

**ANNEX 1 OF INVESTIGATION UNDER S.34 OF THE TRANSPORT ACT 2000:
PROJECT PALAMON – FINAL DECISION**

Summary of the CAA's Response to Representations made on the CAA's Draft Decision and the way forward

CAP 2100a

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Summary of this document

About this document

1. This Annex to our Final Decision (CAP 2100) sets out the CAA's response to the submissions made by interested parties and stakeholders to the CAA's provisional findings in its Draft Decision which we published in September 2020.¹ This Annex forms part of, and should be read alongside, the CAA's Final Decision in relation to its investigation under s.34 of TA00 (Project Palamon) into the compliance of NERL with its obligations under s.8(1) TA00 and Conditions 2 and 5.2 of its Licence.
2. Unless stated otherwise, defined terms in this Annex have the same meaning as those in the Final Decision.
3. The CAA's investigation commenced following complaints by STAL and Ryanair. In the Draft Decision we provisionally found a historical breach by NERL of its statutory obligations and Licence conditions to provide sufficient staffing resilience in Essex airspace.
4. This Annex deals with the following main issues:
 - the CAA's consideration of and reply to the submissions from interested parties to the Draft Decision, including from NERL, STAL, Ryanair and Prospect.² These submissions included observations on the application of the TA00 and Licence conditions, and the need for, and appropriateness of, further enforcement action, as well as more detailed considerations regarding specific factual elements relating to the allegations of breach under investigation in the areas of traffic recovery profiles, the RP2 settlement, staffing resilience, ATC capacity, undue discrimination, coding and provision of sector opening times data, the implementation of the Oberon investigation recommendations, procedural issues, and the need for a staff resilience plan and monitoring;
 - any consequential changes that have been incorporated into the Final Decision.
5. Following analysis of the submissions and further consideration of the wider impact of covid-19 on the aviation industry in general and on NERL in particular,

¹ CAP1943, available at: www.caa.co.uk/cap1943

² Prospect is a trade union representing approximately 3000 air traffic controllers, air traffic management specialists, and air traffic systems engineers in the civil UK air traffic management system.

we developed further our recommendations for NERL. and These are set out in the Final Decision.

6. As set out in the Final Decision, the CAA's findings are summarised as follows:
- in relation to the provision of sufficient staffing resilience in the London Approach Service for users of Stansted and Luton airports, NERL contravened its statutory and Licence duties and obligations in the period January 2019 to March 2020 (the Relevant Period); and
 - in relation to the other parts of the investigation, including on airspace capacity, coding and discrimination, NERL has not contravened its statutory and Licence duties and obligations.

Introduction

7. As explained in the Final Decision, the CAA has investigated complaints brought by Ryanair and STAL regarding the compliance of NERL with its obligations under its Licence and TA00. The complaints related to Air Traffic Flow Management (ATFM) delays experienced by airlines and passengers of Stansted and Luton airports. This Annex summarises and responds to submissions made by interested parties in response to the CAA's Draft Decision³ and explains how we took them into account in making our Final Decision. While this document does not summarise or respond to all points made by stakeholders in their responses, all stakeholder responses were fully considered before the CAA made its Final Decision.⁴ Non-confidential versions of stakeholders' responses and the Final Decision were published alongside this document on the CAA's website.⁵

Overall summary of responses received

8. This section sets out a high-level summary of key aspects of stakeholders' responses to the Draft Decision. We received responses from NERL, Ryanair, STAL and Prospect.

NERL

9. Overall, NERL disagrees with the CAA's Draft Decision, and its response sets out specific concerns. NERL considers that, in reaching the Draft Decision we

³ CAP1943, available at: www.caa.co.uk/cap1943

⁴ CAP 2100, available at: www.caa.co.uk/cap2100

⁵ www.caa.co.uk/Commercial-industry/Airspace/Air-traffic-control/Air-navigation-services/NATS-En-Route-plc-NERL-Licence/

have not considered all relevant factors, and that we have made errors in how we have considered evidence. In particular, NERL considered that:

- the relevant legal tests have not been understood or applied correctly to the facts. The provisional finding of breach is inconsistent with the established understanding of NERL's statutory and Licence obligations and is wrong in law;
- the assessment of NERL's conduct during the Relevant Period entailed a change of the scope of investigation, and the CAA failed to notify NERL of this change in a timely way;
- the CAA has retrospectively imposed a higher and more granular outcomes-based requirement that is not provided for in the TA00 or NERL's Licence;
- the CAA has retrospectively required NERL to meet all 'foreseeable' demand (STATFOR 'high' forecast), irrespective of whether it is reasonable to expect NERL to be able to meet such demand as set out in Condition 2(4)(a) of NERL's Licence;
- NERL was constrained by the RP2 settlement. In advance of the CAA's RP2 decision, NERL warned that reducing staff numbers would have an impact on resilience but the CAA and airlines pushed for cost savings. Staffing resilience in Essex airspace was impacted by RP2 staffing constraints, and by traffic growth being greater than STATFOR's highest growth predictions;
- the higher standard of regulation that NERL considers the CAA's Draft Decision imposes would have an impact on how NERL plans and finances its operations; and
- increased regulatory uncertainty could lead to NERL being less cost-efficient and lead to higher costs for customers.

Ryanair

10. Ryanair also disagrees with the Draft Decision, in particular with our provisional finding that NERL has only historically breached its TA00 obligations and Licence conditions during the Relevant Period. It considers we have not properly discharged our duties with respect to enforcement. Ryanair also sets out its views on next steps and recommendations for NERL. In summary, Ryanair:

- continues to be concerned with NERL's persistent and significant failings in providing staffing resilience for the Stansted approach and emphasises that traffic would not have to rebound to 2019 levels for staffing issues to arise again;

- considers that we are under a legal duty to take enforcement action now as it considers: (i) NERL is very likely⁶ to contravene its Licence and/or s.8 TA00 duties when demand recovers; and (ii) NERL is currently in breach of its duty to plan for future demand;
- contends that robust long-term planning is required to avoid the reoccurrence of delays and that action is needed now because, in its view: demand will recover in a lumpy and unpredictable way; the covid-19 crisis will exacerbate NERL's staffing issues in the long-term; and NERL will fail to meet its obligations even if traffic only recovers to 2016 levels;
- sets out a range of specific steps it considers we should require NERL to undertake, including adopting Eurocontrol's Performance Review Commission (PRC) coding principles, rolling out the rostering tool, and adopting a 5-year staffing resilience plan that is consulted annually with stakeholders;
- makes a number of other detailed points on our conclusions on aspects of the investigation with which it disagrees, including on the implementation of the Oberon recommendations, coding, ATC capacity, discrimination and other aspects relating to procedural fairness; and
- reserves all its rights, including to potentially judicially review our Final Decision if we fail to take enforcement action against NERL.

STAL

11. STAL considers that the Draft Decision is lenient on NERL particularly because:
- we do not take formal enforcement steps despite the provisional finding of a serious breach of its duties;
 - we make no finding of breach in relation to airspace capacity despite a failure to remedy an issue that has been known for over 14 years; and
 - the investigation of discrimination may not have gone into the depth required.
12. It says that its chief concern is to see the issues remedied in a timely and sustainable manner, and is not seeking to take the matter further if:

⁶ In this regard, Ryanair submits that the requirement for a breach to be "likely" under s.20 TA00 does not mean the breach has to be imminent.

- the CAA requires from NERL a clear, transparent and measurable remedial plan mapped against a reasonably optimistic recovery profile, with regular reporting and close monitoring by the CAA; and
- findings remain “open” and NERL continues to be monitored. That is, if NERL does not take the opportunity to remedy the issues satisfactorily, the CAA would not need to launch another investigation and would be able to move straight to formal enforcement on staffing resilience and/or a finding of breach on airspace capacity management.

Prospect

13. In its response to the CAA’s Draft Decision, Prospect:

- broadly agrees with our provisional findings, including on the contravention finding in relation to staffing resilience but also considers that on other aspects, such as airspace change AD6 should continue to be progressed;
- considers that the CAA’s economic settlements are part of the reason for the low levels of staffing resilience shown by NERL; and
- says that, despite covid-19, now is the time to act on resilience as there are significant lead times to train fully qualified controllers and that lessons from RP2 and the previous recession should be learned.

Summary of CAA’s way forward

14. In Chapter 1 of our Final Decision, we have set out that, having considered the responses in the round, we consider that the general direction set out in the Draft Decision remains the most appropriate way forward. In light of the severe reduction in traffic caused by the pandemic, and the uncertain recovery, we have not prioritised further investigation of the causes of delay. We consider that the most effective way forward is to move onto remedial recommendations and regular monitoring to help to reduce the risk that there is a reoccurrence of the historical difficulties encountered at the Stansted and Luton approaches when traffic starts to recover.
15. Our detailed responses to the submissions received in our Draft Decision consultation are set out in the chapters below. Our final conclusions, having taken into account these responses, are set out in our Final Decision. The key issues are summarised below.

NERL concerns over precedent created by our decision on staffing resilience

16. NERL has raised a significant concern that our finding of breach in relation to staffing resilience sets new and higher service standards for specific sectors of airspace than is otherwise set by applicable regulation. We disagree with this

characterisation, and we agree with NERL that some level of delay is to be expected in normal operations, as is some variation in performance across different parts of the network. It is the particular circumstances of this case, and the evidence relating to Essex airspace, that led to the CAA's provisional finding and which have led to the confirmation of that finding in our Final Decision.

17. It is also relevant that the shortcomings identified in NERL's performance are material and have been sustained over a considerable period of time. They have persisted despite the CAA criticisms and recommendations in the previous Oberon investigation, which has not secured sufficient improvements in performance. In particular, the CAA's finding of breach relates to manifest failings on a section of airspace that has now been investigated for staffing delays twice in five years; and the investigation identified resourcing gaps (but not remedied, by NERL) extending over several years. Therefore, our decisions do not create a sweeping new granular standard for quality of service.
18. We are clear the uncertainty around traffic recovery from covid-19 could bring about some performance risks, and that such uncertainty would potentially be a relevant factor when considering any future complaint that we may receive regarding NERL attributable delay performance. However, the hiatus created by covid-19 should have also created opportunities to address performance issues, and have given NERL time to progress the implementation of airspace changes, progress ATCO training (subject to the constraints created by covid-19), and plan a more flexible approach to manage demand in the London Approach Service (LAS).

Other key concerns raised by respondents

19. We have set out our detailed views on the stakeholder submissions we have received below. In summary, our response to the key views expressed:

- we note the points NERL makes regarding the Relevant Period being covered by the scope of the investigation. However, the scope of the investigation did not set any firm limit on the time frame under consideration and indeed referred to the CAA's assessment of NERL's past, ongoing and future conduct.⁷ We also have broad public law obligations to have regard to the best available evidence during an investigation and to have regard to all relevant considerations. Finally, the publication of our Draft Decision has provided NERL with an opportunity to provide a substantive response to our provisional findings in relation to the Relevant Period, including any evidence that it wished to rely on to counter the provisional finding of a staffing contravention so its procedural rights have been fully respected;
- NERL raised concerns about the application of the tests and considers that the CAA's interpretation of the statutory framework amounts to an error of law. We did not make our staffing finding under Condition 2(4)(a) of the Licence but under Condition 5.2 of the Licence and s.8 TA00; these legal provisions do not refer to, and apply independently of, the Service and Investment Plan (SIP). We consider that the RP2 settlement provides relevant context but is not determinative. We do not agree with the suggestion that the RP2 settlement was a binding constraint on NERL's staffing arrangements.
- Ryanair also said that there is evidence of a current/likely future breach by NERL and enforcement is needed. Due to the fall in traffic levels as a result of covid-19, we do not consider that NERL is currently in breach of its Licence conditions or s.8 duties. The reduced traffic levels mean that NERL should now have the opportunity to address the staffing resilience issues that led to this investigation and maintain levels of staffing that are able to manage effectively forward-looking traffic scenarios. The ongoing impact of covid-19 on traffic remains extremely uncertain, and so we are not in a position to determine whether it is likely that NERL will fail to meet its statutory duties and Licence obligations. In these circumstances we consider that users' interests would be better served by focusing on the recommendations in our Final Decision and that careful monitoring of these recommendations and timely action by the CAA in the event of new difficulties would be the most appropriate way forward.

⁷ The scope of the ECTL-PRU report (available at www.caa.co.uk/cap1943a) was focused on the coding of delays in the years leading up to 2018, but the Palamon investigation was not limited to this time period.

Structure of the rest of this document:

20. The rest of this document is structured as follows:
- Chapter 1: contravention finding in relation to staffing resilience
 - staffing resilience
 - issues raised by NERL on the contravention finding
 - Chapter 2: ATC capacity
 - Chapter 3: undue discrimination
 - Chapter 4: enforcement, recommendations and monitoring
 - the need to take enforcement action
 - recommendations and monitoring
 - Chapter 5: other issues raised in the consultation
 - coding
 - Oberon recommendations
 - procedural issues

Chapter 1

Staffing resilience

- 1.1 The obligations imposed on NERL by s.8 of the TA00 and its Licence and the CAA's statutory duty to investigate complaints under s.34 TA00 are set out in Chapter 2 of the Final Decision.
- 1.2 In this chapter, we consider the responses to the Draft Decision finding in relation to staffing resilience and set out our views in response.

Staffing resilience

- 1.3 In our Draft Decision we concluded that, during the Relevant Period, the significant increase in staffing delays together with a persistent lack of staffing resilience on the LAS to Stansted and Luton airports and the failure to anticipate and implement adequate and timely steps to resolve those issues meant that NERL contravened its duties under s.8(1)(c) and s.8(1)(d) TA00 and its obligations under Condition 5.2 of the Licence during the Relevant Period.⁸ This section sets out our views on these issues. We also consider this issue further in the enforcement section of Chapter 4 of this Annex.

Stakeholders' views

- 1.4 NERL considered that, given the ongoing constraints placed on its business plan, together with the unexpected material increases in traffic and their relevance to NERL's obligations, the delay observed does not provide a lawful basis on which the CAA can determine NERL to be in breach of its obligations.⁹ NERL noted the following constraints that affected staffing resilience in Essex airspace:
- The RP2 price control settlement. NERL said that "the RP2 business plan, which was requested by airlines and imposed by the CAA, was predicated upon NERL reducing overall staff numbers, including the number of ATCOs, through voluntary redundancy to meet its cost-saving targets. This has in turn resulted in long-standing staffing resilience issues during RP2".¹⁰

⁸ Paragraph 35 of CAA's Draft Decision. www.caa.co.uk/cap1943

⁹ Paragraph 32 of NERL's response to the Draft Decision.

¹⁰ Paragraph 17 of NERL's response to the Draft Decision.

- The short-term lack of available ATCOs qualified to manage Essex airspace following the redundancy process, and the fact that insufficient time had passed between putting in place actions to address the problem and the events that led to the CAA's provisional finding of breach in the Palamon investigation.¹¹ NERL noted that “increasing ATCO numbers is both a time and resource intensive process due to the long lead times, relatively high attrition rate of trainees and the demands placed on present capacity in terms of diversion of resources to train additional ATCOs in circumstances where a shortfall already exists”.
- The resilience issues “were made more acute in respect of Essex airspace by the significant localised [traffic] growth at Stansted and Luton airports during RP2”, resulting in further staffing delays.

- 1.5 NERL considered that the current difficult circumstances resulting from covid-19 mean that the matters raised in the CAA's Draft Decision are historical only and agreed with the CAA's Draft Decision not to take enforcement action.¹² NERL suggested that future risks to staffing resilience remain once demand recovers from the covid-19 downturn. However, given that reliable traffic forecasting is currently not possible and that customers may, in future, prioritise cost savings over resilience in the reset of RP3, that could create similar conditions to those prevalent in the lead up to RP2.¹³
- 1.6 NERL also suggested that if it was expected to meet “foreseeable traffic”, in the sense of it being able to meet STATFOR high-case traffic forecasts, then it would need to recalibrate its business plan, as the STATFOR base-case is currently being used to prepare its business plans.¹⁴
- 1.7 While NERL accepted that the CAA can investigate instances of localised delay, it considered that the CAA should take into account NERL's network-wide obligations and performance.¹⁵ NERL considered that if the CAA's provisional findings of breach in the Draft Decision were confirmed, it would have less flexibility in how it manages localised spikes in demand across the network which would result in it providing a more costly and less efficient service to customers.¹⁶
- 1.8 Ryanair agreed with our finding that NERL has contravened its duties under s.8(1)(c) and s.8(1)(d) TA00 and its obligations under Condition 5.2 of the Licence during the Relevant Period. However, it considered that NERL is still in

¹¹ Paragraph 21 of NERL's response to the Draft Decision.

¹² Paragraph 32 of NERL's response to the Draft Decision.

¹³ Paragraph 33 of NERL's response to the Draft Decision.

¹⁴ Paragraphs 37 to 39 of NERL's response to the Draft Decision.

¹⁵ Paragraphs 45 to 47 of NERL's response to the Draft Decision.

¹⁶ Paragraph 48 of NERL's response to the Draft Decision.

breach of its 'future-oriented' planning duty under section 8(1)(d). It also considered that NERL is very likely to be in breach of section 8(1)(c) and Condition 5.2 when 'normal' levels of demand resume. In its view, the exact same problems are liable to repeat themselves if no enforcement action is taken by the CAA now.

- 1.9 Ryanair recognised that, given current difficult circumstances, NERL has to exercise some caution in terms of its recruitment process and that NERL must also reduce costs over the coming years. However, it considered that covid-19 also presents NERL with unique opportunities to reduce delays in the future. It considered that NERL should be using the current low levels of traffic to devise and implement a coherent, long-term Staffing Resilience Plan. It also considered that NERL should put in place other measures that require limited investment and would, in Ryanair's view, enable NERL to better manage foreseeable traffic increases, namely:
- fully rolling out the rostering tool cited in the NERL Action plan;
 - reducing the length of time required to train new ATCOs and/or using the current unusually low levels of traffic and demand to train more ATCOs;
 - increasing the use of overtime where needed and amendments to collective labour agreements where that is possible;
 - using flexible rosters and associated changes to increase the utilisation and efficiency of staff; and
 - making better use of the latest technology and operational developments to increase efficiency of NERL's operation, such as SESAR solutions.
- 1.10 STAL considered, given Project Oberon identified significant staffing resilience issues over three years ago that needed addressing and have still not been addressed, that it is now unavoidable that the CAA must reach the conclusion that NERL has contravened its obligation under sections 8(1)(c) and 8(1)(d) of the TA00 and Condition 5.2 of the Licence.
- 1.11 STAL considers that until staffing issues are remedied "in a sustainable and long-term manner that can handle pre-covid-19 levels of traffic, there inevitably continues to be a 'likely future' breach of Licence and / or TA00". STAL's chief concern is to see that NERL remedies staffing issues expediently and sustainably prior to traffic volumes returning to the extent where it is again causing problems.
- 1.12 Prospect agreed with the CAA's provisional finding that NERL breached its Licence as a result of insufficient staff resources. Prospect noted that several of its members holding validations on Luton and Stansted have expressed their concerns to the Union surrounding staffing issues. It also noted several short-

term initiatives agreed with NERL to provide a more resilient service to Luton and Stansted, such as making greater use of overtime arrangements, and the attempted introduction of a Stansted and Luton Approach Resilience Mode (which would allow Stansted validated controllers to manage Luton airspace and vice versa). In Prospect's view, these initiatives are strong evidence that there were not enough staff to provide the required, resilient level of service for Luton and Stansted airports. Also, Prospect considers that this situation is continuing and the only reason that staffing for Luton and Stansted is now able to meet demand is the current covid-19 crisis.

- 1.13 Prospect noted that it will be "all too easy to make short term choices on staffing levels, including training, through the prism of covid-19". It cautioned that, as seen in past downturns, these short-term choices always lead to staffing shortages once traffic recovers. It also noted that 122 student ATCOs have already been made redundant, which would effectively stop the training supply line.
- 1.14 Prospect's response also considered that the CAA's RP2 determination was part of the reason for the low levels of staffing resilience. Prospect considered the wider economic context is a key factor in understanding NERL's performance. Prospect summarised comments it has made previously, i.e. that the pressure to achieve cost efficiencies under the RP2 determination would ultimately impact future service provision, and in particular a lack of staffing resilience. Prospect considered that the CAA should reflect on the pressure that its price control mechanisms has put on NERL and the impact it has had on NERL's performance.
- 1.15 Prospect also stated that the CAA should consider requiring NERL to produce a fully auditable and traceable 'workforce plan' for the LAS.

CAA's way forward

- 1.16 We note that the parties have not disputed the factual evidential basis that we took into account in reaching our decision. It is not disputed that the relevant sector has been suffering significant staffing pressures for many years and that those could have continued for some time had there not been a major downturn in traffic as a result of covid-19.
- 1.17 While we appreciate that the RP2 regulatory settlement might have created a challenging financial envelope to NERL, we do not accept that this meant that performance issues were unavoidable in the LAS to users of Stansted or Luton or that such issues, once identified, could not have been addressed over a reasonable period of time. While traffic in this section of airspace rebounded more quickly than those in other sectors or faster than base-case traffic scenarios for NERL's business as a whole, this does not provide sufficient mitigating evidence to justify the gap between supply and demand for ATCOs