

THE GOVERNMENT'S DECISION TO SUPPORT A THIRD RUNWAY AT HEATHROW

1. *What are the key aspects of the decision, and why are they significant?*

Except for a substantial adjustment to the economic case, the government's policy decision to support a third runway at Heathrow followed the recommendation and reasoning of the Airports Commission. It is more than a decision in principle but is subject to the outcome of both public consultation on the forthcoming National Policy Statement on Airports and a debate in Parliament. As the Secretary of State said in his statement to the House of Commons on 25 October 2016:

“The Government decided very clearly today on their recommendation, which will have to be validated in the statutory process. It must be voted on and confirmed by the House, and that is what will happen. However, we are not entering the process with a view to changing our minds.”

The heart of the decision in favour of Heathrow is the need for Heathrow to continue to function as Europe's foremost hub airport. The Secretary of State rejected the concept of a second runway at Gatwick. However, that is not a view shared by Gatwick Airport Limited, its operators. As the House of Commons Library Briefing Paper on Heathrow Airport published on 19 October 2016 stated, “There would be nothing preventing any other airport from putting in a planning application irrespective of the government's preferred option”. It would then be a matter for future consideration of the weight to be given to government policy and whether there are materially changed circumstances favouring Gatwick over Heathrow.

Legally significant aspects of the decision are the government's commitment to guarantee increased connectivity with the Regions, the guarantee of respite to local communities and the ability to meet noise and air pollution control obligations. All could be the subject of legal controversy.

2. What are the likely implications for lawyers in different practice areas (e.g. planning, construction, environment) and their clients?

An infrastructure project on this scale requires substantial resources and teams of specialist lawyers to be employed over a number of years. Planning, property and environmental lawyers will need to devise and scrutinise the Development Consent Order application. The process is carried out almost entirely by written submissions, normally drafted by lawyers. In addition to public inquiries, lawyers will be advising and representing promoters and landowners in settlement negotiations of claims and objections to the various Orders.

The land acquisition aspects of the Orders will be both extensive and complicated. These include the compulsory purchase of some 800 homes, numerous businesses and over 500 hectares of land including British Airways' HQ.

The surface access effects of diverting and constructing roads and motorways to accommodate a third runway could be some of the most complicated ever proposed in conjunction with airport expansion as Transport and Works Act Orders. The consequences in terms of traffic pollution effects could be particularly serious for promoters if legally binding Regulations and EU Directives would be likely to be breached. It is then a question of timing. As advised at the time of the 2003 White Paper, the construction of a new runway does not cause pollution problems, it is its use that has that potential and its use can be controlled.

Assuming the Orders are confirmed, the project to construct the third runway will be likely to be one of the world's largest development projects taking place. The implementation and construction of a third runway will require the negotiation of numerous contracts and some will inevitably lead to legal disputes including litigation over many years requiring specialist commercial and construction lawyers as well as those practising in health and safety.

The implications for the airlines and the aviation and aerospace industry include reconsideration of aircraft fleet renewal contracts and leases. An airline's fleet mix is determined many years ahead but contracts for future orders will inevitably be reviewed as a result of the strict air pollution and noise requirements and on-board air traffic management technology which will be required to operate at Heathrow when R3 becomes operational. These will all have legal implications both in the UK and internationally for commercial and aviation lawyers.

3. *What happens next? Is the decision likely to be subject to any challenge? If so, what form is this likely to take and who is likely to bring it?*

There have been numerous rumours of threatened litigation, in particular concerning judicial review on grounds including that the government's decision is flawed as it would not be capable of meeting environmental obligations.

Any such claimants would need standing and may include environmental groups, residents' groups, rival airport operators or local authorities whose areas would be adversely affected.

If such a party or body seeks to challenge the government at this stage, it is almost inevitable that the government would argue that the challenge is premature. However, the counter to this may be that it would be wrong to delay a challenge if it is inevitable that there would be a regulatory breach or if a delay in challenging would cause greater prejudice or administrative difficulties. There is always the potential that if a judicial review challenge is not taken at an early stage but later, it will be met with the argument that the challenge should have been taken earlier.

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