

Executive summary

1. On 19 November 2019, British Airways and Qatar Airways jointly applied for authorisation, pursuant to section 88 of the Civil Aviation Act 1990, to coordinate their air passenger services on 26 routes between Auckland and the UK or Europe, which incorporate the London-Doha trunk route. Currently, British Airways has no direct flights to or from New Zealand, while Qatar Airways usually offers daily flights from Auckland to Doha¹.
2. The proposed codeshare arrangement may include coordination of schedules, revenue planning and pricing, sales and marketing activities, and service parameters and standards. Authorisation is sought for a term of 5 years. The coordination would be based on an existing Joint Business Agreement between the applicants.
3. The effect of authorisation under this section is that the proposed cooperation would be exempt from the provisions of the Commerce Act 1986 that prohibit arrangements substantially lessening competition.
4. The Ministry of Transport recommends that the Minister of Transport authorises the proposed arrangements for British Airways and Qatar Airways to coordinate their air passenger services.
5. We consider that the proposed cooperative arrangement meets the statutory conditions allowing it to be authorised under section 88 of the Civil Aviation Act, and is not likely to reduce competition on the affected routes.

Introduction

6. The Minister of Transport is responsible, under the Civil Aviation Act 1990, for authorising or declining to authorise arrangements between airlines that relate to fixing tariffs or capacity. The Ministry of Transport provides advice to the Minister on whether authorisation would be consistent with the criteria set out in the Act, and in New Zealand's interest.
7. The effect of authorisation is that the arrangements are exempt from the provisions of the Commerce Act 1986 that prohibit arrangements substantially lessening competition.
8. This report provides the Ministry's analysis of the application from British Airways and Qatar Airways for authorisation of their proposed coordination of air passenger services on 26 routes between Auckland and the UK or Europe, which incorporate the London-Doha trunk route.
9. The proposed arrangement may include coordination of schedules, revenue planning and pricing, sales and marketing activities, and service parameters and standards. Authorisation

¹ Qatar Airways increased its flights to twice a week during April to assist with repatriation during the COVID-19 crisis.

is sought for a term of 5 years.

10. The arrangement would be based on an existing Joint Business Agreement between the applicants, which was entered into on 17 November 2016. This Agreement provides the applicants with access to routes connecting to the London-Doha route that they do not serve with their own aircraft. The Agreement has been implemented in stages, starting with the London-Doha trunk routes and routes into Asia and Africa and Europe, and now with the proposed arrangements for New Zealand and Australia.
11. Under the Joint Business Agreement, the applicants share revenues on the London-Doha route and may coordinate capacity. However, on all connecting routes, the applicants have a codeshare arrangement, and revenue is not shared. The proposed coordination on routes to New Zealand and Australia would also involve codesharing, and may include coordination in relation to joint pricing.
12. Revenue-sharing alliances involve close collaboration on pricing and services, and can raise concerns about effects on competition.
13. Codeshare arrangements are agreements by which an airline is able to sell seats on flights operated by another airline as if it were operating that flight with its own aircraft. Codeshare agreements are relatively common and, without additional cooperation, rarely raise competition issues unless they involve the only airlines flying a route.

The Applicants

British Airways

14. British Airways is the United Kingdom's national carrier, based in London. It has a fleet of nearly 300 aircraft. Before the COVID-19 crisis, it flew to more than 70 countries and carried more than 40 million passengers a year. However, it does not operate its own aircraft to New Zealand.
15. British Airways does usually market flights to New Zealand, which involve transfer onto the aircraft of codeshare partners for the final leg into New Zealand. Its codeshare partners already include Qatar Airways from Doha to Auckland, as well as Malaysia Airlines from Kuala Lumpur, Cathay Pacific from Hong Kong, and Qantas from Sydney.
16. British Airways is part of International Airlines Group (IAG), which it formed from a merger with the Spanish airline Iberia in 2011.

Qatar Airways

17. Qatar Airways is the state-owned national carrier of the State of Qatar. It has grown quickly since it was established in 1993, and now has more than 200 aircraft, which were flying to more than 160 destinations, including Auckland, before COVID 19. The daily Doha-Auckland flight is one of the world's longest direct commercial routes.
18. Qatar Airways is a minority shareholder of IAG, the parent company of British Airways. On 19 February 2020, it was announced that it had increased its share of IAG from 21.4 percent to 25.1 percent.
19. Both British Airways and Qatar Airways are part of the Oneworld alliance.

Legal framework for analysis

20. Our analysis of the proposed cooperative arrangements includes both an analysis of whether it meets the specific statutory criteria in the Civil Aviation Act, as well as a public interest assessment.
21. Section 88 of the Act provides that the Minister “may from time to time” authorise arrangements concerning airline tariffs or capacity. It also provides constraints on this power, by specifying effects the provisions of the proposed arrangements must not have.
22. If the proposed arrangements do not violate the specified criteria, the Minister may authorise them, but is not required to. We interpret this, along with the consequent exemption from some provisions of the Commerce Act, as implying that authorisation should depend on whether the arrangements are in the public interest.

Statutory Criteria Analysis

Specific Criteria in Part 9 of the Civil Aviation Act

23. This section examines whether and how the proposed codeshare complies with Part 9 (principally section 88) of the Civil Aviation Act 1990.

Section 88(3):

In considering whether to grant authorisation under subsection (2) of this section, the Minister shall ensure that the granting of such authorisation will not prejudice compliance with any relevant international convention, agreement, or arrangement to which the Government of New Zealand is a party.

24. Air service agreements exist between New Zealand and the UK, and between New Zealand and Qatar. There is also an Agreement between the European Community and New Zealand on certain aspects of air services.
25. The *Agreement between the Government of New Zealand and the United Kingdom of Great Britain and Northern Ireland Concerning Air Services* specifically allows that airlines of each party may “enter into code-sharing or other cooperative marketing arrangements with any other airline or carrier”, for flights that the other airline is otherwise entitled to operate.
26. The *Agreement Between The Government of New Zealand And The Government Of The State Of Qatar For Air Services* does not directly address the issue of codeshare arrangements, but an accompanying MOU regarding application of the Agreement does provide that the airlines of each side may enter into codeshare arrangements, including with airlines of a third country.
27. The *Agreement between the European Community and New Zealand on certain aspects of air services* primarily relates to ownership and control of airlines but does not otherwise constrain their commercial arrangements.
28. The proposed arrangements will not affect compliance with the relevant international agreements.

Section 88(4):

Subject to subsection (5) of this section, authorisation shall not be given under this section to any provision of any contract, arrangement, or understanding that:

(a) “provides that any party to it may directly or indirectly enforce it through any form of action by way of fines or market pressures against any person, whether or not that person is a party to the contract, arrangement, or understanding”

29. The proposed arrangements do not provide for enforcement through fines or market pressures.

30. However, we note that [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

31. By not limiting their nature, this section provides for remedies that could, in principle, include fines. Remedies such as mandatory pricing could conceivably even expose a party to market pressure from the other, though this seems unlikely. However, we consider that the additional requirement of agreement on the remedy, and the resort of dispute resolution, rule out unilateral enforcement. That is, such a remedy would not have the effect of enforcing the provision; rather, agreement to a remedy presumes acceptance of the provision. The effect of the section is a further commitment to the Agreement.

(b) Has the purpose or effect of breaching the terms of a commission regime issued under section 89 of this Act

32. Two commission regimes issued by the Minister of Transport are currently in force - the Civil Aviation (Passenger Agents' Commission Regime) Notice 1983 and the Civil Aviation (Cargo Agents' Commission Regime) Notice 1983.

33. The proposed arrangements do not involve commissions to passenger or cargo agents (and in any case there is no prohibition on commissions outside of those set by the regimes). The provisions of the agreement do not breach the terms of these regimes.

(c) Unjustifiably discriminates between consumers of international air services in the access they have to competitive tariffs

34. The Joint Business Agreement does not set tariffs, but establishes a process for setting tariffs. It contains no provisions that unjustifiably discriminate between consumers with respect to access to competitive tariffs.

(d) So far as it relates to tariffs, has the effect of excluding any supplier of international carriage by air from participating in the market to which it relates

35. Nothing contained in the proposed arrangements, with respect to tariffs, will affect the ability of other airlines to participate in this market. [REDACTED]
[REDACTED]

[REDACTED]

These constraints do not violate the criterion of the Act.

36. The Auckland to Europe routes have healthy competition between several international airlines. Although Qatar Airways has a significant market share (up to a fifth of Auckland-Manchester), British Airways' share (through codeshares) is negligible. Even between them, it is not likely that the parties have market power such that they could set tariffs that would exclude competitors.

(e) Has the purpose or effect of preventing any party from seeking approval, in terms of section 90 of this Act, for the purpose of selling international carriage by air at any other tariff so approved

37. There is nothing in the joint business agreement to prevent any party from seeking the Minister's approval of any tariff under section 90 of the Act.

38. In any case, Ministerial approval is no longer required for the sort of tariffs covered by section 90 of the Act.

(f) Prevents any party from withdrawing without penalty on reasonable notice from the contract, arrangement, or understanding

39. Though the applicants' proposed coordination on the routes that are the subject of this application amounts to a code sharing arrangement, the terms of the agreement are those of the Joint Business Agreement which already exists between them. The applicants have likened this agreement to an alliance.

40. Under the Joint Business Agreement, no penalty is payable when a party withdraws on reasonable notice.

41. The Joint Business Agreement provides that either party may terminate the agreement [REDACTED] notice [REDACTED].

42. Either party may terminate the agreement with [REDACTED]
[REDACTED]
[REDACTED].

43. The Joint Business Agreement, as it relates to the proposed cooperation, does not contain any provisions that prevent any party from withdrawing without penalty on reasonable notice from the contract, arrangement, or understanding.

Conclusion on section 88(4)

44. There are no provisions in the proposed codeshare agreement, or in relevant sections of the Joint Business Agreement, that fall within any of the prohibitions in section 88(4) of the Act.

Section 88(5):

Notwithstanding the provisions of subsection (4) of this section, the Minister may authorise [this] arrangement if the Minister believes that to decline authorisation would have an undesirable effect on international comity between New Zealand and any other State.

- 45. This provision only becomes relevant if, contrary to the advice set out above, you determine that the proposed arrangements fall foul of one of the criteria in section 88(4) of the Act.
- 46. 'Comity' is not defined in the Act, and its use here is the only instance of the term in New Zealand legislation.
- 47. 'Comity' is defined in the Shorter Oxford Dictionary (in the form of 'comity of nations') as being "the courteous and friendly understanding by which each nation respects the laws and usages of every other, so far as may be without prejudice to its own rights and interests". In very similar vein is Chambers: "The international courtesy between nations in which recognition is accorded to the laws and customs of each state by others". Legal dictionaries focus more on the aspect of courts taking due notice of foreign laws and judgments. Comity is not part of international law but is regarded as important for public policy reasons.
- 48. Most international codeshare arrangements will require approval in two jurisdictions, each with their own legislation or processes. This provision does not entail that New Zealand must accept and adopt the findings of another regulator, which may be applying different legislation. The impacts of a proposed Alliance may also be different in the two jurisdictions.
- 49. The Joint Business Agreement [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED].
- 50. In this case the applicants have also applied for authorisation of the same cooperative arrangements, for the same term, in Australia. This affects nine routes between Australia and the United Kingdom, and between Australia and some cities in Europe, via Doha. In March 2020, the Australian Competition and Consumer Commission issued a draft determination proposing to authorise the arrangements. Subsequently, in May 2020, a final determination was issued granting authorisation effective 29 May 2020.
- 51. There is nothing that requires New Zealand's authorisation decisions to align with those of Australia. However, given that Australia applies similar criteria, and that many similar market considerations are relevant to both markets, similar findings could be expected.
- 52. The applicants have claimed that declining to authorise the proposed arrangements could affect comity between New Zealand and the United Kingdom or Qatar. This is supposed to follow because the arrangements will increase competition on the affected routes, so declining authorisation would deny the United Kingdom and Qatar the public benefits of lower prices and better options in air travel.

53. While the proposed commercial arrangements could increase competition, the applicants note that these routes are already very competitive. The claim that the expectation of public benefits is robust enough to affect international comity is not compelling.
54. We advise that if you determine that one of the provisions of subsection (4) precludes authorisation of the proposed arrangements, considerations of comity do not provide an overriding ground for authorisation.

Section 90:

Authorisation of tariffs by Minister -

(1) The Minister may from time to time specially authorise any tariff in respect of international carriage by air where the relevant places of departure and destination are within the territories of 2 countries, one of which is New Zealand, whether or not there is to be a break in the carriage or a transshipment.

(2) In giving authorisation under this section the Minister shall have regard to –

(a) Whether the proposed tariff is excessive in terms of a reasonable return on investment by the supplier of the carriage; and

(b) Whether it is likely that supply of the relevant carriage can be carried on for a reasonable period at the level of tariff proposed; and

(c) Whether there is likely to be a substantial degree of benefit accruing to consumers generally, or to a significant group of consumers, as a result of the application of the proposed tariff,-

and shall ensure that the granting of such authorisation will not prejudice compliance with any international convention, agreement, or arrangement to which the Government of New Zealand is a party.

55. [REDACTED]

56. As noted for subsection 88(4)(e) above, the Joint Business Agreement does not preclude the parties from individually seeking authorisation pursuant to section 90. The criteria in section 90(2) relate to individual tariffs and would apply in consideration of any such application.

Competition and the national interest

57. The routes that are affected by the proposed arrangements can be characterised as quite competitive, with the market fairly evenly shared by several airlines. Qatar Airways has 9–26 percent of these markets, while British Airways’ share is negligible. For these reasons, cooperation between Qatar Airways and British Airways would make a small difference to competition in the market, and any effects for consumers, positive or negative, are also likely to be small.

58. British Airways is a major international airline that is currently represented in New Zealand by only a few code shared flights. The applicants therefore argue that the proposed cooperation will increase, rather than reduce, competition in the affected markets. They also claim that cooperation will be to the competitive advantage of both parties in those markets, enabling them to improve prices and products, which would be pro-competitive.
59. We also consider that the proposed arrangements would give British Airways an increased incentive to market New Zealand as a destination, particularly as Air New Zealand has withdrawn from the London route. This could benefit tourism to New Zealand.

Potential benefits to consumers

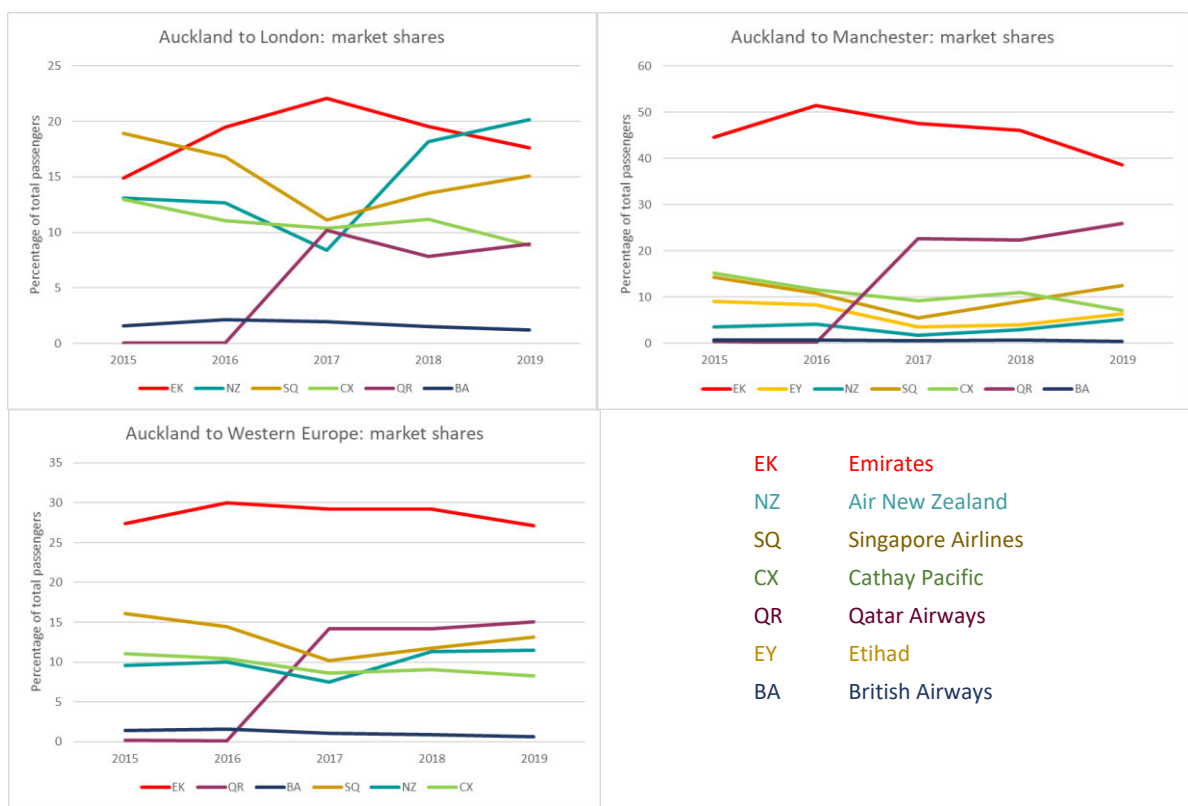
60. Amongst the benefits the applicants expect to offer to passengers are more convenient schedules; better coordination of booking, check-in, and connections; access to both parties' loyalty programmes, with aligned benefits; and fare combinability. Overall, they say, passengers will have more choice and better options. These measures are all specified in the Joint Business Agreement as part of the purpose of cooperating, so it is likely that they would be taken, and likely that they would benefit consumers.
61. The applicants also claim that their cooperation will result in savings from operational efficiencies, which strong competition will oblige them to pass on to consumers. In particular, they suggest that coordinated pricing will eliminate any double marginalization on the pricing of British Airways' London-Auckland tickets. At present, British Airways pays Qatar Airways for providing the Doha-Auckland leg, which Qatar prices at cost plus a mark-up (or margin). British Airways then sells London-Auckland tickets to passengers for a price that includes its own margin as well as Qatar Airways' margin on their Doha-Auckland leg, so there is a 'double margin'. But if British Airways and Qatar coordinate their pricing on this and other routes, their incentive is to eliminate the margins on the legs they buy from each other, and focus on setting the profit-maximising price for each route.
62. The applicants anticipate further efficiencies from sharing marketing efforts in their home markets; reaching acceptable load factors more quickly by combining their passenger feeds (which provides the opportunity to add capacity if needed); economies of scope from each servicing more destinations; more strategic marketing; and fuller aircraft.
63. These operational efficiencies are plausible and are presumably a large part of the motivation for the Agreement. It is possible that the consequent savings would be used to sell more aggressively in the same markets, which show keen competition (see below). This would probably benefit consumers. However, any such benefits would depend on business decisions by the applicants.

Effects on competition

64. Cooperation between market competitors can reduce competition, by reducing the effective number of competitors or by increasing the market power of the cooperating parties.
65. In addressing the impact on competition, the applicants have focused on the busiest of the 26 affected routes: London to Auckland, and Manchester to Auckland.
66. In focusing on these two routes, the applicants suggest an approach similar to that used by the European Commission to assess proposed cooperative arrangements. The Commission applies a threshold of 30,000 passengers per annum to the routes it considers,

assuming that less popular routes will not significantly affect competition². The applicants suggest that given New Zealand's smaller population, a lower threshold of 20,000 is more appropriate, which only covers the two selected routes.

67. Unlike the European Commission, we do not use a passenger threshold to determine which routes are considered for authorisation – all affected routes are subject to authorisation. However, as mentioned, in this case any effects of the proposed arrangements are expected to be small, so if issues are not found for the busiest routes, they are unlikely to be significant. The other routes affected are much smaller markets, so will also not be significant.
68. The following data illustrate market trends for the last 5 years on routes from Auckland to London, Auckland to Manchester, and Auckland to Europe.



69. Each of these markets shows strong competition, though with Emirates historically predominant. Notable on each route is the impact of Qatar Airways from 2017, and the very small market share of British Airways. The least competitive route is Auckland to Manchester, which Emirates has dominated, though now challenged by Qatar Airways. But even here, there are several effective competitors.
70. In 2019, Qatar Airways had 8.96 percent of the Auckland to London market, roughly consistent since 2017. Over the same period, Air New Zealand has more than doubled its share to 20.14 percent, just pipping Emirates, which has dropped to 17.61 percent. Of these routes, this has been British Airways's strongest, exceeding 2 percent in 2016, but

² This seems to be a sector-specific operationalisation of general guidance that gives a threshold in terms of turnover and market share.

dropping to 1.18 percent in 2019.

71. Qatar Airways' strongest market is Auckland to Manchester, where it now has a 25.97 percent share, while British Airways has a mere 0.32 percent. Qatar is one of four airlines to have increased its share over the last couple of years, apparently mainly at the expense of Emirates, though Emirates is still way ahead with 38.61 percent of the market.
72. Auckland to Western Europe also shows Emirates' strong performance, with 27.09 percent of the market in 2019. Qatar Airways has been steady with 14–15 percent, just above Singapore Airlines, Air New Zealand and Cathay Pacific. British Airways has dropped slightly to 0.61 percent.
73. Given British Airways' negligible market presence, its cooperation with any operator would not greatly affect competition. Even if the proposed cooperative arrangements grew the market or led to an increased share, it seems unlikely that they would increase the applicants' market power. Rather, the applicants argue their improved offerings would elicit a competitive response from the other market participants.
74. However, the coordination of schedules between British Airways and Qatar Airways, coupled with potentially keener pricing, might steer some passengers away from the British Airways flights in codeshare with Malaysian Airlines, Cathay Pacific, and Singapore Airlines and Qantas.
75. As noted above, Qatar Airways owns a quarter of IAG, the parent company of British Airways. This stake must reduce the incentive that either airline has to compete with the other, quite apart from any formal agreement. Given that there is also already a formal agreement to cooperate internationally, there is further reason to think that authorising the current proposal to expand the arrangements to New Zealand will not materially reduce competition.

Consequences of declining to authorise the proposed arrangements

76. If the application were declined, we would not expect any change to the applicants' current business in New Zealand. The proposed arrangements are driven by the benefits to the applicants of an existing international strategy, rather than by local pressures. British Airways has told us that its other current codeshare arrangements to New Zealand will continue whether or not authorisation is granted here.

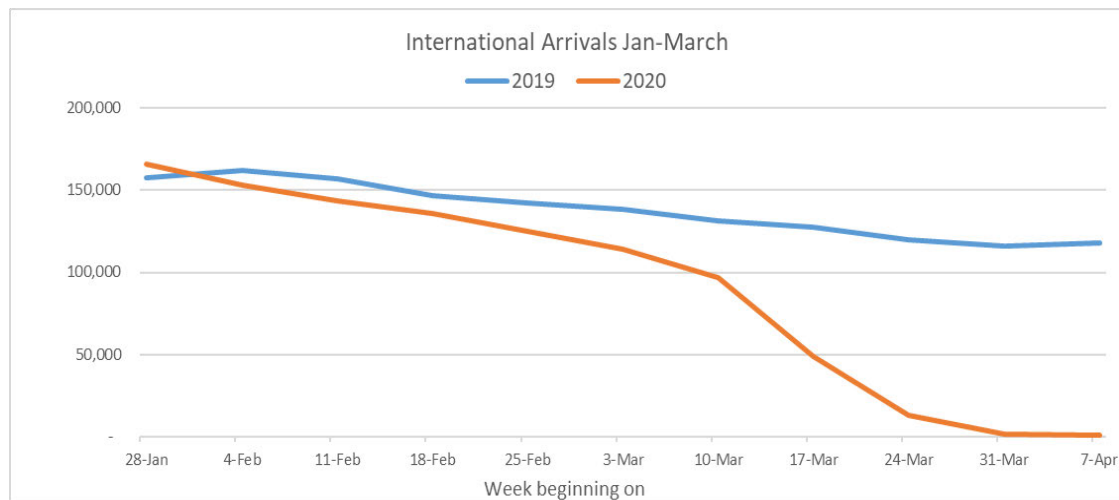
Conclusion

77. Our assessment is that any effects for New Zealand from the proposed cooperative arrangements are likely to be small. The product improvements that the applicants claim to be able to offer customers by coordinating their services, schedules and booking arrangements are credible. It is possible that they will also achieve efficiencies that will enable cheaper ticket prices. If this occurs, customers will benefit directly, and it may enhance competition on affected routes.
78. We consider that given it will enhance British Airways' currently small presence in the New Zealand market, the proposed cooperation will most likely increase options for New Zealand consumers, and will not reduce the effective number of competitors. For the same reason, and given current competition on the affected routes, we also do not expect the proposed cooperation to increase the market power or damage the competitive ability of

any airlines serving those routes.

COVID-19

79. The international health and economic crises caused by the coronavirus pandemic has particularly hit the aviation and tourism industries. In the short term, international air travel has been dramatically curtailed. In the Asia-Pacific region passenger demand fell by 41 percent in February compared to 2019 (and 14.1 percent globally)³. Further travel restrictions were introduced in March. In New Zealand, for the week beginning 7 April, there were only 946 passenger arrivals, which is a 99 percent decrease from last year and a 39 percent decrease from the previous week.



80. At this stage, it is not clear over what time frame the sector might begin to recover, and it may never return to anything like its pre-crisis state. The International Air Transport Association (IATA) has projected that passenger demand in 2020 (international and domestic) will be down by 48 percent compared to 2019 – based on modelling a scenario where travel restrictions are gradually reduced after 3 months⁴.
81. Industry commentators have predicted that many airlines will not survive the crisis. Airlines that emerge with heavy debt will have less flexibility to compete, yet lower operating costs (such as cheaper aircraft and fuel) could ease the entry of new airlines.
82. The term for which authorisation of the proposed arrangements has been requested is 5 years. While the current emergency can be expected to end during this term, its effects will continue. International aviation markets will return with greatly reduced scope, and probably fewer providers. In these unprecedented circumstances, drawing conclusions about the likely future state of the market from the status quo or the recent past is particularly difficult.
83. Qatar Airways remained in the New Zealand market during the period of repatriation flights through to 19 April 2020. It has also participated in the international freight package, suggesting a willingness to stay involved in this market when the situation allows.
84. Nevertheless, our assessment that any increase in British Airways' currently small presence

³ IATA press release, <https://www.iata.org/en/pressroom/pr/2020-04-02-02/>

⁴ IATA press release, <https://www.iata.org/en/pressroom/pr/2020-04-14-01/>

in the relevant markets would be unlikely to harm competition, could enhance it, and could improve options for customers, should hold even if those markets are smaller or have fewer players. Furthermore, it is likely that British Airways will have fewer options for partners to participate in the New Zealand market at all, increasing the importance of this alliance if it is to retain some presence.

Consultation

85. The Ministry consulted stakeholders on the proposed authorisation of the applicant's codeshare arrangements between 28 January 2020 and 28 February 2020. Submissions were received from Auckland Airport and Christchurch Airport. Neither submission raised any objection to authorisation of the proposed arrangements.
86. Auckland Airport supports the application on the basis of benefits it identifies as increased choice and connectivity for consumers. It also notes that by making Qatar Airways' service available through British Airways' network, the codeshare will potentially expose the route to a larger market.
87. Christchurch Airport did not address the current application directly. It reiterated the view it has expressed previously: that before recommending approval of an application, the Ministry should ensure that the public benefits outweigh any risk of public detriment. The Airport also emphasised its own interest in any potential increase in capacity, and how it is distributed regionally.
88. Both Airports noted that consideration of the costs and benefits of an agreement should take account of the cumulative effects of additional codeshare and alliance arrangements.