *area*. The determination applies to an area, rather than to the operator, to allow for it to remain valid in the event that a new operator takes over management control of the assets. Section 7(9) states that a market power determination, once published by the CAA, will continue to have effect until overtaken by a subsequent determination. So if operator A acquires a dominant airport area (which is located at a dominant airport) from operator B, the market power determination and therefore the prohibition will apply to operator A.²
51. **Section 6** states that tests A, B and C all have to be met by the operator of an airport area for the market power test to be met. These tests are designed to ensure that operators of

² Unless there is an operator determination stating that operator B is the operator of the dominant airport area. In practice it is expected that operator B would notify the CAA of the expected change of operator. The CAA would then withdraw the original operator determination and may make a further operator determination on operator A. Otherwise, operator B would remain subject to regulation as the operator of an area over which it no longer has requisite management control. (See also notes on sections 9, 10 and 11 for information about “operator determinations”.)

airport areas are only subject to economic regulation if: (A) the operator has or is likely to acquire substantial market power; (B) competition law on its own is not sufficient to address the risk the operator may abuse its market power; and (C) the benefits of regulating the operator outweigh the costs.

52. *Subsections (6) and (7)* limit the circumstances in which test A is met.
53. *Subsection (6)* states that test A is only met if:
- the product market in which the operator has (or is likely to acquire) substantial market power is a market for services which include or comprise one or more airport operation services; and
 - the geographic market in which the operator has (or is likely to acquire) substantial market power includes, comprises or forms part of the airport area.
54. *Subsection (6)* would therefore prevent an operator being regulated solely on the basis that it satisfies the market power test in relation to a different product or geographic market.
55. *Subsection (7)* states that in conducting test A in respect of an airport area which includes all or part of the core area as well as other areas in the airport, the CAA must identify a market for one or more airport operation services provided in the core area and geographically the market must include the core area. So for example if an operator controlled an entire airport (which includes a core area) but its substantial market power was limited to a market comprising car parks with pedestrian access to the passenger terminal building (which is not a core area), then test A would not be met.
56. *Subsection (10)* states that the CAA must have regard to relevant competition notices and guidance published by the European Commission and relevant advice and information published by UK competition authorities when applying the market power test.

Section 7: Market power determinations and Section 8: Publication of market power determinations

57. *Section 7* empowers the CAA to determine whether or not the market power test is met in relation to an airport area whenever it considers it appropriate to do so. This is defined as a “market power determination”.
58. In order to comply with European law (Directive [2009/12/EC](#) of the European Parliament and of the Council of 11 March 2009 on airport charges), this section also requires the CAA to determine whether the market power test is met in relation to an airport area in certain specified circumstances and if requested by certain specified people. Those specified circumstances are listed in *subsection (2)* and the exceptions to this are listed in *subsection (5)*.
59. When a request is made for a market power determination in respect of an airport area, the CAA is empowered to treat that request as if it were a number of requests in respect of a number of airport areas that consist of or include that area. Or it could consider an area including, but wider than, the area for which the request is made. For example, if someone requested a market power determination in relation to an area which comprises the entire airport and there is more than one operator at that airport, the CAA would need to consider the areas managed by the different operators separately.
60. *Subsection (7)* states that the CAA should have regard to the market(s) in which the operator has substantial market power (test A) when choosing the airport area that is to be the subject of a market power determination. The following simple example illustrates what is meant here. Imagine the CAA concluded that the operator was dominant in the provision of runways, but not in the provision of passenger terminals. In such circumstances subsection (7) would not prohibit the CAA from making a market

power determination in relation to an area that included the passenger terminals, but it does mean that the CAA would need good reasons for doing so.

Section 9: Operators of areas, Section 10: Operator determinations and Section 11: Publication of operator determinations

61. *Section 9* defines an operator of an airport area as the person with overall responsibility for the management of all of that area. This means that where two separate entities both have some form of management control over an airport area (for example the lessee and lessor of a passenger terminal building), only one of them can comprise the operator of the area for the purposes of this Part of the Act.
62. *Section 10* empowers the CAA to determine who has overall responsibility for the management of the area, including in cases where one or more separate entities have some form of management control over the airport area. This is defined as an “operator determination”. *Subsection (4)* sets out the factors that the CAA must in particular consider when making an operator determination.
63. *Subsection (5)* of section 10 provides that the CAA must make an operator determination in relation to a person, if requested to do so by that person. *Subsections (6) and (7)* list the exceptions to this requirement.
64. When a request is made for an operator determination in respect of an airport area, the CAA is empowered by *subsection (8)* of section 10 to treat that request as if it were a number of requests in respect of a number of airport areas that consist of or include that area. Or it could consider an area including, but wider than, the area for which the request is made.
65. An operator determination, once published by the CAA, will continue to have effect until the CAA publishes a notice withdrawing it. If the CAA withdraws the operator determination without making a further operator determination then the identity of the operator will depend on the facts and any regulations which have been made by the Secretary of State under powers conferred by section 9(2).

Section 12: Advance determinations

66. To give prospective operators greater certainty about whether they would require a licence to levy charges, this section empowers the CAA to make market power determinations and operator determinations in advance of a particular event taking place. For example, suppose a third party was considering whether to lease a passenger terminal building from the current operator. This section empowers the CAA to consider the terms of the lease and determine which party would be the operator of the terminal building if the lease were entered into. If the CAA determined that the third party would be the operator of the terminal building, this section also empowers the CAA to determine whether the third party satisfies the market power test and therefore requires a licence if it were to enter into the lease.
67. The advance determination(s) would not take effect until the circumstances described in the determination(s) arose and until then, any previous market power determination would continue to have effect. The CAA is empowered to delay publication of an advance determination if the circumstances have not yet arisen and doing so would involve disclosing commercially sensitive information.

Section 13: Appeals against determinations

68. This section introduces Schedule 1 where provisions relating to appeals against market power and operator determinations are set out.

Schedule 1: Appeals against determinations

69. **Schedule 1** provides a right of appeal to the Competition Appeal Tribunal. It sets out the procedures relating to appeals and to decisions on appeals. The Competition Appeal Tribunal Rules of procedure (under section 15 of the Enterprise Act 2002) also apply insofar as the rules set out in this Schedule do not override them.
70. **Paragraph 1** states which parties may appeal against a market power determination or operator determination to the Competition Appeal Tribunal.
71. **Paragraph 2** states that parties have 60 days to appeal against a market power or operator determination. The time period for appealing starts on whichever of the following days is the later:
- the day on which the determination is published; or
 - the day on which the reasons for the determination are published.
72. **Paragraph 2** also states that although the Tribunal's rules of procedure can amend the time period within which an appeal can be made, the rules cannot alter the day on which the time period commences.
73. **Paragraph 3** states the circumstances in which the Competition Appeal Tribunal may allow an appeal and the decisions that it may take.
74. **Paragraph 4** states that if a default position in respect of an airport area is suspended during the appeal or is set aside, the previous market power determination in respect of the airport area takes effect again or continues to have effect (as appropriate), unless the Competition Appeal Tribunal orders otherwise.
75. **Paragraph 5** establishes that the Competition Appeal Tribunal when deciding an appeal must have regard to the duties imposed on the CAA by section 1.
76. **Paragraph 6** makes provision for further appeals on points of law.

Licences

77. Procedures relating to applications for a licence, and the grant or refusal of such an application, are covered by sections 14 to 16.

Section 14: Application for licence

78. Persons who operate a dominant area at a dominant airport require a licence to levy charges and this section states the requirements on the applicant and the CAA when an application for a licence is made. *Subsections (3) and (4)* provide that if a person is the operator of an airport area on the day on which the area becomes a dominant area located at a dominant airport, then that person will be treated as having already made and published an application for a licence.

Section 15: Granting licence

79. This section states the process the CAA must comply with before granting a licence and before the licence comes into force. This section includes a requirement for the CAA to consult for a reasonable period on proposed licence conditions and states that a new licence may not include conditions which differ significantly from those on which it has consulted.
80. After the notice that the licence has been granted has been published by the CAA, the licence cannot come into force for at least six weeks. The notice must specify certain matters, including the reasons for the conditions included in the licence, how the CAA has taken into account representations made and the reasons for any differences from the conditions initially proposed. This is stated in *subsection (7)*. An application

for permission to appeal against the CAA's decision to include or exclude a licence condition by the licence holder and/or airlines that are materially affected by the decision can be made during the six week period after publication of the notice. Appeals about the inclusion or exclusion of conditions in a new licence are dealt with in section 24 and Schedule 2. For convenience reference is made in this section of the commentary to particular provisions of Schedule 2, in addition to the separate commentary on that Schedule that appears below.

81. **Paragraph 10** of Schedule 2 states that if an application to suspend a licence condition is made in the six week period, the licence condition does not come into effect for ten weeks from the date of publication of the notice of the decision to grant the licence. This extension is to give the Competition Commission at least four weeks to consider the application for a direction to suspend the licence condition before it would otherwise come into effect. The grounds upon which such a direction may be given are set out at paragraph 11(2) of Schedule 2 and the effects of such a direction at paragraph 11(3).
82. **Subsection (9)** provides that if the CAA grants a licence in advance of a person becoming the operator (of all or part of an area), the licence does not come into force until that person becomes the operator (of all or part of the area).

Section 16: Refusing to grant licence

83. **Section 16** states the grounds on which the CAA may refuse to grant a licence and the process the CAA must follow should it decide to refuse to grant a licence, including a requirement to consider representations made about a proposal to refuse to grant a licence. The period allowed for making representations must be a period of at least 30 days beginning with the notice of the proposed refusal. The circumstances where the CAA may refuse a licence are stated in **subsection (1)**. These include circumstances in which the application is made by a person whose licence for that airport area has previously been revoked in accordance with a relevant provision of a licence (see **subsections (2) and (3)**) (or by a person "connected to" that person, within the definition set out in section 71). Otherwise, they comprise circumstances where a licence is considered not to be required.

Section 17: Content and effect of licence

84. Under section 17, the licence must specify the airport and the airport area or areas for which it is granted. The circumstances in which the licence may be revoked by the CAA must be set out in the licence. The licence must also provide that it may only be revoked in accordance with section 48 (which sets out the procedural requirements).

Licence conditions

85. In January 2012, and in response to a request from the Secretary of State the CAA published an indicative licence. This can be found on the CAA's website³.

Section 18: Licence conditions

86. This section states that the CAA may include in the licence any conditions it considers necessary and expedient having regard to the risk that the licence holder may engage in conduct amounting to an abuse of substantial market power in a market for airport operation services (**subsection (1)(a)**). It is further empowered to impose any other licence conditions it considers necessary or expedient having regard to its duties under section 1 (**subsection (1)(b)**).

3 <http://www.caa.co.uk/docs/5/20120126IndicativeLicence.pdf>

Section 19: Price control conditions

87. **Section 19** requires the CAA to impose price control conditions where it considers this necessary or expedient having regard to the risk described in section 18(1)(a).
88. *Subsection (1)* provides that a licence condition is a price control condition to the extent that it regulates prices by (a) specifying the amount (or maximum amount) that may be charged, or providing that the amount (or maximum amount) that may be charged is to be determined in accordance with the condition; or (b) requiring that the amount (or maximum amount) charged should be approved by the CAA.
89. *Subsections (4) and (5)* enable the CAA to impose such price control conditions as it considers appropriate to deprive an operator of some or all of any unfairly high charges recovered by that operator and amounting to an abuse of substantial market power in specified circumstances and over a specified time period. These broadly comprise circumstances where the person is the operator on the day on which the relevant area becomes subject to regulation and is treated as having a licence for a period (under section 4) or would be treated as having a licence for a period but for the suspension of a market power determination or operator determination. The relevant time period begins when the operator becomes subject to regulation and will generally end when a licence is granted (see section 4(4)).
90. *Subsection (6)* provides that provisions for a price control condition may be made by reference to the amount charged for particular goods or services or to the overall amount charged for a range of goods or services.
91. *Subsection (7)* requires price control conditions to be time-limited.

Section 20: Conditions relating to CAA charges

92. **Section 20** provides that a licence may include conditions requiring payment of the CAA's charges determined by a scheme or regulations made under section 11 of the CAA 1982 in respect of its functions under Chapter 1 of Part 1 of the Act.

Section 21: Content and effect of licence conditions

93. Generic examples of provisions which may be included in licence conditions are set out in *subsection (1)*. The examples are neither a prescriptive nor an exhaustive list of provisions that may be included.
94. *Subsections (3) and (4)* state that a condition of the licence may be modified without recourse to the standard licence modification process (set out in sections 22 to 30), provided the specific requirements of subsection (3) are met in that licence condition. However, the proposed inclusion of such a provision in the licence condition would itself be subject to the standard licence modification process (including possible appeal to the Competition Commission).
95. The requirements to be met under subsection (3) are that the licence condition specifies or describes the circumstances in which it may be modified, the period(s) within which the power may be exercised and the types of modification which may be made. For example, a licence condition may require information to be provided by a specified date each year but provide also that the CAA may replace that date with a different date at any time in the next 3 years if the number of passenger movements in a stated period exceeds a stated figure.
96. Such a provision may be modified through the standard licence modification process or through its own self-modifying provisions.
97. *Subsection (5)* concerns licence conditions containing exceptions relating to, or operating by reference to, financial arrangements entered into by the licence holder or a connected person before section 3 of the Act comes into force ("derogations"). Where

a licence condition contains such derogations it may not specify that the exception will cease to have effect on a stated date or in specified circumstances, or provide for the CAA to determine which financial arrangements benefit from the exception. The effect of this provision is that a derogation can only be removed by use of the standard licence modification process under sections 22 to 30 including the special rules that apply to a licence modification in such a case (see the notes on section 23 below).

98. *Subsection (6)* states that a licence condition does not have effect when the licence holder is not the operator of any part of the airport area for which the licence is granted or when the CAA makes a determination that the airport area is no longer a dominant area located at a dominant airport (see also the notes on sections 7, 9 and 10 above).

Modifying licences

Section 22: Modifying licence conditions and licence area

99. This section provides the process the CAA must follow for modifying conditions of a licence or the area for which the licence is granted. “Modifying” a licence condition is defined in section 72 and comprises adding, removing or altering a licence condition.
100. The process requires the CAA to publish a notice that specifies the proposed modification, give reasons for and state the effect of the proposed modification and consider any representations received during the period specified in the notice (*subsections (2) to (4)*).
101. If after doing so the CAA decides not to make the modification it must publish its reasons (*subsection (5)*).
102. If, following consideration of representations, the CAA wishes to make significant changes to the proposed licence modification then the process described in subsections (2) to (4) will need to be repeated in respect of the amended proposal (*subsection (7)*).
103. If the CAA decides to make the proposed modification to a licence condition, it will take effect from the date specified by the CAA in the notice it publishes under *subsection (6)*. This must be at least six weeks after the day on which this notice is published (*subsection (9)*). The notice must also state how the CAA took into account representations received and the reasons for the modification (including the reasons for any differences from the proposed modification) and its effect (see *subsection (8)*).
104. An application for a direction to suspend a licence condition may be made under paragraph 12 of Schedule 2 where an application for permission to appeal under section 25 has been made.
105. **Paragraph 13** of Schedule 2 states that if an application for a direction to suspend the modification of a licence condition is made in the six week period (referred to in subsection (9)), the modification does not come into effect for ten weeks from the date the decision on the modification was published. This extension is to give the Competition Commission at least four weeks to consider the application for a direction to suspend the modification of the licence condition before it would otherwise come into effect. The grounds upon which such a direction may be given are set out at paragraph 14(2) and the effects of such a direction are set out at paragraph 14(3).
106. The area for which the licence is granted is not appealable and a proposal to modify that area is also not appealable. As a result the effect of these decisions cannot be suspended and hence the six week delay in coming into force is not required for such decisions.

Section 23: Restriction on power to modify

107. **Section 23** provides a restriction on the CAA’s powers to modify licence conditions. It applies where a licence condition contains an exception (“derogation”) relating to or operating by reference to financial arrangements entered into before section 3 of the Act

comes into force. This may occur, for example, where a ring-fencing licence condition is subject to a derogation to prevent it cutting across financial arrangements entered into by the licence holder or a person connected to the licence holder before section 3 comes into force.

108. In these circumstances, the CAA cannot modify the licence by removing or restricting the derogation unless it has determined that: (i) there has been a material change in circumstances since the derogation was granted; and (ii) the benefits of modifying the derogation are likely to outweigh its adverse effects to users of air transport services. The CAA must publish its determination on or before giving notice of its proposal to make a licence modification.
109. For example, a typical ring-fencing licence condition found in other regulated sectors is a prohibition on the granting of security over assets of the regulated business. Where an operator of an airport area (or a person connected to the operator) has existing lending in place at the time that section 3 comes into force, which is secured on the assets of the regulated company, the regulator may choose to include such a condition in the licence but with a derogation in respect of the existing lending. In these circumstances the CAA would not be able to remove or restrict this derogation until the dual test had been satisfied.

Appeals against licence conditions etc

Section 24: Appeal to Competition Commission: conditions of new licences

110. An appeal against a decision by the CAA under section 15 (granting licence) to include or not to include a licence condition may be brought by either the holder of the licence (the operator of the airport area), or a provider of air transport services (an airline) whose interests are materially affected by the decision. Such an appeal is made to the Competition Commission. “Air transport service” is defined in section 69.
111. The time limit for an application for permission to appeal is set out in paragraph 1(1) of Schedule 2. The application for permission to appeal must be made within six weeks of the CAA publishing the notice under section 15 of the decision to grant the licence.
112. The Competition Commission may refuse permission to appeal under section 24 only on one of two grounds. First, that the appeal is brought for reasons that are trivial or vexatious, or secondly, that the appeal does not have a reasonable prospect of success.

Section 25: Appeal to Competition Commission: modification of licence conditions

113. An appeal against a decision by the CAA to modify a licence condition may be brought by either the holder of the licence (the operator of the airport area), or a provider of air transport services (an airline) whose interests are materially affected by the decision. Such an appeal is made to the Competition Commission. “Air transport service” is defined in section 69.
114. The time limit for an application for permission to appeal is set out in paragraph 1(1) of Schedule 2. The application for permission to appeal must be made within six weeks of the CAA publishing the notice of its decision to modify the licence condition.
115. Permission to appeal may be refused on any of three grounds. First, that the appeal is brought for reasons that are trivial or vexatious reasons. Secondly, that the appeal does not have a reasonable prospect of success. Thirdly, that the appeal is brought against a decision relating entirely to a matter remitted to the CAA under an earlier appeal under section 24 or 25 and that it is brought on grounds that were considered, or could have been raised by the applicant or a relevant connected person, as part of that earlier appeal (see *subsections (5) and (6)*). “Relevant connected person” is defined in *subsection (7)*.

Section 26: When appeals may be allowed, Section 27: Determination of appeal, Section 28: Determination of appeal: time limits and Section 29: Determination of appeal: publication etc

- 116. **Section 26** states the circumstances in which the Competition Commission may allow an appeal under section 24 and 25. It may only do so to the extent that it is satisfied that the decision appealed against was based on an error of fact and/or that it was wrong in law and/or that an error was made in the exercise of a discretion. These are thus in practice the grounds on which a party could make an appeal.
- 117. **Section 27** states what the Competition Commission must do if it does or does not allow an appeal under section 24 or 25 or allows only part of the appeal. Where the appeal is allowed (in whole or in part), it may quash the decision, remit the matter to the CAA for reconsideration and decision (in accordance with Chapter 1 and any directions it may give) or substitute its own decision for that of the CAA.
- 118. **Section 28** stipulates the time limits within which the Competition Commission must determine an appeal. All of these are taken from the date on which the notice of the decision to grant the licence or the decision to modify the licence condition was published.
- 119. The standard time limit for determining an appeal is 24 weeks. This may be extended once by up to 8 weeks if the Competition Commission is satisfied that there is good reason to do so.
- 120. The Competition Commission may also extend the appeal period, by a period it considers appropriate, if there is an ongoing appeal to the Competition Appeal Tribunal which the Competition Commission thinks may be relevant to the appeal that has been made to it.
- 121. *Subsection (9)* of section 28 enables the Secretary of State, by regulations made by statutory instrument subject to annulment by either House of Parliament (see section 73(3)), to modify the time periods specified in section 28.
- 122. **Section 29** states the procedures that the Competition Commission must follow after its determination of an appeal, including procedures for publication of the order which contains the determination. *Subsection (6)* of section 29 states the CAA must take the steps that it considers requisite for it to comply with the order.

Section 30: Procedure on appeals

- 123. The Competition Commission must have regard to the CAA's duties as set out at section 1, in deciding an application for permission to appeal under section 24 or 25, in deciding an application for permission to intervene in an appeal and in determining an appeal, including in giving of directions under section 27.
- 124. The effect of *subsection (4)* is that Part 2 of Schedule 7 to the Competition Act 1998 does not apply to the Competition Commission when it carries out its functions under Chapter 1 of Part 1 of the Act.

Schedule 2: Appeals under sections 24 and 25

- 125. This Schedule applies to appeals to the Competition Commission in respect of conditions in new licences (or the absence of a condition in a new licence) and in respect of the modification of licence conditions.

Part 1: Permission to appeal

- 126. This Part of the Schedule provides the procedures applicable in relation to an application for permission to appeal to the Competition Commission under section 24 (conditions of new licences) or section 25 (modification of licence conditions). Permission may

be granted subject to conditions. Permission must exclude consideration of matters considered as part of an earlier appeal or matters that could have been raised by the applicant (or a relevant connected person) in the earlier appeal, unless the Competition Commission thinks that there are compelling reasons not to exclude consideration of such matters (paragraph 2(5) and (6)).

Part 2: Intervention in appeal

127. This Part of the Schedule provides that any person with standing to appeal is eligible to seek permission to intervene in an appeal in support of the appellant(s) or the respondent. It sets out the procedures that apply. Permission to intervene is to be granted only where the Competition Commission is satisfied that allowing the intervention is necessary or desirable for the proper resolution of the appeal.

Part 3: Automatic suspension of condition of new licence or modification

128. This Part of the Schedule provides for the automatic suspension of relevant financial arrangements conditions when they are appealed under section 24 (conditions of new licences) or section 25 (modification of licence conditions). “Modification” includes adding a relevant financial arrangements condition to an existing licence as well as altering an existing financial arrangements condition. A “relevant financial arrangements condition” is one that is subject to an exception relating to financial arrangements entered into by the licence holder (or a connected person) pre-dating the coming into force of section 3. It also includes financial arrangements effected after section 3 came into force where they are made pursuant to other financial arrangements affected before that date. The purpose of this provision is to ensure that a relevant financial arrangements condition included in a new licence does not have effect until the appeal against the decision is determined or withdrawn, or to preserve the current position where the removal or restriction of an exception to such a condition in an existing licence is proposed. The underlying reason is that without such a provision an appeal may prove nugatory where it cuts across existing financial arrangements.

Part 4: Application for suspension of condition of new licence or modification

129. This Part of the Schedule provides the procedures in relation to applications for a direction suspending the effect of a decision under section 15 to include a licence condition and for applications for a direction suspending the effect of a decision under section 22 modifying a licence condition. It also sets out the test which must be met before a direction may be given (see paragraphs 11(2) and 14(2)).

Part 5: Appeals

130. This Part of the Schedule provides the procedures applicable to the Competition Commission in relation to appeals under section 24 (relating to conditions of new licences) and section 25 (relating to modification of licence conditions).
131. **Paragraph 21** of Schedule 2 provides the CAA with limited additional powers when a licence condition or modification is remitted back to the CAA (see section 27(2)(b)). In particular, paragraph 21(2) provides that the CAA may make a licence modification on reconsidering the matter effective on or after the date on which the original decision took effect or would have taken effect but for its suspension, provided the licence holder agrees. This will allow the CAA to address any injustice that may have arisen through licence enforcement measures taken in respect of an obligation which in the light of the Competition Commission’s decision should never have been imposed on the licence holder.
132. **Paragraph 21(3) to (5)** empowers the CAA to make adjustments to any new or altered price cap imposed in consequence of the Competition Commission’s determination where it transpires that the charges made by the licence holder during the appeal period were higher than the maximum that would have been allowed if the CAA’s original

decision had accorded with that of the Competition Commission's determination. In such a case, the CAA in determining the new price cap is empowered to put the licence holder in the position it would have been in if, during the appeal period, it had in fact charged at the revised (lower) price cap. There is flexibility to allow the CAA to set an adjusted price cap so the licence holder cannot retain the benefit of the excess charge.

133. For example, the licence holder charged airlines £10 per passenger during the appeal period. The Competition Commission's decision leads the CAA to conclude that a price cap of £7.50 per passenger is appropriate for the entire period of the appeal and subsequently. The new price cap could be set below £7.50 per passenger to the extent necessary so the licence holder does not retain all or some of the £2.50 excess charge per passenger during the appeal period.
134. [Paragraph 21\(3\), \(6\) and \(7\)](#) provides the CAA with similar powers to make appropriate adjustments where the Competition Commission's decision on appeal leads to a higher price cap than the charges made during the course of the appeal.
135. [Paragraph 22](#) provides the Competition Commission with similar powers to those applicable to the CAA under paragraph 21 of Schedule 2, where the Competition Commission substitutes its decision for that of the CAA (see section 27(2)(c)).

Part 6: General

136. This Part of the Schedule sets out general procedures applicable to the Competition Commission in carrying out its functions under Chapter 1 (including Schedule 2). It makes provision for the receipt of new evidence in certain circumstances. It provides that an application for permission to appeal or an appeal, or permission to intervene or an intervention, may only be withdrawn with the Competition Commission's consent (at paragraph 30). It includes provisions requiring the Competition Commission to make a costs order to recover its own costs and empowers it to make costs orders between the parties and former parties to an appeal (at paragraph 32). Paragraph 33 enables the Secretary of State, by regulations, to modify the time periods in Schedule 2.

Enforcement of licence conditions

[Section 31: Contravention notice](#)

137. [Section 31](#) provides that the CAA may issue a contravention notice where it reasonably believes that a person has contravened or is contravening a licence condition. It must specify the contravention, explain any action that the CAA may take and specify a representation period of not less than 30 days (which may be extended), except in cases of a repeated contravention where a shorter period for representations may be given. The contravention notice (and any subsequent extension or withdrawal) must be published and a copy sent to appropriate industry representatives.

[Section 32: Restrictions on giving contravention notices](#)

138. [Section 32](#) provides that the CAA must not give a contravention notice where it has already given a contravention notice or an urgent enforcement order in respect of the same contravention, except in specified circumstances such as where contraventions of the same condition have occurred in different ways or at different times.

[Section 33: Enforcement order](#)

139. [Section 33](#) provides that the CAA may issue an enforcement order to a person if it has determined that the person is contravening a condition set out in a contravention notice. It may also do so if it has determined that the person has contravened a condition set out in a contravention notice and, before the end of the representation period, has failed to take all the appropriate steps specified in the notice. An enforcement order must be published, specifying the condition and contravention, the appropriate steps to be taken

and a reasonable period in which to take them, and the CAA's reasons for giving the order.

Section 34: Enforcement order: modification and revocation

140. **Section 34** provides that the CAA may revoke or, with the agreement of the person to whom the order was given, modify an enforcement order provided that a notice in relation to the proposed revocation or modification has been published, a copy sent to the person to whom the order was given, and any representations made in the specified period have been considered. The notice must include reasons for the modification or revocation and specify a reasonable period for making representations. The CAA must publish a notice detailing the revocation or modification of an enforcement order as soon as practicable after revoking or modifying the order and must send a copy of the notice to appropriate industry representatives.

Section 35: Urgent enforcement order

141. **Section 35** provides that an urgent enforcement order may be given where the CAA has reasonable grounds for believing that a person is contravening, or has contravened or is likely to contravene, a licence condition, that the contravention has resulted in or creates, or is likely to result in or create, an immediate risk of a serious economic or operational problem for users or providers of air transport services, and that an order is appropriate to prevent, remove or reduce that problem or risk or the likelihood of the problem or risk arising. Such an order must give the CAA's reasons for giving the order, specify the condition and contravention, specify the steps to be taken and specify a reasonable period in which to take them. The CAA must publish an urgent enforcement order as soon as practicable after giving it and send a copy to appropriate industry representatives.

Section 36: Urgent enforcement order: confirmation

142. **Section 36** provides that the CAA must confirm or revoke an urgent enforcement order as soon as practicable after giving it. The CAA may only confirm an urgent enforcement order (with or without modifications) where it has determined that the contravention in fact has occurred or is occurring, or is likely to occur; that it has resulted in or creates or is likely to result in or create an immediate risk of a serious economic or operational problem; and that the order is appropriate to prevent, remove or reduce that problem or risk, or the likelihood of the problem or risk arising. Before confirming an urgent enforcement order, the CAA must publish, and send to the person to whom it was given, a notice of the proposal to confirm the order, giving reasons, and allowing for any representations to be made. A notice with details of the confirmation must be published as soon as practicable after the confirmation of the order and a copy sent to the person to whom the order was given and appropriate industry representatives.

Section 37: Urgent enforcement order: modification and revocation

143. **Section 37** provides that the CAA may revoke or, with the agreement of the person to whom the order was given, modify, an urgent enforcement order, provided it has published a notice, sent a copy to the person to whom the order was given and considered any representations made about the proposal in the specified period. The notice must include the CAA's reasons for the proposed modification or revocation. The CAA must publish a notice as soon as practicable after modifying or revoking an urgent enforcement order and send a copy to the person to whom the order was given and to appropriate industry representatives. *Subsection (6)* provides that the power under section 36 to confirm an urgent enforcement order with modifications (without the agreement of the person subject to it) is not restricted by the provisions of this section.

Section 38: Civil proceedings

144. **Section 38** provides that a person who has been given an enforcement order or an urgent enforcement order (whether or not it has been confirmed) must comply with it. The CAA may enforce compliance in civil proceedings for an injunction or any other appropriate remedy or relief. The obligation to comply with an enforcement order or an urgent enforcement order that has been confirmed is a duty owed to every person who may be affected by a contravention of a requirement of the enforcement order or urgent enforcement order. Any person affected by a contravention of a requirement of an enforcement order or urgent enforcement order that has been confirmed may bring civil proceedings against the person to whom such an order was given. It is a defence for the person to whom the order was given to show that all reasonable steps were taken and all due diligence exercised to avoid contravening the order's requirements.

Section 39: Penalty for contravention of licence condition

145. **Section 39** provides that a penalty may be imposed on a person to whom the CAA has given a contravention notice after the CAA has considered any representations made in the specified period and determined that the person is contravening or has contravened a licence condition specified in the notice. Where the contravention notice specifies more than one contravention and/or more than one period of contravention, the CAA may impose a separate penalty for each contravention and/or for each period of the contravention, as appropriate.

Section 40: Penalty for contravention of order

146. **Section 40** provides that the CAA may impose a penalty where it has determined that a person is contravening or has contravened a requirement of an enforcement order or an urgent enforcement order that has been confirmed.

Section 41: Procedure before imposing penalty

147. **Section 41** provides that the CAA must, before imposing a penalty in respect of a contravention notice or contravention of a requirement of an enforcement order or urgent enforcement order that has been confirmed, give the person a notice about the proposed penalty, publish the notice as soon as practicable, send a copy to appropriate industry representatives and consider any representations made about the proposed penalty in the specified period of not less than 21 days. The notice must include the proposed amount of the penalty, which may be varied upon further notice. It must specify the relevant licence condition or requirement and the act or omission that the CAA has determined constitutes a contravention of the condition or requirement. Where the penalty is calculated entirely or partly by reference to a daily amount, the notice must specify the day on which daily amounts would begin to accumulate and the day on, or circumstances in which, they would cease to accumulate.
148. Before varying the proposed amount of the penalty, the CAA must give the person notice, specifying the proposed variation and giving the CAA's reasons for the proposed variation. The notice must be published as soon as practicable and a copy sent to appropriate industry representatives. The CAA must consider any representations made about the proposed variation in the specified period of not less than 21 days. A notice imposing a penalty or varying the proposed amount of the penalty may be withdrawn by the CAA at any time by giving notice to the person. Such a notice must be published as soon as practicable and a copy sent to appropriate industry representatives.

Section 42: Procedure after imposing penalty

149. **Section 42** provides that the CAA must, as soon as practicable after imposing a penalty in respect of a contravention notice or contravention of a requirement of either an enforcement order or an urgent enforcement order that has been confirmed, give notice to the person on whom the penalty is imposed, publish the notice and send a copy to

appropriate industry representatives. The notice must state the amount of the penalty imposed, specify the relevant licence condition or requirement and specify the act or omission that the CAA has determined constitutes a contravention of the condition or requirement. It must provide a reasonable period for payment of the penalty. Where the penalty is calculated entirely or partly by reference to a daily amount, it must specify the day on which daily amounts begin to accumulate and the day on which, or circumstances in which, they cease to accumulate.

Section 43: Amount of penalty

150. **Section 43** provides that the amount of a penalty that is imposed on a person for contravention of a licence condition or contravention of an enforcement order or an urgent enforcement order that has been confirmed may consist of either or both of a fixed or daily amount. It must be appropriate and proportionate to the contravention for which it is imposed. In determining the amount of a penalty, the CAA must have regard in particular to any representations made to it, any steps taken by the person on whom the penalty is to be imposed towards complying with the licence condition or requirement specified in the notice given under section 41(1), and any steps taken by that person towards remedying the consequences of the contravention or requirement.

Section 44: Amount of penalty: fixed amount

151. **Section 44** provides that a penalty of a fixed amount that is imposed on a person for contravention of a licence condition or contravention of an order must not exceed 10% of a person's qualifying turnover for the qualifying period. *Subsections (2) to (6) and (9)* explain what is meant by "qualifying turnover" and "qualifying period". The person's qualifying turnover for the qualifying period is to be taken to be the figure reported in what are known as regulatory accounts, unless regulations made by the Secretary of State (under *subsections (7) and (8)*) provide otherwise.

Section 45: Amount of penalty: daily amounts

152. **Section 45** provides that a penalty of a daily amount imposed on a person for contravention of a licence condition or of a requirement of an order is an amount payable where the contravention continues after the penalty is imposed. The daily amount, which must not exceed 0.1% of the person's qualifying turnover for the qualifying period, is payable in respect of each day in a specified period that the CAA considers appropriate.

Section 46: Use of powers under Competition Act 1998

153. **Section 46** provides that the CAA must consider whether it would be more appropriate to proceed under the Competition Act 1998 before exercising its powers to give a contravention notice or an enforcement order, to give and confirm an urgent enforcement order, and to impose penalties for contravention of a licence condition or contravention of an enforcement order or confirmed urgent enforcement order. The CAA must not proceed to exercise these powers if it considers proceeding under the Competition Act 1998 to be more appropriate.

Section 47: Appeals against orders and penalties and Schedule 3: Appeals against orders and penalties

154. **Section 47** gives effect to Schedule 3 which sets out the decisions against which a person may appeal to the Competition Appeal Tribunal in respect of action to enforce licence conditions, and the circumstances in which the Competition Appeal Tribunal may allow an appeal. Appeals may be made against a decision to give an enforcement order or to confirm an urgent enforcement order, the specified steps to be taken and the period allowed for taking those steps. A decision to modify or revoke such an order may be appealed. Appeals may also be made against a decision to impose a penalty, the

period allowed for payment, the amount of the penalty or, in the case of daily amounts, the period during which daily amounts accumulate. An appeal against an enforcement order or urgent enforcement order, or an appeal against a penalty for contravention of a licence condition or order, may be made by the person to whom the order has been given or on whom the penalty has been imposed (as the case may be). Appeals against modification and revocation of enforcement orders may be made by a person who is not the person to whom the order was given and who appears to the Competition Appeal Tribunal to have sufficient interest in the decision. The making of an appeal against an enforcement order, but not an urgent enforcement order, suspends the effect of the order until the appeal is decided or withdrawn, unless the Competition Appeal Tribunal orders otherwise. A further appeal may be made on a point of law arising from a decision of the Competition Appeal Tribunal.

Revocation of licence

Section 48: Revocation of licence

155. **Section 48** provides that the CAA may, by notice, revoke a licence in the circumstances specified in the licence (in accordance with section 17). Before revoking a licence the CAA must notify the licence holder that it intends to revoke the licence, giving its reasons and allowing the licence holder to make representations. The CAA must allow a period of at least 30 days from notification before it gives notice revoking a licence, unless the licence holder agrees otherwise. The period may be extended once for up to 30 days. The CAA may withdraw a notice revoking a licence, giving its reasons for doing so. The notice of revocation, extension or withdrawal must be published as soon as practicable after it has been given and a copy must be sent to appropriate industry representatives.

Section 49: Appeals against revocation of licence and Schedule 4: Appeals against revocation of licence

156. **Section 49** gives effect to Schedule 4 which provides for appeals against a decision to give a notice revoking a licence and a decision to give a further notice withdrawing a licence revocation notice, except where such a notice was given in accordance with a direction given by the Competition Appeal Tribunal. An appeal may also be made against a decision as to the day on which revocation takes effect. The making of an appeal suspends the effect of the notice and extends the period specified in the notice until the appeal is decided or withdrawn. A further appeal may be made on a point of law arising from a decision of the Competition Appeal Tribunal.

Obtaining information

Section 50: Power to obtain information

157. **Section 50** provides that the CAA may, by notice, require a person to provide information or a document that it reasonably requires for the purposes of carrying out its functions under Chapter 1 of Part 1. The information or document required may only be of a kind which a person could be compelled to produce in evidence in civil proceedings before a court.

Section 51: Enforcement of information notice

158. **Section 51** provides that the CAA may impose a penalty that is appropriate and proportionate of a fixed amount up to £2,000,000 and/or a daily amount up to £100,000 on a person who fails to comply with a notice to provide information or a document. The Secretary of State may by regulations amend those amounts.

Section 52: Penalty for providing false information, destroying documents etc

159. **Section 52** provides that the CAA may impose a penalty that it considers appropriate and proportionate on a person who, in relevant circumstances, knowingly or recklessly provides information that is false or misleading. The relevant circumstances are where the person provides the false or misleading information in accordance with a licence condition or in response to a notice under section 50 or knowing that the information is likely to be used by the CAA for the purpose of carrying out its functions under Chapter 1 of Part 1. A penalty may also be imposed if a document that is required to be produced by a notice under section 50 is intentionally altered, suppressed or destroyed.

Section 53: Procedure before imposing penalty

160. **Section 53** provides that before imposing a penalty in respect of a failure to comply with a notice under section 50 or in respect of the provision of false or misleading information etc, under section 52 the CAA must give notice about the proposed penalty, including the proposed amount. Such a notice must be published and a copy sent to appropriate industry representatives. The CAA must allow for a representation period of not less than 21 days. Before making any variation to the proposed amount or to the day on which daily amounts begin or cease to accumulate, or to the circumstances in which they cease to accumulate, the CAA must give notice, publish the notice, send a copy of the notice to appropriate industry representatives and consider any representations made.

Section 54: Procedure after imposing penalty

161. **Section 54** provides that as soon as practicable after imposing a penalty under section 51 or 52 the CAA must give a notice to the person on whom the penalty was imposed. The notice must be published and must state the amount of the penalty, give the CAA's reasons and specify a reasonable period within which the penalty must be paid.

Section 55: Appeals against penalties and Schedule 5: Appeals against penalties: information

162. **Section 55** gives effect to Schedule 5 which sets out the basis on which a person may appeal to the Competition Appeal Tribunal against a penalty imposed on the person for failure to provide information or for providing false or misleading information etc. An appeal may be made against any of the decisions mentioned in paragraph 1(2) of Schedule 5, including the amount of penalty and the period allowed for payment. Schedule 5 sets out the grounds for appeal, and makes provision about decisions on appeal. A further appeal may be made on a point of law arising from a decision of the Competition Appeal Tribunal.

Penalties

Section 56: Imposing penalties

163. **Section 56** provides that the CAA may not impose a penalty under section 39, 40 or 51 in respect of an act or omission for which a penalty has already been given under one of those sections, unless the acts or omissions took place at different times or over different periods.

Section 57: Recovering penalties

164. **Section 57** provides for the consequences of unpaid penalties including recovery of unpaid balances and interest due to the CAA, which must be paid into the Consolidated Fund.

Section 58: Statement of policy on penalties

165. **Section 58** provides that the CAA must prepare and publish a statement (including any revised statement) of its policy on penalties. The CAA must consult when preparing or revising a policy statement. Section 58 also provides that the CAA must, when imposing a penalty or determining the amount of a penalty, take into consideration the last statement of policy published before the contravention in respect of which the penalty is to be imposed.

Disclosing information

Section 59: Disclosing information and Schedule 6: Restrictions on disclosing information

166. **Section 59** provides that the CAA is not required to publish or otherwise disclose commercial information and information relating to the private affairs of an individual where they are satisfied such disclosure would cause significant harm. It gives effect to Schedule 6. Schedule 6 imposes a prohibition on the disclosure of information which relates to the affairs of an individual or a particular business and is obtained under or by virtue of Chapter 1 of Part 1 of the Act, subject to permitted exceptions. Those exceptions include where information is disclosed by the CAA to facilitate carrying out its regulatory functions under Part 1 of the Act or its functions under section 83 or 84 and disclosure for the purposes of law enforcement or criminal proceedings.

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.
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.

Chapter 3 – General Provision

Interpretation

Section 66: Airports and Section 67: Airports: supplementary

192. These sections define what an airport is for the purposes of this Part of the Act.
193. *Section 66(1)* states that an airport comprises an aerodrome (as defined in the CAA 1982) as well as other land, buildings and structures used for the purposes described in paragraphs (a) to (f).
194. Section 105(1) of the CAA 1982 defines an aerodrome as “any area of land or water designed, equipped, set apart or commonly used for affording facilities for the landing and departure of aircraft and includes any area or space, whether on the ground, on the roof of a building or elsewhere, which is designed, equipped or set apart for affording facilities for the landing and departure of aircraft capable of descending or climbing vertically”.
195. *Section 67* provides further clarification on what is and is not included in the definition of an airport. For example it states that a passenger (who has not arrived by air) arrives at the airport when they arrive at one of the following:
 - the passenger terminal building;
 - the terminal forecourt; or

- a car park with pedestrian access to the terminal.
196. The Secretary of State may by regulations provide that land, buildings and other structures are or are not to be treated as part of an airport, or part of the core area of an airport, for the purposes of Part 1 of the Act.

Section 68: Airport operation services

197. The CAA's primary duty (section 1(1), which governs all of its functions under Chapter 1 of Part 1) is to further the interests of users of air transport services regarding the range, availability, continuity, cost and quality of *airport operation services*.
198. *Subsection (1)* defines what services provided at an airport (as defined in sections 66 and 67) comprise "airport operation services". They include services provided for the landing, taking off, servicing and parking of aircraft and for the arrival, departure and processing of passengers and cargo. For example, providing facilities for baggage reclaim is included and so is providing lighting on the runway. *Subsections (3) and (4)* provide further clarification on what services are and are not included in airport operation services. For example, they do not include air transport services (defined in section 69) or air traffic services (defined in section 72) or retail sales in terminal shops.
199. For the purposes of this Part of the Act *subsection (5)* clarifies that "airport operation services" include permitting a person to access or use land. Section 72(2) further clarifies that any reference to providing a service includes providing a facility. As a result the provision of space to retailers in the terminal building would be caught by the definition of airport operation services; however, due to section 68(3)(c), the provision of retail services (for example duty free sales) would not.
200. The Secretary of State may by regulations provide that services are or are not to be treated as airport operation services for the purposes of Part 1 of the Act.

Section 69: Air transport services

201. The CAA's primary duty (section 1(1), which governs all of its functions under Chapter 1 of Part 1) is to further the interests of users of *air transport services* regarding the range, availability, continuity, cost and quality of airport operation services.
202. This section defines "air transport service" and "provider" and "user" of such services. Users comprise: current and future passengers of both commercial and private flights; and those with current and future property rights in cargo which is transported by air.
203. The definition of users of air transport services does not include airlines, pilots or other members of crew.
204. Only flights to or from airports in the United Kingdom are covered by the definition.

Section 70: Joint operators of areas

205. *Subsection (1)* of this section defines joint operators in relation to airport areas. There are joint operators where two or more persons jointly have overall responsibility for the management of all of the area. This mirrors the provision made by *subsection (1)* of section 9 in relation to sole operators.
206. One example of joint operators would be where the ownership structure of an airport area is a partnership. Partnership is defined by section 1 of the Partnership Act 1890 as "the relation which subsists between persons carrying on a business in common with a view of profit".
207. *Subsection (2)* clarifies that the power of the Secretary of State to make regulations under section 9 about when a person is or is not to be treated as having overall responsibility for the management of an airport area includes power to make provision

about when two or more persons are to be treated as jointly having overall responsibility for the management of an airport area.

- 208. *Subsection (3)* clarifies that the CAA's powers in section 10 to make operator determinations include the making of a determination that there are joint operators.
- 209. *Subsection (4)* empowers the Secretary of State to make regulations modifying the provisions of Chapters 1 and 3 of the Act in respect of joint operators. This is required because aspects of Chapters 1 and 3 may need to be modified in order to apply in the intended way where there are joint operators.

Section 71: Connected persons

- 210. *Sections 3, 16, 21, 23, 25, 44* and Schedule 2 refer to the concept of "connected persons". Section 71 defines this concept for the purposes of Part 1 of the Act. Connected persons are defined by reference to the Companies Act 2006 using the definition of "group undertaking" set out in section 1161 of that Act in order to cover any arrangements an operator may have within a company group. *Subsection (3)* enables the Secretary of State to modify the "connected persons" definition for the purposes of Part 1.

Other general provision

Section 76: Minor, consequential and transitional provision

- 211. This section repeals Part 4 of the AA 1986 and revokes Part 4 of the Airports (Northern Ireland) Order 1994. It also gives effect to Schedule 8 (consequential amendments relating to the status of airport operators as statutory undertakers in Great Britain and Northern Ireland), Schedule 9 (other consequential amendments) and Schedule 10 (transitional provision).

Schedule 8: Status of airport operators as statutory undertakers etc

- 212. *Part 1* of Schedule 8 amends Part 5 of the AA 1986 and Article 2 of the Airports (Northern Ireland) Order 1994 (the "1994 Order") to make provision for conferring the status of statutory undertaker on certain airport operators.
- 213. Under the AA 1986 an airport operator has statutory undertaker status if a permission to levy charges under Part 4 of the AA 1986 has been granted in respect of the airport, or there is a subsisting pending application and it is not for these purposes an excluded airport under section 57(2) of that Act. Under section 37(2) of the AA 1986 permission to levy charges is necessary where the annual turnover of the airport operator exceeds £1million per financial year in at least two of the last three financial years.
- 214. *Part 1* of the Act will repeal section 37 of the AA 1986 and this financial threshold will no longer be the determining factor as to whether an airport is regulated. Therefore consequential amendments are needed to the AA 1986 to enable the status of statutory undertaker to be conferred upon airport operators and preserve the position in respect of existing airport operators which have had such status conferred upon them.
- 215. Section 57 of the AA 1986 is substituted with section 57A, which provides that a relevant airport operator will have the status of a statutory undertaker where a certificate has been granted in respect of the airport of which it is the operator. The CAA will grant such a certificate if the airport operator has applied for the certificate, has paid the relevant charge, and is eligible. An airport will continue to be eligible where the annual turnover of the business carried on by the operator at the airport exceeds £1 million in at least two of the last three financial years.
- 216. Airports owned solely or jointly by a principal council, an Integrated Transport Authority (as defined by the Local Transport Act 2008) in England or a metropolitan

county passenger transport authority in Scotland are excluded from being an eligible airport.

- 217. A certificate may be withdrawn by the Secretary of State (in relation to an airport in England and Wales) or the Scottish Ministers (in relation to an airport in Scotland) if the airport no longer meets the eligible annual turnover in the relevant financial years. Before withdrawing a certificate the Secretary of State or the Scottish Ministers (as appropriate) must consult the CAA and the airport operator. The withdrawal of a certificate does not affect rights or liabilities accrued during the period when a certificate had been granted.
- 218. The Secretary of State may make regulations about the operation of new section 57A of the AA 1986 in cases in which there is more than one operator at an airport (see paragraph 5 of Schedule 8).
- 219. The Secretary of State may make an order substituting a greater sum than £1 million.
- 220. Separate arrangements exist in Northern Ireland for the conferral of statutory undertaker status on airport operators. Part 2 of Schedule 8 makes amendments to the 1994 Order for airports in Northern Ireland to achieve a similar effect to the Great Britain arrangements.

Schedule 10: Regulation of operators of dominant airports: transitional provision

- 221. **Part 1** of Schedule 10 to the Act contains the key elements for the transition to Part 1 of the Act from the existing regulatory regime set out in Part 4 of the AA 1986 and Part 4 of the 1994 Order. Further transitional provision will be made in secondary legislation.
- 222. **Paragraph 1** of Schedule 10 defines for the purpose of this Schedule an interim period, which will run from the date of commencement of section 3 (“the commencement day”) until 31 March 2014. The remainder of the Schedule makes provision about the operation of the AA 1986, the 1994 Order and the Act during that period.
- 223. **Paragraphs 2 and 3** apply where an airport is designated under the AA 1986 or the 1994 Order at the beginning of the interim period. There are currently three designated airports - Heathrow, Gatwick and Stansted – which are subject to price controls that expire on 31 March 2014. The Government has made a commitment not to disturb the current price control settlements for those airports.
- 224. **Paragraph 2(2) and (3)** provide that, on the commencement day”, a designated airport under the AA 1986 will be treated as having met the market power test under section 6 and as if the CAA had published a notice of that determination under section 8.
- 225. **Paragraph 2(4)** has the effect that the CAA may not treat this determination as having been previously made for the purposes of section 7(5). Therefore the CAA could not refuse a request from the operator of the airport area and/or other persons whose interests are likely to be materially affected by the determination on the basis that there has been no material change of circumstances since section 3 came into force.
- 226. **Paragraph 2(6)** disapplies the right of appeal in relation to the market power determination which is treated as made under paragraph 2(3). But it does not remove the right of appeal under section 13 and Schedule 1 where a market power determination is made in response to a request made after the commencement day”. The CAA is obliged to respond to a request made by the operator of the airport area in question or a person whose interests are likely to be materially affected by the determination (see section 7).
- 227. **Paragraph 3(2)** provides an exemption during the interim period from the prohibition under section 3. In brief, section 3 prevents specified persons from requiring others to pay relevant charges for airport operation services provided in an airport area if the operator of the area does not have a licence. The exemption under paragraph 3(2) applies to any person at an airport which is a designated airport on the commencement day”.

228. [Paragraph 4\(1\)](#) provides that if a decision was made to designate an airport, or to confirm or revoke a designation, on or after 10 November 2011, the CAA can refuse to make a market power determination (if it is requested to do so) if it considers that there has not been a material change of circumstances since the previous decision. The [Airport Charges Regulations 2011\(SI 2011/2491\)](#) came into force on 10 November 2011. They amended the AA 1986 and the 1994 Order to provide for mandatory procedures whereby the CAA examines whether airport operators have or are likely to acquire substantial market power.
229. [Paragraph 4\(2\)](#) provides for the handling of requests made before the commencement day” for an order designating an airport or revoking its designation. If the Secretary of State (or the Department of the Environment in Northern Ireland) has not made such an order (or a decision not to make such an order) before the commencement day”, the request will be treated as a request for a market power determination under the Act.
230. [Paragraph 5](#) provides that during the interim period no orders can be made designating an airport under the AA 1986 or the 1994 Order. If, during the interim period, a designated airport ceases to be a dominant airport for the purposes of Part 1 of the Act, an order must be made revoking the designation subject to the specified restrictions set out in paragraph 5(4). The decision on whether an airport is still dominant will be made by the CAA and, if the CAA’s decision is that the airport has ceased to be dominant, the Secretary of State (or the Department of the Environment in Northern Ireland) must then make an order revoking its designation. The Secretary of State (or the Department of the Environment in Northern Ireland) is to have no discretion when making such an order.
231. [Paragraph 5\(4\)](#) provides that the Secretary of State (or the Department of Environment in Northern Ireland) must not revoke such an order in three circumstances: 1) during the sixty day period in which a person may make an appeal to the Competition Appeal Tribunal against the market power determination; 2) at a time when the effect of the market power determination has been suspended by the Competition Appeal Tribunal or when the Secretary of State or the Department of the Environment in Northern Ireland considers it may be suspended; or 3) if all or part of the market power determination has been set aside or quashed.
232. [Paragraph 5\(5\)](#) provides that where a request is made during the interim period for an order revoking an airport’s designation and the Secretary of State (or the Department of the Environment in Northern Ireland) has not made such an order before the end of this period, the request is to be treated as a request for a market power determination.
233. [Paragraph 6](#) makes provision to address the different definitions of an “airport” under the AA 1986 or the 1994 Order and sections 66 and 67 of this Act to ensure that the provisions in this Schedule are properly applied during the interim period.
234. For example, paragraph 6(3) provides that where an airport (as defined in the AA 1986 or the 1994 Order) is designated under that Act or Order, the effect of paragraph 2(2) and (3) of Schedule 10 is that the main operator’s airport area will be treated as having met the market power test. The main operator’s airport area is the area at the airport (as defined in this Act) which is under the overall management of the person who, immediately before the commencement day”, was the operator of the airport for the purposes of the AA 1986 or the 1994 Order.
235. [Paragraph 7](#) restricts the power under section 108 for the Secretary of State to amend Part 1 of Schedule 10 so that the power cannot be used to end the interim period before 31 March 2014. This prohibits any amendments which would in effect remove the exemption from the prohibition for people at designated airports from the prohibition before 31 March 2014. It does so in order to ensure that the current price controls affecting designated airports are not disturbed before 31 March 2014, unless the designations are revoked.

236. [Part 2](#) of Schedule 10 makes transitional provision for airport operators that currently have the status of statutory undertakers by virtue of Part 5 of the AA 1986 or Article 25 of the 1994 Order.
237. Under the AA 1986 an airport operator has statutory undertaker status if a permission to levy charges under Part 4 of that Act has been granted in relation to the airport or it has a pending application for such a permission and the airport is not an excluded airport described in section 57(2) of that Act. Excluded airports include airports owned by certain types of local authority. Under section 37(2) of the AA 1986 permission to levy charges is necessary where the annual turnover of the airport operator exceeds £1million per financial year in at least two of the last three financial years.
238. Under new section 57A of the AA 1986 (to be inserted by Schedule 8), an airport operator will have statutory undertaker status by virtue of Part 5 of the AA 1986 if a certificate has been granted under that section in respect of the airport.
239. [Paragraph 9](#) of Schedule 10 provides that, where a permission to levy charges is in force in respect of an airport immediately before the day on which Schedule 8 to the Act comes into force, the permission is to be treated as if it were a certificate given under section 57A of the AA 1986. So the airport operator's status as a statutory undertaker will be uninterrupted.
240. [Paragraph 10](#) of Schedule 10 makes similar provision for cases in which an application under section 38 of AA 1986 for permission to levy charges is pending on the commencement day".
241. Separate arrangements exist in Northern Ireland for conferring statutory undertaker status on airport operators under the 1994 Order. Paragraphs 14 to 18 of Schedule 10 make provision in relation to airports in Northern Ireland that achieves a similar effect to the Great Britain arrangements described above.

Section 77: Crown application

242. This section provides that Chapter 1 (other than sections 50 to 52 on obtaining information), Chapters 2 and Chapter 3 bind the Crown, subject to certain exceptions mentioned in or provided by the section. It also provides that Chapters 1 and 3 do not affect Her Majesty in her private capacity.
243. *Subsection (5)* provides that nothing in Chapters 1 and 3 prevents a person from requiring payment of, or recovering, charges in respect of services provided in the course of carrying out exempt Crown functions (as defined in *subsection (12)*), i.e. customs functions, immigration functions, police functions and other functions exempted by regulations, to the extent that such functions are carried out by or on behalf of the Crown.
244. *Subsection (6)* provides that if the operator of an airport area exercises overall responsibility for its management in the course of carrying out exempt Crown functions, the absence of a licence in respect of the airport area does not prevent charges being imposed in respect of services provided at another area in the same airport. It also removes the possibility of the CAA being required, in response to a request under section 7(2), to make a market power determination in respect of a core airport area operated by a person exercising exempt Crown functions; and disapplies section 14(4) so that any person carrying out exempt Crown functions is not to be treated as having applied for a licence in respect of the relevant airport area in the event of the area becoming a dominant area at a dominant airport.
245. *Subsections (7) to (9)* provide for services provided in an exempt Crown airport area to be excluded from the scope of economic regulation. "Exempt Crown airport area" is defined in *subsection (10)*, which provides amongst other things that the area must be part of a small airport (an airport where the number of passenger movements did not exceed 5 million during the previous calendar year or the airport was not open to

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

commercial traffic) and that it must be explicitly excluded from the scope of economic regulation through regulations made by the Secretary of State.