Economic regulation

Decision on modifications to Condition 2 of NATS (En Route) plc licence in respect of resilience planning, policy statement on enforcement and resilience plan guidance

CAP 1682

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Chapter 1

Introduction

Purpose of this document – CAA decision to modify the NERL licence

1.1 This document explains our decision to modify the air traffic services licence (the licence) held by NATS (En Route) plc ("NERL") under section 11(1) of the Transport Act 2000 (the Act), as proposed in our consultation document CAP 1639.[1] The modifications require:

- NERL to submit a resilience plan to us to setting out the principles, policies and processes by which it will comply with its obligation to develop and maintain its assets, personnel and systems to meet its requirement to provide the core service and specified services[2] under Condition 2 (2) with regards to resilience, contingency and business continuity;
- NERL's Board to take full ownership of the plan and submit a certificate to us confirming that it considers the plan is fit for purpose and complies with NERL's obligations under its Licence;
- NERL to ensure that the resilience plan is consistent with any guidance we have issued;
- NERL to review the plan at least every two years, or when we direct it to do so; and
- the plan submitted by NERL to be subject to review by an independent reviewer appointed by us to provide an opinion on the likely effectiveness of NERL's principles, plans and processes to produce a resilient service.

1.2 NERL confirmed its unconditional consent to the modifications on 27 April 2018.

1.3 The reasons for, and effect of, our decision to modify the licence are set out in Chapter 2.

1.4 The modifications are at Appendix A to this document.

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1 CAP 1639: Proposal to modify Condition 2 of NATS (En Route) plc licence in respect of resilience planning, policy statement on enforcement and consultation on draft guidance (February 2018): www.caa.co.uk/cap1639

2 The core services are the UK En route Air Traffic Control Service, the Oceanic En route Air Traffic Control Service, the Advisory Control Service and the London Approach Service, as defined in Condition 1 of the NERL Licence. The specified services are set out in Schedule 4 to the NERL Licence.

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1.5 Under the modifications, NERL's resilience plan has to be developed in accordance with any guidance we have issued. CAP 1639 included draft resilience plan guidance for consultation. This document also sets out, in Appendix B, the finalised guidance. This guidance may be amended in the future following further consultation.

Our proposals and representations

1.6 With NERL's consent under section 11(1) of the Act, we published proposals to modify Condition 2 in NERL's licence by notice under section 11(2) of the Act in CAP 1639 on 26 February 2018.

1.7 We invited representations on our proposals by 26 March 2018. Representations were received from:

- NERL
- British Airways
- Colin Hume, AOC consultant
- Prospect ATCO's branch
- Guild of Air Traffic Control Officers

1.8 All respondents welcomed the licence modification supporting the requirement for NERL to produce a resilience plan. Respondents' views on the proposed conditions and the draft guidance are discussed in Chapter 3.

Policy statement on the requirements for resilience, contingency and business continuity

1.9 In addition to the licence modification summarised above we have being developing policy on the wider licence requirements on NERL in relation to resilience, and how we should enforce these requirements. CAP 1639 explained that, following an earlier consultation in February 2017[3] we have adopted a policy on the principles and performance levels for resilience requirements for NERL to achieve, and how we proposed to enforce them. These requirements are intended to be used as guidance for informing our enforcement process, using indicators that would trigger intervention by us in accordance with our enforcement policy. They complement the requirements set out in NERL's licence. We anticipated that we could, if appropriate, amend these expected resilience levels during the RP3 price control period. Our latest policy statement with respect to these matters is set out in Appendix C.

[3] CAP 1512: Proposals to take forward the NATS Independent Enquiry recommendations with regards to resilience: www.caa.co.uk/cap1512

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Chapter 2

The reasons for the CAA's decision to modify NERL's licence and the effect of that decision

2.1 We have a primary duty under section 2 of the Act to exercise our functions under the Act so as to maintain a high standard of safety in the provision of air traffic services. We have secondary duties, including to exercise our functions in a manner we think best calculated to further the interests of users of air traffic services (including with regards to the availability, continuity, and quality of air traffic services).

2.2 Under section 8 of the Act NERL has a number of duties that it must fulfil in carrying out its functions in respect of the licensed area. It must:

- secure that a safe system for the provision of authorised air traffic services is provided, developed and maintained;[4]
- take all reasonable steps to secure that the system is also efficient and co-ordinated;
- take all reasonable steps to secure that the demand for authorised air traffic services is met; and
- have regard, in providing, developing and maintaining the system, to likely future demands.

2.3 Under Condition 2 of the licence NERL has a general obligation to make available the Core Services (as defined in Condition 1(3)) so as to be capable of meeting on a continuous basis any reasonable level of overall demand for such services. Furthermore, NERL must at all times develop and maintain its assets, personnel, systems and other parts of its business so as to be able to comply with its general obligation.

2.4 Our enforcement policy[5] explains that we concentrate on serious and systemic issues and, as far as practicable, take a proportionate approach to enforcement issues with increasing levels of involvement and intervention, depending on the severity of the issue. Our involvement and interventions can range from working level meetings to flag areas of possible concern to prevent these becoming more serious; through to more formal, high level discussions for more serious

[4] For the purposes of Section 8 of the Act, the system is considered safe if (and only if) NERL complies with requirements imposed by the Air Navigation Order with regards to its services.

[5] CAP 1234: Economic Licensing Enforcement Guidance (May 2015): www.caa.co.uk/cap1234

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incidents; or ultimately, for serious issues that we consider could indicate a licence breach, a more formal investigation that can lead to an enforcement order requiring specific action.

2.5 NERL's resilience performance is already, to some extent, reflected in the delay performance metric within the licence.[6] Effectively NERL has a points allowance with excess delay on any given day scoring a number of points. If NERL exceeds the allowance within a given year then it becomes liable for penalties within the incentive scheme. The formula for determining the excess delay score varies according to the time of year and level of delay, but is broadly based on the average delay per aircraft.

2.6 On 12 December 2014 a disruption in NERL's en route air traffic services caused 14,863 minutes of NERL attributable delay. This followed a more severe disruption on 7 December 2013 which caused 137,225 minutes of NERL attributable delay. The 2014 disruption led to the establishment of an Independent Enquiry,[7] led by Sir Robert Walmsley, to review the circumstances around the events of that day, including addressing the levels of future resilience and service delivery that should be expected across the en route air traffic network, taking into account relevant aviation benchmarks and costs.

2.7 In relation to both incidents, we found it difficult to assess whether NERL could be said to have taken 'all reasonable steps to secure that…demand is met'[8] and that it had 'at all times develop[ed] and maintain[ed] its assets, personnel, systems and other parts of its business'[9] to be able to meet demand in accordance with its statutory duties and licence obligations. In respect of each incident we accepted that NERL had taken a number of steps to recover quickly and safely, that it had maintained good communications with its customers and had taken steps to minimise the impact of the disruption such as offering alternative routing. However, we did not consider that the licence obligations were clear enough to effectively hold NERL to account should we find that its policies, plans and procedures were inadequate to properly minimise the risk of disruption or to manage an efficient and effective recovery, in line with its statutory duties and licence obligations. The Independent Enquiry did not find that there had been deficiencies in NERL's actions in this regard but accepted our concerns about better oversight and assurance in the future.

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6 C4 set out in Condition 21 (12) and (13) in NERL's licence.

7 The Independent Enquiry's final report can be found at http://www.caa.co.uk/Commercial-industry/Airspace/Air-traffic-control/Air-navigation-services/Air-Traffic-Control---NATS-system-failure-enquiry/.

8 Section 8 of the Transport Act 2000 (2000).

9 Condition 2 of the licence.

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2.8 The Independent Enquiry recommended that we and NERL jointly develop and agree definitions of resilience, contingency and business continuity to be used in the context of air traffic control in the UK and a methodology for determining acceptable levels of disruption to give greater clarity.[10] The Independent Enquiry also recommended that we include a new condition in the licence requiring NERL to submit a resilience plan to us for our approval.[11]

2.9 In line with the Independent Enquiry's recommendations, we have developed the new licence condition. It contains definitions of resilience, contingency and business continuity and requires NERL to prepare and submit a resilience plan consistent with guidance. The requirements are similar to requirements in the airport, energy and rail sectors.

2.10 The new condition should focus NERL's attention on providing a resilient service with sufficient contingency, by requiring it to produce a resilience plan and to review it at least every two years, in accordance with any guidance issued by us. The requirement to submit a resilience plan certificate after every review will assure us and other stakeholders that its Board has visibility and ownership of the principles, policies and processes in the plan.

2.11 The new condition will allow us to obtain an independent expert opinion on the likely effectiveness of NERL's principles, policies and processes in the plan to produce a resilient service, by making provision for us to appoint an independent reviewer of NERL's resilience plan (and any revisions to the plan that NERL makes to ensure continued compliance). The independent reviewer will not decide on whether NERL is compliant with its licence conditions but, coupled with the resilience plan certificate, this review should give us greater assurance that NERL's plan is robust.

2.12 The new condition also requires NERL to consult stakeholders on the form, scope and level of detail in the plans and we must also consult NERL and stakeholders before we issue any guidance. These consultations will give users visibility of NERL's principles and policies to maintain resilience and an opportunity to comment. NERL will not be required to consult stakeholders on its internal processes and procedures.

2.13 Enforcement of the new licence conditions will be carried out in line with our enforcement policy. We would carry out an urgent review if NERL failed to produce the required plans and/or to provide updates when required and, if the matter was not resolved to an agreed timescale, this would be considered prima facie evidence of a breach of the licence. If the independent reviewer finds that the plans are materially inadequate, we may also consider this to be prima facie

[10] Recommendation 20 of the Independent Enquiry.

[11] Recommendation 30 of the Independent Enquiry.

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