

NERL response to CAA initial proposals on
modifications to NATS (En route) plc licence in respect
of Governance and Ring-fencing (CAP 1287)

10 June 2015

Executive Summary

1. NERL acknowledges that it is appropriate for the CAA to review periodically the arrangements for NERL's Governance and Ring-fencing.
2. The company has been engaged fully with the CAA's process over the past year.
3. NERL has assessed the CAA's proposals and in most cases is willing to accept them subject to only to relatively minor changes.
4. However, NERL requests that the CAA adopts a different approach in two areas where NERL has significant concerns. These relate to new mandatory independent directors (MIDs) and the changes to the language relating to cross subsidies.
5. In order to provide a positive and constructive way forward, in the Executive Summary that follows NERL elaborates on its concerns and sets out alternative proposals for the CAA to consider.

Genuine Public Private Partnership arrangements

6. The fundamental context for regulation of NERL is that it is the central part of a public private partnership (PPP). The PPP is a very deliberate structure which is entrenched until there is a significant and fundamental change of Government policy in this area, including its shareholding. Were the PPP structure and the protections in it to be fundamentally changed, the CAA would inevitably review the governance of NERL, and NERL would be supportive of that review. However, as things stand, the PPP provides a very different context for regulation of NERL than that of fully privatised companies, which don't have the same level of Government involvement and oversight. The CAA's view that NERL's regulatory regime is an "outlier" arises from the unique PPP structures which already offer better protection than the starting point for other regulated companies that have subsequently adopted the concept of MIDs.
7. Given the long term, strategic and Government backed nature of this structure it is essential that any assessment of the risk profile of NERL and the appropriate regulatory checks and balances should take a full account of the PPP structure. The structure would not fundamentally change without significant policy consideration and Government discussion with NERL, NATS and the CAA. In these circumstances, NERL believes it is appropriate for the CAA to regulate NERL taking full account of the ownership structure.
8. The PPP ownership structure has two features that are particularly important in the context of the CAA's proposals: the role of Customers and Government, including the Partnership Directors ("PDs") appointed by it.

Strong Customer and Government guardianship of NERL

9. In other sectors, the focus of recent governance reform has been providing greater accountability to customers. However, in the case of NERL, key customers (i.e. significant airlines) and Government already work together as shareholders within the PPP to ensure it is properly governed, including compliance with all of its licence obligations. This is further reinforced by the unique, extensive customer consultation by NERL directly with airline customers (and indirectly, the travelling public) providing input into investment and operational priorities based on transparent cost benefit analyses. This transparency for airlines is further emphasised by the presence of the IATA CEO on the NATS Holdings Board.
10. Clearly, the interests of Government and the airline customers are aligned in ensuring that there is no material detriment to the air traffic network of which NERL is the custodian and the CAA also has the benefit of direct undertakings from Airline Group members to that effect. In any event, since NERL is the core asset of the PPP, it will inevitably be the focus of attention of all NATS Holdings Board directors.

Partnership Directors are Independent Directors with additional powers

11. Second, a key feature of the PPP is the inclusion on the NATS Holdings Board of the PDs. These directors are subject to full statutory and fiduciary duties, in common with all NATS directors. In addition, the Mission Statement, which is the Government's guidance to PD's about how they carry out their role, requires that they act in accordance with the UK Corporate Governance Code. It also requires them to exercise, for the benefit of NATS Holdings and all shareholders as a whole, their independent judgement and ensure that the Board functions effectively and transparently.
12. Further, the Mission Statement states that the PDs have duties to protect Government's financial interest in NATS and to ensure that NATS can operate independently, without undue or improper reliance on the shareholders, which therefore includes monitoring the activities of NERL. The Mission Statement is explicit that PDs must take account of the interests of all shareholders and is clear that the PDs are **not** intended to take on "regulatory" responsibilities (i.e. to represent Government's policy positions) as they represent Government only as a shareholder.
13. PDs have special powers not available to MIDs. First, they have access to information concerning all NATS group companies. This provides them with access and insight into precisely the perceived risks from NSL about which the CAA is concerned. Second, acting together they can veto material decisions affecting NERL on a wide range of matters e.g. from refinance to contract approvals above certain thresholds.
14. In these important respects, PDs are more effective than MIDs, whose only recourse would be to resign if they objected to such material decisions. Therefore, for so long as PDs exercise oversight over NERL with the advantages described above, NERL does not consider that appointing additional independent directors can be proportionate as it would add no increased benefit over the checks and balances already in place by virtue of the PPP.

15. In the context of the PPP, Government has also put in place an agreement with NERL's debt funders to manage any potential insolvency which significantly mitigates the likelihood of the CAA's concern about directors' conflicts arising in a financial crisis. Since then, the CAA has also added into NERL's Licence the concept of a gearing target and cap which provides the CAA with early warning of financial difficulties and a requirement for oversight of a remedial plan.
16. Taking into account all these factors, we suggest that it is neither appropriate nor necessary for the CAA to seek to impose upon NERL a regulatory requirement for additional independent directors when NATS Group already has in place a structure to ensure proper governance and oversight with Directors whose primary responsibility is to ensure independence.

Alternative proposals which align with PPP protections

17. NERL considers that, during the continuance of the current structure, appropriate arrangements for independent and transparent governance are already in place. However, in order to adopt a positive and constructive way forward, NERL is proposing an alternative response to the CAA's concerns. This builds on the PPP structures by providing additional assurance now, as well as certainty over the governance of NERL in the future were changes to the PPP structure to come about.

- a. Assurance now: NERL would be willing to agree to a change to the licence which had the effect of requiring the independent PDs (as well as Airline Group's representative Directors save for the Managing Director of NSL) to be appointed to the NERL Board.

NERL is confident that the independence of the PDs is sufficiently assured in the context of their statutory and fiduciary duties, combined with their appointment process and the current content of their Mission Statement. However, to the extent that the CAA has proportionate concerns that might be allayed by adding to the terms of the Mission Statement to clarify the application of the requirements for independence and transparency to NERL as well as to NATS Holdings, NERL would be willing to explore such clarifications with DfT.

- b. Future Certainty: NERL would be willing to agree to a licence change to the effect that, should Government cease to exercise or lose its right to appoint independent PDs to the NATS Holdings Board, NERL would itself be required to have two MIDs.

18. NERL considers this to be a proportionate response to the CAA's concerns in the context of the existing protective structures of the PPP.

Justifiable cross subsidies

19. With respect to the prohibition on unjustifiable cross-subsidies contained in Condition 9 of the Licence, NERL's view is that the most appropriate approach would be to reflect the model of the EU Regulation on Service Provision which prohibits all cross subsidies which are not objectively justifiable.

Chapter 1

Introduction

- 1.1. This paper is NERL's formal response to the CAA's initial proposals on modifications to the NATS (En route) plc ("NERL") licence in respect of Governance and Ring-fencing (CAP 1287). CAP 1287 sets out the CAA's initial proposals for such modifications, and NERL welcomes the opportunity to engage positively with the CAA ahead of its final decision. Although NERL has engaged substantively and transparently with the CAA and its advisers prior to the issue of CAP 1287, the document omits significant areas of analysis carried out for the CAA by legal advisers in relation to governance and the PPP arrangements, which the CAA has declined to disclose on the basis of legal privilege. This absence of transparency has made it difficult for NERL to assess the basis for the CAA's concerns and has meant that NERL's response is obliged to repeat significant aspects of its evidence already submitted to those advisers to ensure that all stakeholders have a full appreciation of NERL's position.
- 1.2. NERL fully supports the CAA's aim of ensuring that NERL is subject to appropriate regulation. NERL's aim in submitting this response is to be as positive and constructive as possible to help reach a suitable and robust final decision on NERL's governance arrangements. Some of the initial proposals already satisfy these criteria. However, in order for all of the CAA's proposals to be both suitable and robust, we request that the CAA change its approach in a number of key respects including, most significantly, by having due regard to:
 - (a) the nature and purpose of NERL's PPP arrangements; and
 - (b) the CAA's own legal duties.
- 1.3. NERL believes that once further consideration is given to the factors above, some of the proposals in CAP 1287 are unlikely to be appropriate or workable. In particular, the requirement for NERL to appoint two independent directors to its board is unnecessary (as a result of the PPP arrangements) and therefore conflicts with the CAA's legal duties.
- 1.4. NERL has structured the remainder of its response broadly according to the structure of the principal chapters of CAP 1287. In each chapter, we have picked out the elements that cause us concern.

Chapter 2: Background and Context

Chapter 3: Objectives

Chapter 4: Governance

Chapter 5: Ring Fencing

Chapter 6: Areas of no change

Chapter: 7 Other Areas

Chapter 8: Costs

Appendices: Proposed Licence Changes

Annex 1: Airline Group letter about its ongoing strategic intent

Annex 2: The Partnership Director's Mission Statement

Annex 3: Proposed NATS governance arrangements following trigger event

Chapter 2

Background

Introduction

- 2.1. Chapter 2 of CAP 1287 describes the context and background to the CAA's proposals.
- 2.2. Much of Chapter 2 is uncontentious. However, there are a number of unique contextual factors that NERL believes receive insufficient attention in this chapter. These include the specific characteristics of the NATS PPP, the duties of the current directors, and the applicable regulatory regime. It is critical that these highly relevant contextual factors and legal requirements are taken into account by the CAA when assessing the most appropriate regulatory requirements to impose upon NERL.

Context

- 2.3. This section of Chapter 2 does not mention the NATS PPP. That is a significant omission, as is clear from the following paragraphs, which describe the purpose and nature of the NATS PPP.
- 2.4. The purpose of the NATS PPP was to maintain safety and improve efficiency in the operation of the UK's most critical air traffic management infrastructure. The *en route* services operated by NERL represent the backbone of that infrastructure and account for more than 75% per cent of the NATS group's total income.
- 2.5. The UK domestic and international contestable activities operated by NSL represent the remainder of NATS group's income. The approximately 25% per cent of total income is in line with expectations at the time the PPP, and the associated governance and regulatory structure, were established. **REDACTION FOR CONFIDENTIALITY REASONS.**
- 2.6. The PPP has a number of important features.
 - (a) Introduction of private sector management skills and finance to ensure increased financial and operational discipline, a clear focus on the safe and efficient delivery of services, investment and major projects.
 - (b) Separation of the NSL contestable activities from NERL's *en route* business to facilitate transparent economic regulation of the latter and the establishment of an air traffic administration regime to protect the core *en route* assets.
 - (c) Selection of The Airline Group Limited, a consortium of some of the group's largest customers (as well as most recently Universities Superannuation Scheme as an infrastructure investor and second largest investor in the PPP), as the Strategic Partner within the PPP reflected a commitment by Government to ensure that the interests of aviation users are paramount in every significant decision made by NATS. Airline Group has further enhanced the customer representation by appointing the

CEO of IATA as a standing director to the NATS Holdings Board and a clear summary of the ongoing strategic intent of the Airline Group is set out in a recent letter to NATS Holdings which is included in Annex 1.

- (d) Government “Partnership Directors”, appointed in accordance with the Code of Practice for Ministerial Appointments to Public Bodies, whose mission statement requires them to use their independent judgement of matters as corporate directors and ensure transparency of decision making, and expressly not to have regard to Government's regulatory functions, so ensuring effective separation of regulation from corporate governance.
 - (e) Maintenance of a significant and entrenched Government stake carrying vetoes over "Reserved matters" (to ensure Government approval of major decisions whether taken at a NATS group, NERL or NSL level) and ultimately a right to replace Airline Group as Strategic Partner in the unlikely event that serious issues should arise.
 - (f) Recognition of the primacy of the NERL Licence, reflected in robust contractual undertakings by shareholders to ensure compliance with the Licence, including direct undertakings from Airline Group shareholders to the CAA.
 - (g) A single service company as employer of all staff and provider of group-wide services to maximise operational efficiency and ensure that training and a safety culture can apply equally across all aspects of the business.
 - (h) A financing structure under which, in the event of any potential solvency concerns, providers of debt finance are required to work with Government and to enable Government to exercise its rights to replace Airline Group as Strategic Partner to provide an additional firewall against any risk of the application of an Air Traffic Administration regime.
- 2.7. This unique structure means there is no like-for-like comparison between NATS group/NERL and other regulated utilities that are owned either by listed companies, or otherwise wholly by the private sector. As a result, NERL believes it is inappropriate for the CAA to start from a premise that the ring-fence conditions of NERL “*be agnostic as to the ownership structure of NERL/NATS so that they are fit for purpose irrespective of who owns it*”.
- 2.8. Particularly important features of the PPP arrangements that distinguish NERL from private sector companies include the ongoing oversight by Government through its role as shareholder and its entrenched independent Government appointed directors; directors appointed by customers of the *en route* network; and mechanisms by which Government can manage risks to, and ultimately intervene to protect, national infrastructure. Of these, the most fundamental to ensuring good governance is the independent PDs that sit on the NATS Holdings Board.

Duties of Directors of NATS Holdings and NERL

- 2.9. The Directors of each company within the NATS group owe statutory and fiduciary duties to the shareholders of the relevant company to act in the best interests of that company.

- 2.10. This means that the principal duties of the Directors of NERL are to act, in that capacity, in the best interests of NERL and not any other company within the group; for example, NSL.
- 2.11. The Directors of NATS Holdings Limited have a duty to act, in that capacity, in the interests of that company. NATS Holdings is the parent company of both NERL and NSL. As a result, in their capacity as members of the Board of NATS Holdings, Directors are required to take decisions as a shareholder (via NATS Limited) in the operating subsidiaries and also more generally to take account of the impact of their decisions on the NATS Holdings investments in those operating subsidiaries.
- 2.12. NERL's operating turnover represents approximately 75% of the current NATS Group turnover and this is in line with the NSL growth plans contemplated at the implementation of the PPP governance. **REDACTION FOR CONFIDENTIALITY REASONS.** As the provider of *en route* services which provide traffic that is critical to the success of UK airports, NERL's successful operation is also business critical to NSL. The Directors of NATS Holdings will, when exercising those duties, to the extent that any decision might impact both NERL and NSL, be concerned to protect the integrity of the NERL business, and in particular the NERL Licence that provides its fundamental right to operate.
- 2.13. The principal duties of the Directors of NSL are to act, in that capacity, in the best interests of that company. However, given the importance of continuity and efficiency of the *en route* service to provide traffic that will sustain and promote the success of UK airports, it will not be in the interests of NSL as air traffic services provider at a number of major UK airports to adversely affect the *en route* operations of NERL. Furthermore, the reputation of NATS group globally is predominantly dependent upon the maintenance of successful UK *en route* operations to the extent that any significant issues arising in the latter context would have a significant adverse impact upon any commercial operations and prospects of NSL both inside and outside the UK. The duties of the Directors of NSL therefore require that, in that capacity, they do not do anything which would jeopardise the provision of the UK *en route* service by NERL.
- 2.14. In summary, any Director of NERL has a duty, in that capacity, to act in the interests of NERL. Any Director of any other company in the NATS Group will be concerned to see the success of NERL to ensure the success of that other company, and therefore has a duty, in that capacity, not to do anything which would jeopardise or damage NERL's provision of the UK *en route* service.
- 2.15. In addition, the Government has the right to appoint three independent PDs to the board of NATS Holdings, including one on the NATS group audit committee and one to chair the safety committee. These Directors, who are appointed by Government in accordance with the Code of Practice for Ministerial Appointments to Public Bodies, are subject to formal guidance, known as the Mission Statement, which was incorporated by Government into the legal framework of the PPP. A copy of the Mission Statement is included at Annex 2.
- 2.16. Key features of the Mission Statement are that the PDs will act in accordance with best corporate governance practice and exercise their independent commercial judgement on issues of strategy, performance, resources and standards of conduct. While the PDs are tasked with protecting the value of the Government's financial interest in NATS Holdings, given the fundamental importance of successful operation of NERL both to NATS group and

to NSL (whose principal business is the operation of airport ATS services whose success would be significantly adversely affected by any shortfalls in NERL performance) the practical effect of that is, as described above, the PDs pay particular attention to the operations of NERL.

CAA's duties under the Transport Act 2000

- 2.17. NERL agrees that paragraph 2.12 of the Initial Proposals accurately reflects the duties of the CAA under the Transport Act 2000. NERL specifically notes the duty of the CAA under s. 2(6) of the Transport Act, which is included in the bullet points of CAP1287 at paragraph 2.12, and which is to exercise its functions:

so as to impose on licence holders the minimum restrictions which are consistent with the exercise of those functions.

- 2.18. The CAA is also required by s. 2 of the Transport Act:

(a) to further the interests of operators and owners of aircraft, owners and managers of aerodromes, persons travelling in aircraft and persons with rights in property carried in them;

(b) to promote efficiency and economy on the part of licence holders.

- 2.19. However, in addition to those duties highlighted in paragraph 2.12, the CAA is also required to bear other things in mind when making regulatory decisions. For example, as a regulator, the CAA is required to comply with the principles of better regulation. These principles, which were most recently re-issued in March 2015, provide that:

The Government will regulate to achieve its policy objectives only:

(i) having demonstrated that satisfactory outcomes cannot be achieved by alternative, self-regulatory, or non-regulatory approaches

(ii) where analysis of the costs and benefits demonstrates that the regulatory approach is superior by a clear margin to alternative, self-regulatory or non-regulatory approaches

(iii) where the regulation and the enforcement framework can be implemented in a fashion which is demonstrably proportionate; accountable; consistent; transparent and targeted.

There will be a general presumption that regulation should not impose costs and obligations on business, social enterprises, individuals and community groups unless a robust and compelling case has been made.¹

¹ https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/421078/bis-13-1038-Better-regulation-framework-manual.pdf

- 2.20. In addition, as a public authority, the CAA is required to ensure that its decisions accord with the principles of public law. This includes:
- (a) having regard to all relevant considerations and not have regard to any irrelevant ones (see e.g. *Re Duffy* [2008] UKHL 4 at [53]);
 - (b) ensuring that any new regulatory measures are a reasonable and proportionate means by which to achieve their intended purpose; and
 - (c) ensuring that sufficient reasons for particular proposals are included in a consultation to allow those consulted to give intelligent consideration and an intelligent response (see e.g. *R v North and East Devon Health Authority ex p Coughlan* [2001] QB 213 at [108]).
- 2.21. These requirements, and the best way in which they may be complied with, must all be at the forefront of the CAA's mind when making a final decision as to the regulatory requirements to impose upon NERL. In NERL's view the CAA has fallen short of the requirements set out above. It has not demonstrated that a regulatory intervention in respect of MIDs is required in the context of the NATS PPP, not least through omitting to show why the existing arrangements or reasonable adjustments to them do not achieve its objectives.

The CAA's review process

- 2.22. NERL agrees with the CAA that it is important to keep under regular review the question of whether any changes are required to the Licence in the context of evolving circumstances to NERL and its external environment as well as lessons learned from good regulatory practice in comparable scenarios. However, sight should not be lost of the fact that were the Government to fundamentally change its policy on ownership of NERL through the PPP structure, this would inevitably lead to a further review of NERL's governance. NERL is therefore committed to continuing the full and constructive engagement with the CAA that has been underway since the start of the CAA's review process but remains cognisant of the practical issues and context that need to inform such a review. This section outlines, in brief, that review process so far.
- 2.23. In 2012, the CAA carried out an "ad hoc review of NATS related risks" and, in particular, considered whether any changes were required to the CAA regulation of NATS. The CAA's report was published in January 2013, and included some brief discussion of the governance arrangements in NERL's licence before concluding that further work should be carried out in order that modifications could be made to NERL's licence by the end of 2014.
- 2.24. Following the ad hoc review report, the CAA sent NATS a document that included a number of questions about options that could be pursued to increase the level of assurance that the CAA could take in consideration of restating the CAA consents. The question of statutory independent directors was not expressly raised in these questions. However, subsequently, the CAA published the terms of reference for a review of the NERL ring-fence and governance arrangements. The document included a table of options that the CAA wished

to consider further. These included amending the ring-fence arrangements and the question of board composition.

Other regulators include licence conditions on the composition of the board of the regulated company. For example, the ORR for Network Rail includes an obligation to "maintain a board of directors with an appropriate balance of skills, experience, independence and knowledge, where at least 2 non-executive directors have substantial experience of working in the rail industry."

- 2.25. On 19 December 2014, NATS wrote to the CAA setting out a number of concerns about the CAA's approach to the ring-fencing and governance review of NERL's licence. This was the culmination of a process whereby the CAA requested significant quantities of background information from NERL on the PPP and aspects of day-to-day management of the ring-fence. As part of that process, NERL has also had ongoing dialogue at policy and working group level with the CAA, with the aim of clarifying NERL's responses to the information requests and testing working hypotheses. As a result, the positions stated by NERL in this response do not include any substantive new points.

Chapter 3

Purpose and objectives of the Governance and Ring-fencing proposals

- 3.1. Corporate governance and ring-fencing play a number of important functions in the context of NATS group in addition to the requirements of the Transport Act 2000. In particular:
- (a) given the overriding significance both to airlines and to Government of the UK *en route* service, it facilitates a focus on those operations;
 - (b) it is a significant element in ensuring transparent protections for the commercial interests of Government and the Strategic Partner and in clarifying their respective roles within the PPP structure;
 - (c) it is important to Government in providing transparency as regards the operation of a business in which the public sector has a significant investment; and
 - (d) as NERL's revenues are the primary asset by reference to which commercial finance is, and will be, secured by NATS group to enable continuing investment, providers of that finance require certainty as to the assets and operations within NERL and transparency of its dealings with other member of the NATS group.
- 3.2. In Chapter 3, the CAA refers to its assessment that NERL is becoming an "outlier" in regulatory terms. While that is correct, and NERL is distinctly different from typical privately owned utilities, the reasons that make NERL different require a different approach to its regulation. As described above, NERL is the central element of a public private partnership bringing together a user based "strategic partner", Government and private sector debt finance (which is locked into key features of the PPP through direct agreements with Government and the Airline Group).
- 3.3. NERL's status as the centre of the existing controls under the PPP regime means that the CAA should take these into account in considering any necessary changes to regulation of NERL. Therefore, rather than being a justification for the imposition of new regulatory requirements to bring NERL's regulation in line with those of wholly private utilities, NERL's unique status requires that it is subject to different regulatory requirements to those imposed on wholly private utilities.
- 3.4. NERL agrees with the CAA that the objectives of governance and regulation for the purposes of the Transport Act 2000 are threefold:
- (a) to facilitate economic regulation of NERL through the price cap by ensuring transparency of the finance of its regulated activities separate from commercial activities within the group which are not economically regulated;
 - (b) to facilitate the precautionary regulation of NERL by enabling any risks to the continued operation of NERL arising from decisions taken by NERL management to

be transparent and subject to regulatory control which is proportionate to the risks identified and to any financial and non-financial costs (to each of the company and users) associated with such controls; and

- (c) to facilitate the operation, in extremis, of the air traffic administration regime by ensuring that an administrator would have both legal and practical access, via NERL as licence holder, to all assets critical to the operation of the *en route* service.

3.5. Within the context of PPP, the interests of shareholders (as Government, infrastructure investors and users of NERL's services), NERL (as licensee), the CAA (as regulator) and finance parties (as creditors of NERL) are fundamentally aligned. It is therefore appropriate that NERL's regulation reflects the characteristics of the PPP and the differences between the PPP and the ownership, governance and financing of other utilities, and it would be inappropriate to seek to align regulation of NERL with regulation of those other utilities without proper consideration of the relevant differences. To the extent that NERL is an outlier in its characteristics, that should be reflected in its regulation. In other words, proportionate regulation of NERL should take proper account of this alignment and its implications for the risk profile of NERL.

Development and assessment of initial proposals on Governance

- 4.1. Chapter 5 of this Response describes NERL's acceptance of the principal elements of the CAA's proposals regarding ring-fencing and, in particular, the enhanced regime of certificates required to be delivered by the NERL Board. This chapter describes why the proposed governance arrangements are considered by NERL to be inappropriate. In particular, given the necessity for regulation to be proportionate, it is necessary that a legitimate regulatory concern be addressed in the manner which imposes the least regulatory burden on NERL and without imposing unnecessary parallel regulatory requirements.
- 4.2. For clarity, NERL's acceptance of the ring-fencing regime with only minor modifications do not form part of the grounds on which NERL believes that the governance proposals described in this chapter are inappropriate.

Issues identified

- 4.3. This section of Chapter 4 focuses on the structure of the PPP and, in particular, on its complexity.

Assessment of the CAA's governance proposals

- 4.4. The CAA's initial proposals as regards governance have three components:
 - (a) a requirement that the Licence specifically record the requirement for all NERL Directors to act (in that capacity) independently of the interests of affiliates of NERL and having regard exclusively to the interests of NERL;
 - (b) a requirement that at least two "mandated independent directors" (MIDs) serving on the NERL Board be present for any NERL Board meeting to be quorate; and
 - (c) a requirement that certificates issued for the purposes of ring-fencing be signed by a MID of NERL.
- 4.5. If the CAA imposed these requirements, then it would have failed to act in accordance with its specific statutory duties or those imposed by public law more generally.
- 4.6. As mentioned above, s.7 of the Transport Act 2000 provides that licences may contain provisions that are necessary and expedient. NERL believes that the CAA's powers are restricted to introducing changes to conditions that are necessary and expedient. However, CAP 1287 does not demonstrate that the proposed changes meet these tests.
- 4.7. As set out above, the CAA is also required by the Transport Act 2000 to impose the minimum necessary requirements on licence holders. The same requirements are imposed

by the principles of better regulation and by public law. However, the CAA has not complied with these requirements in a number of ways.

- (a) The CAA has failed to have regard to the protections and benefits already afforded by the PPP arrangements, which are highly relevant to the identification of an appropriate regulatory regime, instead treating NERL as "the regulated company delivering the monopoly regulated service within NATS"².
- (b) The CAA has not convincingly identified any need for such significant change while the PPP arrangements remain in place.
- (c) The CAA has not properly turned its mind to the question of the minimum requirements that would address the concerns that it has identified.

4.8. In addition, as a result of proposing inappropriate additional requirements, with associated costs (which have not been properly assessed as discussed below) the CAA has not complied with its duty to promote efficiency and economy on the part of licence holders.

Restatement of fiduciary duties

- 4.9. NERL believes it could be helpful to include explicit recognition in the Licence that NERL directors (when acting in that capacity) owe their duties to NERL, even though this is already clear from a director's legal duties.
- 4.10. However, NERL has specific concerns that the language proposed by the CAA in the Initial Proposals could conflict with the duties of NERL's Directors (in that capacity) under the general law. In particular a director of a company should quite properly have regard to the interests of the shareholders (as a group) of that company.
- 4.11. NERL would therefore agree to the proposal described in Condition 8(1) of Appendix C of the Initial Proposals provided that it is supplemented by language making clear that this obligation is subject to the duties under the general law of NERL's Directors acting in that capacity.
- 4.12. NERL would be content for this change to be made irrespective of whether any potential alternative change to the membership of the NERL Board (see below) were to proceed.

Mandated independent directors

- 4.13. The CAA has proposed that there be a licence obligation upon NERL to have two competent independent directors at all times and for quorum thresholds to have the effect of requiring those directors to be included in all decisions.
- 4.14. NERL considers that the duties of NERL's directors (reinforced by a licence condition as described above) renders such a requirement, on balance, unnecessary.

² Paragraph 4.26

- 4.15. The CAA's proposal for independent directors appears in essence to introduce two additional independent directors to the NATS group structure whose primary value from a regulatory perspective would be to resign if a matter of concern arose, thereby alerting the CAA that an issue had arisen.
- 4.16. As noted above, the existing PDs are entirely independent, and are required to make decisions without taking into account the Government's regulatory functions. However, these existing independent directors of NATS Holdings are not (as per the Mission Statement) simply mandated to "*exercise their independent commercial judgement on issues of strategy, performance, resources and standards of conduct*" but also benefit from unrestricted access to information and documentation relating to both NATS group and NERL specifically and from extensive veto rights in respect of a significant range of potential actions on the part of each company within the NATS group (i.e. their reserved matters apply separately to the actions of NERL as well as to the group as a whole).
- 4.17. The existing PDs are therefore expressly as independent as the MIDs proposed by the CAA as well as holding significantly greater powers than those proposed directors.
- 4.18. To the extent that the CAA raises a concern that the PDs as Directors of NATS Holdings (by contrast to MIDs who would be directors of NERL only) might not act in NERL's best interests at times of financial difficulty for the NATS group, we believe that concern is unjustified given three factors:
- (a) economically, NERL remains the core asset of the NATS group. As a rational shareholder, NATS Holdings will at all times give significantly greater weight to the interests of NERL than any other company in the NATS group;
 - (b) practically Government's role in governance and oversight and in any insolvency situation as regards NERL (as described above) means that decision making at the NATS Holdings level will always remain rational; and
 - (c) the NERL Licence contains a gearing target and gearing cap; a feature which is also unique to NERL and not built in to the regulation of the regulated utilities which the CAA has used as the basis of comparison with NERL. The combination of a gearing cap and gearing target provides both an early warning to the CAA of any potential financial stress on NERL and provides for the CAA oversight of a remedial plan.
- 4.19. Therefore, in the context of the additional protections inherent in the PPP structure, and in particular the existence of three expressly independent PDs appointed by Government on the NATS Holdings Board, the requirement for additional independent directors to be appointed to the NERL Board is rendered unnecessary.
- 4.20. In addition, that appointment could potentially even be confusing in certain scenarios which is highly undesirable in a safety critical business. The presence of both MIDs on the NERL Board and PDs on the NATS Holdings Board would provide two parallel regimes of independent oversight. The respective responsibilities of each group of independent directors could create possible conflict and confusion should the two groups reach different (independent) conclusions on a matter, likely supported by separate, independent legal

advice. For example, were MIDs to be appointed to the NERL Board and to approve a course of action by NERL of which the PDs disapproved (or vice versa) this risks putting directors, the company, shareholders and the regulator in a difficult position.

Requirement in the absence of Partnership Directors

- 4.21. NERL recognises that the practicality and overall balance of advantage in appointing MIDs to the NERL Board would change significantly if there were no longer PDs on the NATS Holdings Board.
- 4.22. The CAA suggests, in paragraph 4.45 of the Initial Proposals, that it would not be possible to identify a "fixed point" at which additional protections might apply if the alternative protections which the PPP provides in lieu of MIDs ceased to operate. It also suggests that in these circumstances introduction of additional protections would be a lengthy process.
- 4.23. NERL disagrees. In the context of a proposal to introduce MIDs, the trigger point at which the characteristics of the PPP would change materially would be a simple and objective test that is the date upon which Government ceases to have any right to appoint or ceases to appoint at least two independent PDs to the Board of NATS Holdings.
- 4.24. In light of the importance of these PDs for ensuring the independence of the Board, it would be appropriate for the CAA to determine the absence of the independent PDs as a trigger for specified, additional regulatory requirements. However, until such an event, it is inappropriate to require more independent directors to be appointed: to do so would be to regulate NERL as though it were not a PPP and thus to fail to take into account the most relevant contextual factor that distinguishes NERL from other companies in the private sector. In more practical terms, though, duplicating the role of the existing independent directors would not enhance governance and could risk causing confusion and potentially conflict, as described above, the prospect of which alone could be actively damaging to governance.
- 4.25. NERL would therefore agree to a provision being included in the Licence to the effect that, in a circumstance in which Government were to cease to appoint or lose its right to appoint two independent PDs to the Board of NATS Holdings, NERL would be required to appoint to its board two independent and competent directors. However, NERL is concerned that a requirement that each of these directors be present at every board meeting could prove impractical. It would therefore propose that, in this scenario, the quorum require the presence at all meetings of at least one MID but that the whole Board (therefore including both MIDs) should follow due process in authorising the delivery of any ring-fencing certificate submitted by NERL.
- 4.26. An example of how that post-trigger event governance would work within the PPP framework is set out, with reasoning, in Annex 3. It is however notable that these arrangements are significantly more complex and less efficient than the current NATS Board arrangements and are expected to have both a quantifiable and an opportunity cost in terms of the additional, scarce senior management resource required to accommodate them.

Potential alternative within the PPP framework

- 4.27. NERL's alternative proposal is that all non-executive directors of NATS Holdings (being both the independent PDs appointed by Government and the user representatives appointed by Airline Group, but with the exception of any executive director with predominantly responsibility for operating the NSL business) would join the NERL Board.
- 4.28. This alternative mechanism, combined with the explicit statement of NERL PD's principal duties referred to above (and taking into account the enhanced ring-fencing certification requirement), would have the effect of ensuring that NERL's own governance directly included:
- (a) directors whose express responsibility is to be independent, with a clear statement that those directors must focus on the interests of NERL and consider the resources available to NERL expressly when the issue of a certificate to the CAA is required; and
 - (b) other directors with a direct user perspective of the core *en route* activities undertaken by NERL.

However, it would also ensure that the current strengths of the PPP are carried forward. These strengths include independent directors with a real role, responsibility to ensure transparency and real vetoes, together with non-executives who understand and can speak powerfully and directly for the interests of users.

Assessment of initial proposals on Ring Fencing

Introduction

- 5.1. NERL agrees with the CAA that ring-fencing (i.e. functional and/or structural separation of regulated and non-regulated ventures) is an important component in ensuring proper and appropriate regulation of its *en route* activities.

NERL's ring-fence in the PPP context

- 5.2. Like all forms of regulation, ring-fencing is required to be proportionate and rational in the context of the particular activities, risks and other issues associated with the activities in question. In the context of NERL's *en route* activities, NERL notes that the following factors were taken into account at the time of the PPP and appear to NERL to remain the most significant factors:
- (a) there are important operational and safety interfaces between *en route* activities and those undertaken by NSL at those UK airports where it provides air traffic services (as is the case at airports where a competitor provides the equivalent services). Ring-fencing should not therefore operate in a way which creates artificial barriers which might inhibit safe and efficient operation at those interfaces;
 - (b) the customer oriented Airline Group (as strategic partner) and Government are both directly interested in the maintenance of safety, continuity and efficiency in the provision of *en route* services. These interests will always outweigh purely financial interests of the shareholders in that capacity. In contrast to privately owned utilities, the balance of incentives on the NATS shareholders will therefore always be to maintain the integrity of the *en route* service. There are no incentives to seek to find ways around, or loopholes in, any ring-fencing regime;
 - (c) there are efficiency benefits to be gained in operating a "single management services" based structure for shared activities and staff. This enables efficient deployment and training and provides reassurance to highly skilled and specialist staff.
- 5.3. NERL recognises the CAA's observation that there has been an increased focus on corporate governance since the time of the PPP. However, NERL also notes that the relative size and nature of the NSL and NERL businesses are in line with projections made at the time of the PPP. There have been no developments in NSL's business model since PPP which would suggest a need for more onerous ring-fencing than was originally envisaged. As noted earlier, NSL income accounts for c.25% of NATS group income, **REDACTION FOR CONFIDENTIALITY REASONS.**

- 5.4. NERL agrees with the CAA's proposals to make more transparent/visible the evidence base that NERL already uses in providing various certificates under its licence.

Concerns raised by CAA

- 5.5. The CAA has identified the following concerns with the current ring-fencing arrangements:

- (a) NERL is required to provide to the CAA a single certificate covering both financial and operational matters. The CAA is concerned that this amalgamated approach creates the potential for NERL not to place sufficient focus on each of its financial and operational risks;
- (b) NERL is not required to detail in each certificate the basis upon which the Directors have concluded it is appropriate to issue the certificate. The CAA is concerned that as a result it does not have sufficient visibility of the systems and processes by which NERL ensures its resources are adequate;
- (c) although NERL is required to issue a certificate annually, it is not required to issue further certificates prior to declaring dividends or distributions of capital. The CAA is concerned that an annual certificate is insufficient to drive a culture of regular review by the NERL Board of compliance with the licence and is therefore proposing its reissue prior to a dividend payment or capital distribution, if more than six months have passed since the last annual statement;
- (d) NERL is not currently required to have in place specific arrangements to facilitate the work of an Air Traffic Administrator. The CAA is concerned that this could make the operation of an Air Traffic Administration insufficiently effective;
- (e) The CAA is concerned that the specific restriction upon NERL with respect to cross-subsidies which is contained in Condition 9 of the Licence is insufficiently clear to facilitate compliance by NERL and enforcement by the CAA.

- 5.6. NERL would be content to accept the CAA's proposals in relation to each of the following points:

- (a) the replacement of a requirement to certify financial and operational resources in a single certificate with a requirement to do so in separate certificates;
- (b) the introduction of a requirement on NERL to explain the processes used by it in providing a certificate (provided that the language is tailored to the NERL regulatory regime along the lines of the proposed drafting changes made by NERL);
- (c) the reissue of a certificate to the CAA prior to declaring or distributing a dividend (other than when a dividend or distribution is declared within six months of a prior certification);

- (d) the intervention plan in the form proposed by the CAA of a directory approach (noting that there would almost certainly be an opportunity for orderly planning in advance of such a scenario and that the existence of a gearing target and cap provides an early warning to the CAA of any potential financial stress on NERL);

NERL's views on changes to the prohibition against cross subsidy

- 5.7. Ring-fencing plays an important role in ensuring that a "regulated monopoly" business such as NERL does not exploit that position to distort competition in a competitive market in which an associated company operates. The CAA states, in connection with the obligation in Condition 9 regarding cross subsidies, a desire to ensure that trading between NERL and its associated companies (in particular, NSL) is on arms-length and normal commercial, terms. However, this requirement is already reflected in Condition 5 of the Licence. For that reason, if Condition 9 had actually been designed to address trading between NERL and its associated companies, it would be redundant.
- 5.8. Condition 9 is designed to ensure that transactions across the regulatory ring-fences (i.e. not simply between NERL and NSL but also between the en route and oceanic businesses) are not structured in such a way as would involve a competition-distorting cross-subsidy. This is important because there are elements of NERL ring-fenced businesses which do not operate as a monopoly (e.g. there are other potential providers of aeronautical and meteorological information to aviation). For the reasons described above, NERL considers that the CAA's objections to the current language are misplaced.
- 5.9. However, in practice NERL's compliance procedures are not focused on examining implications for competition but are based on a principal of ensuring that transactions are transparent and objectively justified.
- 5.10. NERL notes the provision of Article 15 of the EU Service Provision Regulation (550/2004) which requires, inter alia, that:

“(e) cross-subsidy shall not be allowed between en-route services and terminal services. Costs that pertain to both terminal services and en-route services shall be allocated in a proportional way between en-route services and terminal services on the basis of a transparent methodology. Cross-subsidy shall be allowed between different air navigation services in either one of those two categories only when justified for objective reasons, subject to clear identification;”
- 5.11. NERL is concerned that an absolute and entirely unqualified prohibition on cross subsidies would both be inconsistent with the EU Regulation and would not sit comfortably with the provisions of Condition 5(19) given the lack of any definition of "cross-subsidy" or regulatory certainty as to its congruence with, or distinction from, the concept of "arms length" or "normal commercial" terms. The proposal raises a real concern that if Condition 9 is amended to be "absolute" it could result in NERL being in breach of its licence for an immaterial breach of a technical test of cross subsidy.

- 5.12. Specifically, whilst NERL seeks to allocate costs objectively, it also notes that there are scenarios in which there may be good objective reasons for NERL undertaking a position with respect to NSL but it may be unclear whether or not that position represents a cross-subsidy. For example, the highly skilled employees of NATS represent a very valuable resource to the group as a whole and it is in NERL's direct interests to support those staff. In addition, as part of the PPP NATS undertook (in the "trust of a promise") to maintain the pension positions of staff at the date of the PPP. Therefore, if NSL were to lose an airport contract it would be expected (and in the objective best interests of NERL) that NATS Limited would seek to maintain the employment of the most experienced and skilled staff and to redeploy them into significant roles in NERL. This could arguably be perceived to be a "cross subsidy" of NSL as it would relieve NSL of the obligation to address the employment status and costs of those staff but it would also be in the objective best interests of NERL.
- 5.13. NERL therefore considers that replacing the current provision of Condition 9 with an equivalent provision that any cross-subsidy whatsoever would be a breach of the Licence would expose NERL to excessive and unnecessary risk. NERL would therefore be content to accept the changes proposed to Condition 9 provided that an additional qualification is added to the effect that cross subsidies are permitted if they can be justified by reference to objective criteria (i.e. an approach directly reflecting the language of the EU Regulation).

Chapter 6

Areas CAA does not propose to change

Extending the cash lock up

- 6.1. NERL welcomes the CAA view that extending the cash lock provisions would not provide any additional protection to consumers, and could instead be detrimental to consumers if it increases NERL's financing costs. As the CAA notes, the current provisions imply a credit rating that is significantly higher than that currently required by the Licence and, therefore, the present rule affords greater protection than a cash lock up related to credit rating would.
- 6.2. After careful consideration (including a comparison by NERL's financial advisors of other regulated sectors), NERL concludes that the CAA's oversight in this area is already, in substance, greater than that of other UK regulated sectors. Consequently, when seeking elsewhere in the Licence to import regulatory obligations from the water, gas and electricity network licences, the CAA should ensure that the resulting regime remains proportionate and that it imposes on NERL the minimum restrictions which are consistent with the exercise of the CAA's functions (under the Transport Act 2000).

Employee arrangements

- 6.3. NATS welcomes and agrees with the CAA proposal not to take any further action at this time in this area. The analysis leading to this decision as set out in paragraph 6.6 and 6.7 agrees with NERL's own analysis and legal advice previously submitted to the CAA.

Cross default obligations

- 6.4. NATS welcomes the balanced approach being proposed by the CAA in relation to cross default obligations. As highlighted by the CAA, the current approach provides the CAA with the opportunity to consider the detailed information being presented by NERL and in turn enables the CAA to provide NERL and its providers of finance with an appropriate level of comfort in respect to this area of the licence.

Extending the ring-fence

- 6.5. NATS agrees with the conclusions being formed by the CAA.

Cost of implementing the initial proposals

Lack of robust cost benefit analysis

- 7.1. NERL notes that the CAA has not carried out a robust cost benefit analysis of its proposals, in spite of the need to do so in order to assess whether the initial proposals are reasonable and proportionate to the aims pursued, or to take such analysis into account.
- 7.2. However, as set out extensively in this response, NERL's view is that the appointment of MIDs to the NERL Board is both inappropriate and disproportionate. It is difficult to see how any additional costs could be justified given the absence of any incremental benefit brought by such MIDs alongside PDs.
- 7.3. Notwithstanding this prima facie cost benefit analysis, NERL would like to highlight that any costs to NERL of implementing the CAA's proposals will be more than just the costs of the salaries, together with incidental expenses for the larger Board. Other costs for the business will include the opportunity cost of senior management time ensure that revised governance arrangements provide sufficient and appropriate information to any appointed Independent Directors on the Board of NERL while ensuring that the existing PPP rights of the Airline Group, as Strategic Partner, and Government to exercise vetoes over the activity of NERL, are not compromised.

Chapter 8

Summary and Next Steps

- 8.1. On the ring-fence proposals put forward by the CAA, NERL believes it has set out a reasoned and balanced analysis of the CAA's proposals which NERL accepts subject only to a few necessary changes. In response, NERL has made positive and constructive proposals which in essence accept the majority of the CAA's proposals, subject only to a few important and necessary changes.
- 8.2. On the governance proposals put forward by the CAA, NERL feels strongly that these are inappropriate and disproportionate. NERL has put forward its strong arguments for why the PPP context leads to a different solution for NERL than for regulated utilities and why its constructive alternative set out above is far more appropriate, as well as lawful.
- 8.3. NERL would be happy to meet with the CAA to discuss further the issues and proposals set out in this response.

APPENDICES

Comments on illustrative proposed licence condition amendments

APPENDIX A

Condition 5: Availability of Resources and Financial Ring-Fencing

1. The objectives of this Condition are to set out measures which, inter alia:-
 - (a) require the Licensee to act in a manner calculated to secure that it has available to it sufficient resources to perform its Licence obligations and that it informs the CAA about the resources available to it and its compliance with certain conditions of this licence;
 - (b) limit the scope of activities which the Licensee undertakes which are outside the En route (UK) Business and the En route (Oceanic) Business;
 - (c) create an effective financial ring-fence around the En route (UK) Business and the En route (Oceanic) Business and promote transparency;
 - (d) require the Licensee to make the CAA aware of any material steps proposed to be taken under the Finance Documents;
 - (e) require the Licensee to notify the CAA on the occurrence of certain events which might prejudice the licensees' financial stability;
 - (f) control the disposal of relevant assets, and place certain restrictions on the ability of the Licensee to incur debt;
 - (g) require the ultimate holding company to undertake not to act, or cause any subsidiary to act, in such a way as to cause the Licensee to breach the Licence;
 - (h) prohibit the Licensee from entering into any agreement or arrangement with any affiliate or related undertaking except on an arm's length basis and on normal commercial terms unless otherwise permitted;
 - (i) require the Licensee to use all reasonable endeavours to maintain at all times an investment grade issuer credit rating; and
 - (j) establish a financial gearing target and cap.

This paragraph 1 provides a descriptive summary of the provisions which follow in this Condition. This paragraph 1 is not intended to add to the provisions which follow, and for the purposes of interpretation it is the detailed provisions which prevail. Availability of Resources

2. The Licensee shall at all times act in a manner calculated to secure that it has available to it sufficient resources including (without limitation) financial, management and staff resources, fixed and moveable assets, rights, licences, consents and facilities, on such terms and with all such rights as shall ensure that it is at all times able to:
 - (a) carry out its Permitted Purpose activities; and
 - (b) comply in all respects with its obligations under the Act and this Licence including, without limitation, its duties under section 8 of the Act.

Certificates for the CAA in relation to financial resources

3. With effect from 1 January 2016, the Licensee shall submit a ~~certificate addressed to the CAA, approved by a resolution of the board of directors of the Licensee and signed by a director of the Licensee appointed under Condition 8 (Requirement for mandated independent directors) pursuant to that resolution~~ CAA certificate. Such certificate shall be submitted within four months of the end of the Licensee's financial year. Each certificate shall be in one of the following forms:
 - (a) "After making enquiries based on systems and processes established by the Licensee appropriate to the purpose, the directors of the Licensee have a reasonable expectation that the Licensee will have available to it, after taking into account in particular (but without limitation) any dividend or other distribution which might reasonably be expected to be declared or paid by the Licensee, any amounts of principal and interest due under any loan facilities and any actual or contingent risks which could reasonably be material to their consideration, sufficient financial resources and financial facilities available to itself to enable the Licensee to carry on the Permitted Purpose activities and comply with its obligations under the Act and under this Licence (as amended from time to time) for a period of two years from the date of this certificate."
 - (b) "After making enquiries based on systems and processes established by the Licensee appropriate to the purpose, the directors of the Licensee have a reasonable expectation, subject to what is said below, that the Licensee will have available to it, after taking into account in particular (but without limitation) any dividend or other distribution which might reasonably be expected to be declared or paid by the Licensee, any amounts of principal and interest due under any loan facilities, and any actual or contingent risks which could reasonably be material to their consideration, sufficient financial resources and financial facilities available to itself to enable the Licensee carry on the Permitted Purpose activities and to comply with its obligations under the Act and under this Licence (as amended from time to time) for a period of two years from the date of this certificate. However, they would like to draw attention to the following factors which may cast doubt on the ability of the Licensee to comply with its obligations under the Act and under such Licence for that period....."

- (c) “In the opinion of the directors of the Licensee, the Licensee will not have available to it sufficient financial resources and financial facilities available to itself to enable the Licensee carry on the Permitted Purpose activities and to comply with its obligations under the Act and under this Licence (as amended from time to time) for a period of two years from the date of this certificate.”
4. The Licensee must ensure that the certificate given to the CAA under paragraph 3 is accompanied by a statement of the main factors that the Licensee’s directors have taken into account in giving that certificate including reference to:
- (a) the systems and processes established by the Licensee to support the giving of the certificate by the directors;
 - (b) the main financial resources and financial facilities available to the Licensee; and
 - (c) the most recent ~~cash flow statement prepared for~~ the most recent management projected cash flows of the Licensee

together with a report prepared by its Auditors stating whether or not the Auditors are aware of any inconsistencies between, on the one hand, that certificate and the statement submitted with it and, on the other hand, any information which they obtained during their audit of the relevant year end accounts of the Licensee.

Certificates for the CAA in relation to operational resources

5. With effect from 1 January 2016, the Licensee must within four months of the end of the Licensee’s financial year give the CAA a CAA certificate ~~that has been approved by a resolution of the Licensee’s board of directors and signed by a director of the Licensee appointed under Condition 8 (Requirement for mandated independent directors) pursuant to that resolution and is~~ in one of the following forms:

- (a) Certificate 1R

“After making enquiries, the Licensee’s directors have a reasonable expectation that the Licensee will have sufficient operational resources including management, personnel, fixed and moveable assets, rights, licences, consents, and facilities available to itself to enable the Licensee to carry on the Permitted Purpose activities and to comply with its obligations under the Act and under this Licence (as amended from time to time) for a period of two years from the date of this certificate.”

or

- (b) Certificate 2R

“After making enquiries, the Licensee’s directors have a reasonable expectation, subject to what is explained below, that the Licensee will

have sufficient operational resources including management, personnel, fixed and moveable assets, rights, licences, consents, and facilities available to itself to enable the Licensee to carry on the Permitted Purpose activities and to comply with its obligations under the Act and under this Licence (as amended from time to time) for a period of two years from the date of this certificate. However, the directors of the licensee would like to draw attention to the following factors, which may cast doubt on the licensee's ability to carry on the Permitted Purpose activities [followed by a description of the factors concerned]." or

(c) Certificate 3R

"In the opinion of the Licensee's directors, the Licensee will not have sufficient operational resources including management, personnel, fixed and moveable assets, rights, licences, consents, and facilities available to itself to enable the Licensee to carry on the Permitted Purpose activities and to comply with its obligations under the Act and under this Licence (as amended from time to time) for a period of two years from the date of this certificate."

6. The Licensee must ensure that the certificate given to the CAA under paragraph 5 is accompanied by a statement of the systems and processes established by the Licensee to support the giving of the certificate by the directors and the main factors that the Licensee's directors have taken into account in giving that certificate.

Certificate for the CAA in relation to compliance with certain Conditions

7. With effect from 1 January 2016, the Licensee must, within four months of the end of the Licensee's financial year, give the CAA a [CAA](#) certificate ~~that has been approved by a resolution of the Licensee's board of directors and signed by a director of the Licensee appointed under Condition 8 (Requirement for mandated independent directors) pursuant to that resolution and is~~ in one of the following forms:

(a) Certificate 1C

"After making enquiries the Licensee's directors consider that, at the time of their approval of this certificate, the Licensee is in compliance in all material respects with all of the obligations imposed on it by Condition 17 (Provision of information to the CAA for regulatory purposes), Condition 5 (Availability of resources and Financial Ring Fencing) and Condition 9 (Prohibition of cross-subsidies)."

or

(b) Certificate 2C

“In the opinion of the Licensee’s directors, the Licensee is not at the time of their approval of this certificate in compliance in all material respects with all of the obligations imposed on it by Condition 17 (Provision of information to the CAA for regulatory purposes), Condition 5 (Availability of resources and Financial Ring Fencing) and Condition 9 (Prohibition of cross-subsidies) [followed by a description of the way in which the Licensee is not complying].”

8. The Licensee must inform the CAA in writing ~~immediately~~ as soon as reasonably practicable if:
- (a) the directors of the Licensee become aware of any circumstance that causes them no longer to have the reasonable expectations expressed in the most recent certificate given under paragraph 3(a), 3(b), 5(a) or 5(b); or
 - (b) the directors of the Licensee consider that any adverse ~~circumstances~~ factors that caused them to give the CAA a certificate in the form of under paragraph 3(b), ~~3(c), 5(b)~~ or 5(~~e~~b) and are referred to in such certificate have materially worsened.

Certificates for the CAA in relation to dividends 8A.

8A. Subject to paragraph 8D, the directors of the Licensee must not declare or recommend a dividend, and the Licensee must not make any other form of distribution within the meaning of sections 829, 830, 849 and 850 of the Companies Act 2006, or redeem or repurchase any share capital of the Licensee, unless before declaring, recommending, or making the distribution, redemption, or repurchase (as the case may be) the April 2015 Page 65 Licensee has given the CAA a CAA certificate that complies in all respects with the three requirements set out in paragraphs 8B and 8C below.

8B The first requirement is that the certificate must be in the following form:

“After making enquiries, the directors of the Licensee are satisfied:

- (a) that, at the time of their approval of this certificate, the Licensee is in compliance in all material respects with all of the obligations imposed on it by Condition 17 (Provision of information to the CAA for regulatory purposes), Condition 5 (Availability of resources and Financial Ring Fencing) and Condition 9 (Prohibition of cross-subsidies);

and

- (b) that the making of a distribution, redemption, or repurchase of [value] on [date] will not, either alone or when taken together with other circumstances reasonably foreseeable at the date of this certificate, cause the Licensee to be in breach to a material extent of any of those obligations in the future.”

~~8C. The second and third requirements are that the certificate:~~

~~(a)~~ 8C. The second requirement is that the certificate must have been approved by a resolution of the Licensee's board of directors passed not more than 14 days before the date on which the declaration, recommendation, or payment is to be made; ~~and.~~

~~(b) must be signed by a director of the Licensee appointed under Condition 8 (Requirement for mandated independent directors).~~

8D. The Licensee need not give the CAA a certificate of the type referred to in paragraph 8B in circumstances where:

(a) during the six months preceding the declaration or recommendation of a dividend, the making of any other form of distribution or the redemption or repurchase of share capital, it has given the CAA a certificate in the form of Certificate 1C under the requirement set out in paragraph 7 of this Condition; ~~and~~

(b) that certificate includes an appropriate addendum using the wording given at paragraph 8B(b) of this Condition.

8E. Where the certificate given under paragraph 8A, or relied upon under paragraph 8D, relates to the declaration or recommendation of a dividend, the Licensee is under no obligation to issue a further certificate before paying that dividend so long as such payment is made within six months of the date on which the certificate was given.

APPENDIX B

Illustrative proposed additional Licence Condition 7: Requirement to Maintain an Intervention Plan

This appendix provides an illustration of a proposed new condition on the requirement to maintain an intervention plan.

Condition 7: Requirement to maintain an intervention plan [Currently “[NOT USED]”]

1. The Licensee must prepare by 1 April 2016, or within 6 months of this condition coming into effect in this licence, whichever is the later and, thereafter, maintain an intervention plan fulfilling the criteria set out in paragraph 3 below.
2. The requirement for the information described in paragraphs 3 below will be satisfied if the plan provides details of other documents or records (including electronic records) where that information can readily be obtained and those documents or records are either maintained by the Licensee itself or are available to the licensee at all times under a legal or contractual right.
3. For the purposes of this condition, an intervention plan shall be a document or set of documents (which may be in a suitably secure electronic format) containing information that would be sufficient to allow any person appointed under an air traffic administration order (within the meaning in Chapter I of the Act) in respect of the Licensee readily to obtain the information they could reasonably be expected to require in order for that person efficiently to carry out his functions and to remain compliant with the Act and this licence. The form of the intervention plan shall, as a minimum, contain information on:
 - (a) the financial assets, resources and facilities of the Licensee;
 - (b) the non-financial assets, rights and resources of the Licensee, including information on key management and operational personnel and information technology systems;
 - (c) the liabilities of the Licensee, including contingent and contractual liabilities with counterparty and maturity information;
 - (d) the tax affairs of the Licensee;
 - (e) the personnel of the Licensee and any personnel employed by any affiliate or related undertaking of the Licensee who are engaged in operating any aspect of the Permitted Purpose activities of the Licensee;
 - (f) any pension schemes of which those personnel referred to in subparagraph (e) above are members and which are sponsored or administered by the Licensee or any affiliate or related company of the Licensee;

- (g) any mortgages, charges, or other forms of security over the Licensee's assets; the systems and processes by which the Licensee carries on the En route Businesses with information on any significant contractual arrangements, including those that impose obligations on the Licensee;
 - (h) any arrangements under which the Licensee has delegated any part of the En route Businesses to any affiliate of the Licensee;
 - (i) any contractual rights to receive cash or other financial assets from any affiliate of the Licensee or any other person;
 - (j) any contractual obligations to deliver cash or other financial assets to any affiliate of the Licensee; and
 - (k) the Licensee's arrangements and procedures for ensuring compliance with legislative requirements and with its obligations under this licence, including the conditions set out in Part III of this licence.
4. The form scope and detail of the intervention plan prepared in accordance with paragraph 1 of this condition shall be approved by the CAA (such approval not to be unreasonably withheld or delayed).
5. The Licensee keep the intervention plan under review at all times and, at least annually, shall review the appropriateness of the intervention plan and submit to the CAA a [CAA](#) certificate, ~~approved by a resolution of the board of directors of the Licensee and signed by a director of the Licensee appointed under Condition 8 (Requirement for mandated independent directors) pursuant to that resolution by within four months of the end of the Licensee's financial year. Such certificate shall be~~ in the following form: "The Licensee has reviewed its intervention plan as required by condition 7 of its licence. In the opinion of the directors of the Licensee, the intervention plan is fit for purpose and complies with the Licensee's obligations under that condition."

APPENDIX C

Illustrative proposed additional Licence Condition 8: Requirement for mandated independent directors and corporate governance

This appendix provides an illustration of a proposed additional condition on the requirement for mandated independent directors and corporate governance.

Condition 8: Requirement for mandated independent directors and corporate governance [Currently “[NOT USED]”]

1. Where potential conflicts exist between the interests of the Licensee and those of any affiliates or related undertakings of the Licensee, the directors of the Licensee, in discharging their responsibilities as directors of the Licensee must, subject always to their overriding corporate law responsibilities in their capacity as directors of the Licensee, act independently of the interests of any affiliate or related undertaking of the Licensee and ensure that they have regard exclusively to the interests of the Licensee.
2. Subject to paragraph 11, the Licensee must, without otherwise restricting the composition of its board of directors, ensure that at all times after a date which is 12 months after this paragraph of this condition comes into effect, it has at least two non-executive directors who meet the criteria set out in paragraphs 3, 4 and 5 below. In this condition such directors are referred to as “mandated independent directors”. This paragraph of this condition shall come into effect upon any date from which the Crown ceases to either have rights to, or to exercise such right to, appoint Directors to the ultimate holding company of the Licensee where a primary function of any such Director is to exercise, in that capacity, their independent commercial judgement on issues of strategy, performance, resources and standards of conduct.
3. A mandated independent director must:
 - (a) be a natural person;
 - (b) in the reasonable opinion of the Licensee, have the skills, knowledge, experience, and personal qualities necessary to perform effectively as a non-executive director of the Licensee and participate fully in the decision making of the board of directors of the Licensee;
 - (c) not have any executive duties within the Licensee’s business; and
 - (d) be of sufficient standing to ensure that, subject always to their overriding corporate law responsibilities in their capacity as directors of the Licensee, directors of the Licensee, in discharging their responsibilities as directors of the Licensee, act independently of the interests of any affiliate or related undertaking of the Licensee and ensure that they have regard exclusively to the interests of the Licensee.

4. A mandated independent director must not be, and must not have been during the 12 months before his appointment as a director of the Licensee or the coming into force of this condition (whichever is the later):
 - (a) an employee of the Licensee; or
 - (b) a director or employee of an associate of the Licensee.
5. A mandated independent director must not:
 - (a) have, or have had during the 12 months before his appointment as a director or the coming into force of this condition (whichever is the later), any material business relationship with the Licensee or any associate of the Licensee;
 - (b) hold a remit to represent the interests of any particular shareholder or group of shareholders of the Licensee or the interests of any associate or the interests of any particular shareholder or group of shareholders of any associate of the Licensee; or
 - (c) receive remuneration from the Licensee or any associate of the Licensee apart from a director's fee and reasonable expenses.
6. For the purposes of sub-paragraphs 5(a) and 5(c) respectively:
 - (a) the holding of a small number of shares or associated rights in the Licensee or any associate of the Licensee shall not, of itself, be considered a material business relationship; and
 - (b) the receipt or retention of any benefit accrued as a result of prior employment by or service with the Licensee or any associate of the Licensee shall not be considered to be remuneration.
7. The Licensee must notify the CAA of the names of its mandated independent directors within 14 days of the ~~later of the two dates referred to in paragraph 1 and must notify the CAA within 14 days where any new~~upon which such any directors (and any successors of such directors) are appointed to fulfil the obligation in paragraph 2 of this condition.
8. The terms of appointment of each mandated independent director must include a condition stipulating that both the Licensee and the appointee will use their best endeavours to ensure that the appointee remains independent during his term of office, having particular regard to the criteria set out in paragraphs 3, 4 and 5.
9. A term of appointment for a mandated independent director may not be for longer than eight years, but an individual may be reappointed thereafter provided that he continues to meet the criteria set out in paragraphs 3, 4 and 5.
10. The Licensee must notify the CAA in writing within 14 days if any mandated independent director is removed from office or resigns, giving reasons for the

removal or (to the extent that they are known to the Licensee) the resignation. For the purposes of this requirement, the reasons for a resignation may, if applicable, be stated to be personal reasons.

11. If at any time the Licensee has fewer than two mandated independent directors because of a removal or resignation or other reason (including death or incapacity), the Licensee must use reasonable endeavours to ensure that a new director is, or new directors are, appointed to fulfil the obligation in paragraph 2 as soon as is reasonably practicable to bring the number of mandated independent directors up to at least two.
12. Where mandated independent directors have been appointed to fulfil the obligation in paragraph 2 this condition, the Licensee must ensure, save where otherwise necessary to address urgent safety or operational matters, that:
 - (a) meetings of ~~its~~ board of directors of the Licensee are not quorate unless attended by at least ~~two~~one of those mandated independent directors;
 - (b) meetings of the board of directors of the Licensee are clearly distinct, and held at a separate time from, any meeting of the board of directors of any associate of the Licensee.

Interpretation

13. In this condition:

“associate” means:

- (a) an affiliate or related undertaking of the Licensee;
- (b) an ultimate holding company of the Licensee;
- (c) a participating owner of the Licensee; or
- (d) a common control company;

“common control company” means any company, any of whose ultimate holding companies (applying the definition set out in Condition 1 (Interpretation and construction) but substituting that company for the Licensee) is also an ultimate holding company of the licensee;

“participating owner” - For the purposes of the definition of associate above, a person is subject to a participating interest by another person (a “participating owner”) if:

- (a) that other person holds a participating interest in the person; or
- (b) the person is subject to a participating interest by a person who is himself subject to a participating interest by that other person; and “participating

interest” has the meaning given in section 421A of the Financial Services and Markets Act 2000.

and in this Condition and in Condition 5 and Condition 7

“CAA certificate” means a certificate which is:

- (a) addressed to CAA;
- (b) approved by a resolution of the board of directors of the Licensee either:
 - (i) at a meeting of the Licensee at which all Directors of the Licensee are present; or
 - (ii) by way of a written resolution of the Licensee signed by all Directors of the Licensee; and
- (c) signed by a director of the Licensee pursuant to that resolution;

APPENDIX D

Illustrative modification of Licence Condition 9: Prohibition of cross-subsidies

This appendix provides an illustration of a modification to Condition 9: Prohibition of cross-subsidies.

Condition 9: Prohibition of cross-subsidies

1. The Licensee shall procure that no Separate Business or part of a Separate Business gives any cross-subsidy (whether in money or money's worth) to, or receives any cross-subsidy from, any other business or part of any other business of the Licensee or any affiliate or related undertaking of the Licensee (whether or not a Separate Business) where such cross-subsidy ~~has or is intended to have or is likely to have the effect of preventing, restricting or distorting competition in any market for the provision of air traffic services~~not justified by reference to objective criteria.
2. Where ~~the CAA is satisfied~~ the Licensee is giving or receiving, or has given or received, any cross-subsidy prohibited by paragraph 1 the Licensee shall take such steps, set out in directions issued by the CAA to ensure that it ceases so to give or receive any cross-subsidy. A failure to comply with any directions shall constitute a breach of this Condition but the Licensee shall not otherwise be considered to be in breach of this Condition.

Annex 1



Fifth Floor
Brettenham House South
1 Lancaster Place
London WC2E 7EN

Finance Director
NATS (Holdings) Ltd
CTC
4000 Parkway
PO15 7FL

Attn: Nigel Fotherby
Finance Director

8 June 2015

Dear Nigel,

I thought it would be useful to confirm to you AG's position on the CAA's consultation on governance and the ring fence.

As you know, AG supports measures which credibly offer CAA greater assurance on the ring fence consistent with the existing PPP arrangements. We have been keen that you engage constructively with the CAA on this and meet reasonable concerns where possible. We are therefore supportive of NERL's approach to accepting (with some modifications) the CAA's proposals. Even though these may not add greatly to the current significant protections (which of course include a gearing cap not commonly seen elsewhere), to the extent that they give the CAA greater confidence, that is itself valuable.

We do, however, have very significant concerns over the CAA's proposal to appoint Mandated Independent Directors (MIDs). This has taken insufficient account of the governance arrangements that already exist within NATS' unique PPP structure. The appointment of MIDs is both an unnecessary and a disproportionate response to regulatory concerns that have yet to be properly evidenced and analysed. However, we are supportive of your constructive response which would entail a trigger event where Government no longer has the right to appoint Partnership Directors or does not exercise that right.

In this context it is worth underlining AG's commitment to the NERL regulated business. AG shareholders, individually and collectively, are clear that ensuring NERL's continuing high performance is their core business objective. It is important because NERL constitutes, and will continue to constitute, the bulk of NATS revenues. But, over and beyond that, it is the key reason that AG's airline shareholders embarked upon the PPP in the first place. Good NERL performance is critical to the

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performance of airlines flying into and out of the UK and to the interests of the passengers they carry. It also underpins the investment case of USS as a pension fund. We are clear that growing the NSL business can in no way be permitted to compromise NERL's interests, as this would be at odds with our own objectives as well as NERL's Licence obligations. In the event, NSL will continue to be primarily focussed in the UK, serving airports and contracts with the MoD. Overseas business will, in line with this strategic approach, therefore comprise a very small proportion of overall NATS revenues.

This strategic positioning should give the CAA additional comfort about AG's intentions and therefore of the context within which the PPP arrangements, which have so far worked so well for NERL, will operate in the future.

Regards,

A handwritten signature in blue ink that reads "Peter Read". The signature is written in a cursive style with a long, sweeping underline that extends to the right.

Peter Read
Chairman

Annex 2

The Partnership Directors' Mission Statement from the PPP Strategic Partnership Agreement

Mission Statement for Partnership Directors

Approach:

The Partnership Directors will be non-executive. They should be familiar with and act in accordance with the best corporate governance practice from time to time including, currently, the principles set out in the UK Listing Authority's Combined Code (regardless of whether the shares of the Company are listed). Their primary functions (which must be exercised for the benefit of the Company and all shareholders as a whole) will be:-

- to exercise their independent commercial judgement on issues of strategy, performance, resources and standards of conduct, and
- to seek to ensure that the board, as the principal decision-making forum in the Company, functions effectively and transparently.

The Partnership Directors will owe no special responsibility to the Crown in any capacity other than that of a financial stakeholder in the Company and will not, therefore, be concerned with the Crown's interests either as a policy-maker or as a regulator (through the Civil Aviation Authority or any successor body).

Duties:

The Partnership Directors are to have two primary areas of particular responsibility:-

- protecting the value of the Crown's financial interest in the Company
- ensuring that the Company, whilst benefiting from the skills, resources and strategic vision of the Strategic Partner and any other Private Sector Shareholders, retains an independent identity and the capability for independent operation without undue or improper reliance on the Strategic Partner or such other Private Sector Shareholders

Carrying out these duties will, in particular, require that, at all times, Partnership Directors consider the possibility of conflicts between the interests of the Strategic Partner and other Private Sector Shareholders, on the one hand, and the Company and/or the Crown as shareholder, on the other.

In particular, the Partnership Directors should assess:

- business proposals against the then current Business Plan and against their own independent commercial assessments of risk and reward, but having particular regard to the impact on the Company's core business in financial and management terms; and be prepared to provide written advice to the Crown as shareholder on the proposals especially where the approval of Shareholders is needed under this agreement
- funding proposals against the Crown's acknowledgement in the Business Plan that further funding may be required for the development of the business, the process set out in this agreement for the provision of equity funds, and also a desire on the Crown's part not to provide this funding when it might be secured from non-equity sources on reasonable terms; and be prepared to provide written advice addressed to the Crown as shareholder on the proposal

- dividend proposals against the Crown's expectations communicated to them from time to time, but also having regard to the likely impact on future cash needs
- all proposals to ensure that they do not favour one Shareholder over another, whether directly or indirectly (for example through the terms of trading arrangements)

To the extent that the Company incorporates or acquires subsidiaries, the directors' duties as outlined will require the Partnership Directors, as directors of the holding company, to monitor activities at subsidiary level.

Means:

To support the Partnership Directors in performing their role as non-executives, they will have the following entitlements (recorded in this agreement):-

- Partnership Directors will be entitled to have access to independent professional advice, as necessary, at the expense of the Company
- Partnership Directors will, at all times, be entitled to have unrestricted access to information within the Company and the right to require specific reports, analyses, background papers and information from management as requested by them
- at least one Partnership Director shall be appointed to each of the Audit Committee and the Remuneration Committee
- a Partnership Director shall be appointed chairman of the Safety Review Committee.

Accountability:

Where the Partnership Directors believe that the conduct by the Company of its business or the conduct of, or arrangements made with, the Strategic Partner or other Private Sector Shareholders give rise to the need for examination in light of the functions and duties set out in this Mission Statement, they should first seek to resolve the questions arising themselves at board level. If this process results in a conclusion which the Partnership Directors consider to be unsatisfactory from the Crown's perspective, they should advise the Crown accordingly. If they believe the conclusion to be both unsatisfactory and, arguably, a breach of the Strategic Partner's or other Private Sector Shareholder's obligations under this agreement, they should advise the Crown that they believe that grounds exist for an investigation of the Company.

The Partnership Directors will meet periodically with representatives of the Crown Shareholder and the Treasury to review developments within the Company. In the intervals between these meetings, they will be obliged to notify and meet with such representatives where any matters requiring Shareholders' views arise (e.g. to discuss funding/business proposals and to understand the Crown's position). They will also have both the right and the duty to inform and meet if circumstances arise which suggest that grounds for an investigation exist. Otherwise, the Crown will have no formal right to meet or seek to influence the Partnership Directors.

Other than as necessitated in order to satisfy accountability to the Crown, the Partnership Directors will be bound to obey normal rules of commercial confidentiality.

Annex 3

Proposed NATS Governance Arrangements following Trigger Event

Trigger Event: The Secretary of State for Transport shall cease to appoint, or shall cease to have the right to appoint at least two independent PDs to the board of NATS Holdings Limited.

Following a Trigger Event, the following governance would apply to the NATS group of companies, taking into account both (a) the existing rights and obligations of the shareholders in the NATS PPP; and (b) the need to provide MIDs with a role that has sufficient scope, authority and access to relevant information to both allow them to fulfil their statutory duties as directors of NERL and to attract candidates of sufficient calibre and appropriate experience.

- A. Two MIDs to be appointed to the NERL Board
- B. NERL Board quorum to be one MID except in relation to resolutions relating to Licence ring-fencing certificate, which requires both MIDs to be present
- C. Quorum arrangements to ensure that in urgent safety or operational circumstances, the absence of both MIDs (including due to vacancies) cannot prevent a meeting of the NERL Board to carry out urgent operational or safety related decisions.
- D. MIDs to be selected and appointed by a NATS Holdings Board Nomination Committee
- E. NERL to be required by its licence to notify the CAA of the resignation of any MID
- F. The NATS Holdings constitution includes a wide range of material Reserved Matters which create potential vetoes for shareholders in the PPP and their appointed directors. Rather than hold meetings of the MIDs on a NERL Board that has a limited membership drawn from the NATS Holdings Board, with subsequent veto rights applied by the full NATS Holdings Board with the MIDs absent, the full NATS Holdings Board would be appointed to the NERL Board and therefore meet with the MIDs in a meeting held separately from, and prior to the NATS Holdings/NSL “nested” Board meeting.
- G. The exception to the appointment to the NERL Board would be any executive director of NATS Holdings whose role was predominantly related to NSL.
- H. Any Reserved Matter decided by the NERL Board could be subsequently vetoed by the NHL Board meeting. However, the presence of the NHL Board among the NERL Board would provide the appropriate voting powers to reflect the power of the NATS Holdings Board such that no such veto would be necessary. At the same time, their presence should provide sufficient informed debate on such Reserved Matters that the MIDs will be included and have a full understanding of the rationale for the final decision.
- I. The NATS Holdings appointees to the Board of NERL will be specifically permitted to vote in circumstances where it is possible that a conflict of interest between NERL and the remainder of the NATS group may exist. This reflects the existing constitution of NATS Holdings.

J. Committee Structures:

- *Nomination Committee* – A Nomination Committee comprising at least one NATS Holdings non-executive director appointed by each of Airline Group and Government, with a remit to select MIDs who fulfil criteria set out in the Licence.
- *Remuneration Committee* – no NERL-specific Remuneration Committee; one NATS Holdings committee as now. NERL Board to approve recommendations for long term and annual bonus targets brought forward to it in respect of NERL's management.
- *Technical Review Committee* – this committee mainly deals with NERL long term capital investment plan issues and would become a NERL-specific committee including appropriately experienced MIDs.
- *Safety Review Committee (SRC)* – given the importance of safety, the need to ensure the best resources are available to the NATS Holdings, NSL and NERL Boards and the difficulty of identifying MIDs with sufficient expertise to participate directly in an SRC, this would continue to operate as a single SRC reporting to each member of the NATS group (including NERL)³. MIDs would review SRC reports as part of the NERL Board meeting (and, if necessary, have an opportunity to require SRC attendance at NERL Board meetings) – see below.
- *Audit Committee* –The Audit Committee would be split along the same lines as the Board meetings below, with NERL business addressed in a “NERL” Audit committee meeting at the start, followed by remaining NATS group business. One MID to be part of the NERL Audit Committee with the remainder the same as the NATS Holdings Audit Committee.

K. Board Meetings:

- NERL meetings would no longer be “nested” with NATS Holdings and NSL. Nesting would apply for those two companies and any other NATS group companies.
- NERL Board meeting to be held at start of Board day with MIDs in attendance. To cover all NERL business including items within NATS Holdings Reserved Matters and reports from the TRC, SRC and relevant parts of the Audit Committee (including Risk). Separate Board minutes created for that board meeting for distribution to NERL Board members.
- Where necessary in the interests of group-wide strategy, the executive directors would present to the NERL Board any paper summarising the NATS Holdings Board's views on significant issues. In some circumstances, this may require a pre-meeting of the NHL Board to approve that paper.

³ Note that at present the Chair of the SRC is reserved to Partnership Directors and therefore it might be appropriate for the Chair to be a MID following the Trigger Event..

- MIDs then leave the board room and the remaining nested NATS group boards consider all non-NERL matters. Any NERL decisions falling within the matters reserved so as to require approval of certain NATS Holdings directors will be subject to formal review and requirement for approval by the NATS Holdings Board (so providing the mechanism to handle those reserved matters)⁴.
- L. Group strategic, risk appetite and similar workshops will only include the NATS Holdings director level. However, any strategic elements directly concerning NERL will be considered by MIDs when presented to the NERL Board as part of the NERL Business Plan approval process.

⁴ Matters reserved directly to approval of specific NATS Holdings shareholder(s) will continue to require that approval before taking effect.