



HEATHROWWEST

Your Choice For A New Terminal

The Arora Group's Response to CAP 1782 Economic Regulation of Capacity at Heathrow: Policy Update and Consultation

May 2019

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ECONOMIC REGULATION OF CAPACITY AT HEATHROW: POLICY UPDATE AND
CONSULTATION

1. INTRODUCTION AND SUMMARY

- 1.1 This submission is provided by the Arora Group in response to the Civil Aviation Authority (CAA)'s consultation "*CAP 1782 Economic regulation of capacity expansion at Heathrow: Policy update and consultation*", published in March 2019 (**CAP 1782**), and builds on Arora's responses to the CAA's previous consultations (CAP 1541 to CAP 1722).
- 1.2 As we have consistently stated, we fully endorse the CAA's position that additional runway capacity in the south east of England will benefit air passengers and cargo owners. We also continue to support the Government's Northwest Runway Scheme (**NRS**) and provide evidence that we can make a positive contribution in ensuring it is implemented and operated in an efficient manner to the benefit of consumers.
- 1.3 We have defended the legal challenges to the designation of the airports national policy statement (**ANPS**) as an interested party to the various legal challenges, given our interest in the delivery of Heathrow expansion, and the judgment was handed down on 1 May 2019. As we set out in more detail in **Section 2** below, that judgment made some key findings regarding Heathrow Airport Limited (**HAL**)'s dominant position at Heathrow and the application of competition provisions to the process of expansion. As a result, the Government, DfT and CAA must bear in mind the risks of allowing HAL to influence the structure of competition at Heathrow or the decision-making process regarding Heathrow expansion in a manner which could amount to a breach of those provisions.
- 1.4 We continue to encourage the CAA to provide a level playing field for alternative parties. Competition will enable the highest quality solution to be adopted for the benefit of the UK, consumers, the local community and all stakeholders.
- 1.5 We have also been progressing our own plans to promote components of the NRS supported by the ANPS and provide a further update on our progress below.
- 1.6 This submission takes a focused approach on certain key points in CAP 1782 and Arora's position can be summarised as follows:
 - 1.6.1 We welcome the CAA's confirmation of its intention to introduce a licence condition requiring HAL to run its business economically and efficiently and consider it should be introduced as soon as possible;
 - 1.6.2 That said, we are disappointed that HAL's failure to engage with a competitor would not *prima facie* engage the condition. In our view, this risks seriously undermining the CAA's policy on alternative delivery mechanisms, since the condition would only assist in facilitating HAL's engagement with third parties bringing forward alternative proposals in circumstances where those proposals contain no element of actual or potential competition with HAL's;
 - 1.6.3 We welcome the CAA's focus on our proposals and are committed to progressing the key areas highlighted by the CAA. In this endeavour we expect – and require – the full engagement and cooperation of the CAA;
 - 1.6.4 However, we do not accept that the CAA should set the bar higher for third parties like Arora than for HAL, and we urge the CAA to begin work on the regulatory framework

imminently, to guard against the risk of the regulatory framework not being able to accommodate our proposals should our DCO application succeed.

2. UPDATE ON ARORA'S PROPOSALS

- 2.1 Arora has continued to progress its proposals, now branded Heathrow West, in a number of respects.
- 2.2 Arora has now assembled a team of recognised experts including in particular:
 - 2.2.1 Bechtel (delivery partner)
 - 2.2.2 Scott Brownrigg (architecture)
 - 2.2.3 Royal HaskoningDHV (including NACO) (engineering, aviation and environment)
 - 2.2.4 DWD (planning)
 - 2.2.5 LDA Design (masterplanning, green infrastructure and sustainability)
 - 2.2.6 CMS (legal)
 - 2.2.7 BECG (engagement)
 - 2.2.8 Millar Management (baggage handling)
 - 2.2.9 Aibara Associates (security)
 - 2.2.10 Bruton Knowles (land referencing)
 - 2.2.11 RPS (mechanical, structural, electrical)
 - 2.2.12 Doig & Smith (cost)
 - 2.2.13 CT Group (communications)
- 2.3 We have had several meetings with the Planning Inspectorate (**PINS**), which in March 2019 issued its opinion on our Environmental Impact Assessment Scoping Report submitted on 14 February 2019. PINS' Scoping Opinion confirms that Arora's Scoping Report was compliant with the requirements of the Environmental Impact Assessment Regulations, and PINS were satisfied that it included: 1) a plan sufficient to identify the land; 2) a description of the proposed development, including its location and technical capacity; and (3) an explanation of the likely significant effects of the development on the environment. We continue to meet regularly with PINS as we progress our plans.
- 2.4 We have begun our Stage One consultation, which runs for eight weeks from 30 April to 25 June 2019, and are engaging with local communities and key stakeholders throughout this period. We have provided the CAA with copies of our Stage One consultation documentation.
- 2.5 We defended the legal proceedings against the ANPS as an interested party and attended the hearing which took place between 11 March 2019 and 22 March 2019. The final judgment handed down on 1 May 2019 made a number of key findings which will have a bearing on Heathrow expansion and which it will be important for the DfT, CAA and other stakeholders to bear in mind as both HAL's and our proposals for Heathrow expansion progress:
 - 2.5.1 The judgment acknowledged, consistent with Arora's submissions on this point, that the ANPS allows for competitors to HAL to apply for a DCO to build and/or operate elements of the NWR scheme, in particular the terminal.

- 2.5.2 The judgment found HAL to be in a dominant position, on the market for the provision of airport operation services (and related services) in the South East of England, and HAL's market power derives from HAL's operative control of Heathrow and the fact that Heathrow airport itself has no substitute.
- 2.5.3 The judges found HAL to be a "privileged" undertaking which has been granted special or exclusive rights and which has accumulated substantial market power as a result of those rights.
- 2.5.4 Provisions which prevent the UK Government from enacting or maintaining measures which would allow HAL to abuse its dominant position apply to the process of Heathrow expansion, including in the context of the judgment the selection of one scheme over another following the Airports Commission process (under Article 106 of the Treaty on the Functioning of the EU). This can include measures which allow HAL to materially influence or affect the Government's preference, decision and/or the structure of or competition in the market for the provision of airport operation services in the South East of England.
- 2.6 We have also been engaged in regular discussions with key stakeholders, including the CAA and airlines. We will continue to update the CAA at our regular meetings as we progress our plans.
- 3. PROMOTING ECONOMY AND EFFICIENCY**
- 3.1 As we indicated in our response to CAP 1722, we welcome the CAA's proposals to introduce a new condition in HAL's licence to require HAL to conduct its business in an economical and efficient manner. We therefore welcome and strongly support the CAA's statement in CAP 1782 that it is minded to continue with the development of this condition, notwithstanding HAL's opposition. This is an important additional element of the CAA's toolkit to address issues with HAL's conduct, particularly in the critical context of Heathrow expansion and against the backdrop of delays and ballooning estimates of cost.
- 3.2 The CAA's reference to significant increases in HAL's Category B and C costs (paragraph 17) is further evidence of the essential requirement for this condition, alongside the equivalent inclusion of alternative party proposals.
- 3.3 We have already voiced our concerns about any delay in introducing this condition, and while we would have preferred the CAA to introduce it as soon as possible, we urge the CAA not to let the timetable for its introduction slip beyond the end of 2019.
- 3.4 We note – and welcome – the CAA's comments stating that any reference to elements of its duties in the condition is not strictly necessary and merely aids interpretation of the condition. We would caution the CAA against departing from this position and focusing on certain elements of its duties only, in particular on HAL's need to finance the provision of airport operation services which it has included in B.3.3 of the draft condition. HAL's compliance with the condition should be assessed in the round against all of the CAA's duties.
- 3.5 Overall, we consider the condition is a positive and necessary step to assist in changing HAL's behaviour in the context of its operation of Heathrow and the airport expansion. However, we obviously remain disappointed with the statement that HAL's failure to engage with a competitor is not an indication of inefficiency absent substantive evidence. There are significant benefits in running an efficient process with a common baseline of datasets and activities, which would enable an effective and fair comparison of the impacts both schemes (the importance of which has been emphasised in the PINS Scoping Opinion), without reducing the rivalry and competition

between both schemes. The comparative assessment of both schemes should focus on their impacts and outputs, not their inputs and underlying data. Setting a high threshold on ‘competitors’ of HAL – as this statement does in respect of the application of this condition – risks seriously undermining the CAA’s policy on alternative delivery mechanisms, unless those are strictly limited to suppliers procured by HAL and which do not have any element of competition with HAL’s proposals. It also sits at odds with the CAA’s April 2018 Section 16 Report which expressly set out an expectation for HAL to develop a clear and inclusive process for engaging with third parties (including those bringing forward proposals). The CAA must recognise that any competitor to HAL is necessarily at a competitive disadvantage. HAL has a wealth of data and information from solely operating Heathrow Airport for over thirty years, and most of its costs are allowable, unlike those of competitors. The CAA has a key role to play in levelling the playing field.

4. ALTERNATIVE DELIVERY ARRANGEMENTS

- 4.1 We welcome the CAA’s continued focus on our proposals and its stated willingness to continue engaging with us. This is important to enable the CAA to properly assess alternative parties and delivery mechanisms.
- 4.2 We are fully committed to continuing the development of our plans, as our recent progress set out in **Section 2** above demonstrates, and we are also fully committed to and engaging in progressing our proposals in the key areas highlighted by the CAA in Annex E (although the tests will need to be progressive and need some refinement). It should also be noted that the scope of some will need to be adjusted as we will not be including a runway.
- 4.3 That said, we do not accept that the onus is entirely on us to make such progress. As we have said previously, we will need and expect the CAA to be fully proactive in driving the competition framework for the airport and to engage in detailed and regular dialogue with us and to comprehensively cooperate with us going forward. The CAA’s input will be a critical element of our plans and we expect to work through each item of Annex E with the CAA’s full cooperation and engagement.
- 4.4 We welcome the CAA’s openness in dealing with us with regards to these points, but we would urge caution in the following respects.
- 4.5 *First*, while we note the CAA’s comment that it does not expect to treat us and HAL identically, we do not accept that the CAA should hold us to a higher standard or subject us to a significantly higher level of scrutiny than HAL. The CAA must take a consistent approach with an appropriate and common standard. Indeed, it should not be taken from the CAA’s (and Arcadis’) comments regarding the need to consider the credibility, plausibility and deliverability of our proposals that there are no such issues with HAL’s. Airlines have for some time now raised concerns regarding the lack of quality information regarding the costs, efficiency and affordability of HAL’s proposals (which even the Department for Transport recognises is ‘*a critical test of HAL’s credibility*’¹) as well as concerns around timescales.
- 4.6 *Second*, we urge the CAA not to delay the development of a regulatory framework and related points regarding our proposals. As we have previously stated, Arora is committing significant resource and investment to the development of its proposals and needs to have the confidence that the CAA will adjust the regulatory framework in time to accommodate our proposals. The CAA has already delayed consideration of this framework. It is critical that any further delay does not

¹ Caroline Low’s letter to the CAA dated 23 January 2019.

risk making the regulatory context a hindrance in the progress of our DCO application, particularly when compared with the mature regulatory framework already designed to accommodate HAL's current monopoly position, and in light of PINS' request that our Environmental Statement confirms "*what uncertainty this introduces into the programme of works proposed*" (para. 2.4.3 of the Scoping Opinion). The CAA will need to have a clear framework for how different operators could fit into the airport to enable it to give its views in response to respective DCO applications. There will be a significant amount of work in this area and the CAA's workstream should therefore be started early.

- 4.7 *Third*, we do not consider that the CAA's reference to issues within the DfT's Relationship Framework Document (para 4.21) should be a reason for the CAA to not give full and equivalent support to, and focus on, Arora's proposals. In particular, HAL would equally need to compulsorily acquire land from Arora and we do not consider that HAL would have a veto on a separate operator working alongside it – indeed this would be inconsistent with the recent findings of the High Court judgment in the judicial review claims regarding the ANPS. The CAA's earlier Technical Information Note specifically confirms that the CAA has the power to integrate a separate operator. We would expect the CAA to regulate HAL's behaviour strongly and effectively.
- 4.8 We urge the CAA to begin consideration of these issues imminently and we look forward to working with the CAA's team and other stakeholders to progress these and the other areas highlighted. We would request our involvement in the workshops referred to by the CAA in paragraph 20.
- 4.9 As we have separately noted to the CAA, we continue to be frustrated by HAL's refusal or delay in providing us with key information for the development of our proposals on a range of grounds which tend to indicate a deliberate strategy and refusal to engage rather than genuine justifications for withholding information. The CAA has made it clear, including in CAP 1722, that it expects targeted and justified requests for information from us, demonstrating how we comply with CAA policy. We have now done this and still failed to receive a positive response from HAL. It is now time for the CAA to consider further 'focused' action as it has previously stated it is prepared to do.