AIR TRAFFIC SERVICES AND COMPETITION LAW

A CAA Policy Document

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Executive Summary

1. In 2001, the CAA was given new powers under the Transport Act 2000 to enforce, in relation to air traffic services and concurrently with the Office of Fair Trading (OFT), the two prohibitions in the Competition Act 1998 concerning anti-competitive agreements and the abuse of a dominant market position. In 2004, the CAA was also given powers to enforce, again concurrently with the OFT, the prohibitions in Articles 81 and 82 of the EC Treaty in matters where there is an effect on inter-state trade within the European Union.[1]

2. In order for European competition law, and the Competition Act, to apply the enterprise concerned has to be an "undertaking". It was drawn to the CAA's attention that it might be the case that neither NATS (En Route) plc (NERL) nor NATS (Services) Ltd (NSL) which provide, respectively, en-route and aerodrome air traffic services are undertakings that are subject to competition law. The CAA obtained legal advice on this matter. The CAA's legal advice was that NERL was not an undertaking for the purposes of competition law and that NSL was also not an undertaking, although the position here was open to some doubt given the competitive environment within which NSL obtains contracts at aerodromes.

3. In June 2004, the CAA published a consultation document that described the legal advice and set out proposals on how it would act in the future if it receives complaints that either NERL or NSL (or indeed any supplier of aerodrome air traffic services) was acting anti-competitively. The CAA proposed that it would normally use its powers under NERL's licence for complaints about NERL. However, if in a particular case its licensing powers were inappropriate or inadequate, it would consider using its competition powers. In those circumstances, the CAA said that any uncertainty about the extent of its powers might have to be resolved by the courts. In the case of complaints about NSL, the CAA only had competition powers and it said it would consider using them. Again, the CAA said that the extent of its powers might have to be resolved by the courts. The CAA has considered the responses to the consultation document and is now publishing a statement setting out its future approach to the application of competition law to air traffic services.

4. Although there was broad support for the CAA's proposals on how it would handle complaints, a number of those who responded to the consultation disagreed with the view that neither NERL nor NSL were undertakings,. The CAA has considered the responses and believes that the arguments are more finely balanced than was previously considered to be the case. The CAA is not, however, in a position to come to a definitive view on this question which can only be determined by the courts. Respondents differed on the extent to which the existence of licensing powers in relation to NERL (but not available in relation to NSL) was an effective substitute for any lack of competition powers.

[1] The Competition Act 1998 and Other Enactments (Amendment) Regulations 2004 (SI 2004 No.1261) designated the CAA as a national competition authority, with respect to the supply of air traffic services, pursuant to Article 35 of Council Regulation (EC) No 1/2003 of 16 December 2002.

5. In these circumstances, the CAA has decided to proceed as follows.

i) In relation to NERL

6. If the CAA believes that NERL may be behaving anti-competitively, the CAA will decide on a case-by-case basis whether to use its licensing powers or its competition powers. Amongst the considerations to which the CAA could have regard are: the nature of the function being carried out; the urgency with which action might be required; and the ease and effectiveness of the alternative approaches. Where the CAA uses its powers under the Competition Act and the conduct has an effect on inter-state trade in the European Union, the CAA would be obliged to apply European competition law as well.

ii) In relation to NSL (and other aerodrome service providers)

7. As the CAA has no licensing powers in relation to suppliers of aerodrome air traffic services, if it receives a complaint against such a supplier alleging anti-competitive conduct it would expect to consider this under competition law.

iii) In relation to the Enterprise Act 2002

8. The CAA has separate powers under the Enterprise Act to make a market investigation reference to the Competition Commission in relation to the supply of air traffic services where a feature of the market is having anti-competitive effects. There may be circumstances where the most suitable response to a complaint made against a supplier of air traffic services would be a market investigation reference to the Competition Commission. In deciding whether to use the Enterprise Act the CAA will adopt the criteria used by the OFT.

iv) In relation to the monitoring and enforcement of the NERL licence

9. In its consultation paper the CAA explained that it was reviewing its licence policies and procedures more generally as a separate exercise. Given the doubts about its competition powers, the CAA has no present intention of removing or modifying licence conditions 2.7 or 2.8 on undue discrimination or condition 9 on cross-subsidy.

1. Introduction

Purpose

1.1 The CAA has powers to enforce competition law with respect to the provision of air traffic services. The CAA received legal advice which suggested that suppliers of air traffic services may not be undertakings for the purposes of competition law and thus not subject to the prohibitions in the Competition Act 1998 and European competition law. The CAA consulted on this issue and, having considered the responses to the consultation, this paper sets out the policies which the CAA intends to follow in considering any future complaints about anti-competitive behaviour by suppliers of air traffic services.

Background

1.2 In February 2001 the CAA was given new powers under chapter V of the Transport Act 2000 to enforce, concurrently with the Office of Fair Trading ("OFT"), the two prohibitions in the Competition Act 1998 relating to:

- anti-competitive agreements; and
- the abuse of a dominant market position.

1.3 In May 2004, European competition law was amended such that member states could apply the prohibitions in Articles 81 and 82 of the EC Treaty (which are similar to those under the Competition Act). Furthermore, when competition authorities apply national competition law to conduct which may affect inter-state trade they now have also to apply Articles 81 and 82. The CAA has powers, held concurrently with the OFT, to apply Articles 81 and 82 in relation to air traffic services. In practice most, if not all, of the conduct the CAA is likely to consider will have an effect on inter-state trade, so in most situations the CAA is likely to apply Articles 81 and 82 instead of, or in addition to, the Competition Act.

1.4 The CAA also has separate powers, held concurrently with the OFT, under the Enterprise Act 2002 to make market investigation references to the Competition Commission.

1.5 The CAA's concurrent powers, in relation to European competition law, the Competition Act and the Enterprise Act, apply to air traffic services which are, essentially, air traffic control and related services that are supplied in the UK. They do not extend to other aspects of aviation activity such as airports or airlines. Air traffic services include en-route air traffic services provided by NATS (En Route) plc (known as "NERL") and air traffic services provided at individual aerodromes. Such aerodrome air traffic services are supplied either by the aerodromes themselves or under contract to specialist suppliers of which the largest in terms of aircraft movements handled at UK aerodromes is NATS Services Ltd ("NSL"). There are a small number of other suppliers.

1.6 A distinction between the application of the CAA's powers under European competition law (and the Competition Act) and under the Enterprise Act is that in order to be subject to the prohibitions in European competition law (and the Competition Act) the enterprise concerned must be an "undertaking". It came to the CAA's attention that it might be the case that none of the enterprises providing air traffic services, including NERL, NSL and other suppliers of services at aerodromes, have the status of an undertaking. Accordingly, the CAA sought and received legal advice on the matter.

1.7 On 23 June 2004 the CAA issued a consultation paper setting out the legal background to the issues, the nature of the legal advice it had received and the implications of that legal advice. At the same time the CAA drew the matter to the attention of the Government. Responses to the CAA's consultation were requested by 31 August 2004. The CAA received six responses, from NATS[2], bmi, British Airways, Virgin Atlantic, BAA and BATA. These are available on the CAA's website[3]. At the request of British Airways the CAA has not made public the airline's more detailed legal advice.

Structure of the document

1.8 Section 2 sets out the legal background and the nature and implications of the legal advice the CAA received. Section 3 summarises the responses to the consultation. Section 4 explains how the CAA now intends to handle complaints about anti-competitive behaviour by air traffic service providers.

[2] NATS' main subsidiaries are NERL and NSL.
[3] www.caa.co.uk/erg/default.asp?page=3953

2. The Legal Background

2.1 This section briefly describes the CAA's various responsibilities and powers in relation to competition and ATS licensing matters, the legal advice it received and the implications of that advice.

The Competition Act 1998

2.2 Chapter V of the Transport Act gives the CAA concurrent powers with the OFT to enforce the prohibitions in the Competition Act relating to:

- agreements, decisions or concerted practices of the kind mentioned in section 2(1) of the Competition Act. This is known as the Chapter I prohibition which broadly prohibits anti-competitive agreements; and
- conduct of the kind mentioned in section 18(1) of the Competition Act. This is known as the Chapter II prohibition which broadly prohibits conduct that amounts to the abuse of a dominant position in a market,

where these relate to the supply of air traffic services (the statutory definition of these services can be found in Attachment 1). Of particular relevance is that the Chapter I and Chapter II prohibitions apply to behaviour carried out by undertakings.

2.3 Under section 60 of the Competition Act that Act has to be applied as far as possible in a manner that is consistent with the treatment of corresponding questions arising in Community law.

EU Modernisation

2.4 With effect from 1 May 2004, Chapter V of the Transport Act was further amended by the Competition Act 1998 and Other Enactments (Amendment) Regulations 2004 (SI 2004 No.1261) ("the Regulations") to give the CAA concurrent powers with the OFT to enforce the equivalent prohibitions in Articles 81(1) and 82 of the treaty establishing the European Community, again where these relate to the supply of air traffic services by undertakings.[4]

2.5 The Chapter I and Chapter II prohibitions in the Competition Act mirror closely those in Articles 81(1) and 82 respectively of the EC treaty. The main distinction is that the former are applied to conduct which may affect trade within the United Kingdom while the latter are applied to conduct that may affect inter-State trade.

2.6 Under Article 3 of the EC regulation which delegated the application of Articles 81 and 82 to Member States, where a competition authority, or national court, in a Member State applies national competition law, if the conduct may affect trade between Member States it must also apply Articles 81 and 82.[5] Competition

[4] The Regulations also designate the CAA as a national competition authority, with respect to the supply of air traffic services, pursuant to Article 35 of Council Regulation (EC) No 1/2003 of 16 December 2002.

[5] Council Regulation (EC) No1/2003 of 16 December 2002 on the implementation of the rules of competition laid down in Articles 81 and 82 of the Treaty.

authorities may also, under Article 5, directly apply Articles 81 and 82 where they do not apply national competition law.

Guidelines on the application of European competition law and the Competition Act

2.7 The OFT is obliged by the Competition Act to publish advice and information on the application and enforcement of the prohibitions in that Act. These explain its powers and how it interprets them in determining whether an undertaking has breached one of the prohibitions. The OFT's latest guidelines, incorporating changes as a result of EC Modernisation, are published on its website.[6]

2.8 Most of the other sectoral regulators have also published guidelines on their approach to the enforcement of the prohibitions in their sectors. In March 2001 the CAA published a notice announcing that it did not intend to produce detailed sector specific guidelines. It proposed, instead, to adopt the relevant guidelines published by the OFT until such time as it decided that it was appropriate to publish specific guidelines for the air traffic services sector.

The Transport Act 2000

2.9 The Transport Act established, *inter alia*, a system of licensing of providers of air traffic services. It is an offence to provide air traffic services without a licence or an exemption. Currently, the only provider operating under a licence is NERL, the sole supplier of en-route services. The licence was granted by the Government in March 2001, and for a variety of key services is exclusive to NERL for a period of 10 years (i.e. until 2011). The CAA is responsible for monitoring and enforcing the NERL licence. The full licence with its associated conditions can be found on the CAA's website.[7]

2.10 The Government has exempted other providers of air traffic services from licensing requirements, in particular those, such as NSL, which provide services at aerodromes. The exemption came into force in April 2001 and continues for a period of 10 years.[8]

The Enterprise Act 2002

2.11 The CAA has powers under the Enterprise Act, held concurrently with the OFT, to make market investigation references to the Competition Commission in relation to the supply of air traffic services. The CAA may make a reference if it has reasonable grounds for suspecting that any feature, or combination of features, of a market prevents, restricts or distorts competition in the UK or part of the UK.

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[6] The full set of guidelines on the application of the competition law may be found at www.oft.gov.uk. One of the most relevant guidelines is "Services of general economic interest exclusion", OFT, December 2004, which includes guidance on when an organisation will be considered to be acting as an undertaking for the purposes of competition law.
[7] The full reference for the licence is www.caa.co.uk/docs/5/ergdocs/natslicence_january06.pdf.
[8] The Air Traffic Services (Exemption) Order 2001 SI 2001 No. 287

The CAA's Legal Advice

2.12 In respect of NERL, the CAA's legal advice, in March 2004, was that it is not an undertaking for the purposes of competition law. In summary, the reasons for this view were:

- the fundamental role of air traffic services is to enable the safe and efficient use of airspace;
- it is the activity being carried out rather than the status of the enterprise that determines what is an undertaking;
- the provision of air traffic services is connected by its nature, aims and the rules to which it is subject with the exercise of powers which are typically or necessarily those of a public authority; and
- various judgments of the European Court of Justice and decisions and statements made by the European Commission lend support to this view.

2.13 For NSL, the CAA's legal advice was that, although it provides somewhat different services from NERL, its broad functions are in essence the same as NERL's. Consequently, NSL would also not be regarded as an undertaking for competition law purposes. However, there remained more doubt about this given the competitive commercial environment within which NSL obtains its contracts.

2.14 Although the CAA has not obtained specific legal advice on the status of other providers it would seem reasonable to extend the finding in respect of NSL to any provider of aerodrome air traffic services, at least in relation to those services.

Implications of the CAA's legal advice

2.15 The CAA's legal advice cast considerable doubt on the extent of its competition powers. The CAA, therefore, gave some thought as to how it should act in the future in the light of that advice. In its consultation paper it proposed the following:

- where a complaint is made in respect of the conduct of NERL, the CAA would normally rely on its licensing powers under Chapter 1 of the Transport Act. These include powers to enforce the conditions in NERL's air traffic services licence, to modify licence conditions and to add new conditions. Where, in any particular case, the CAA's licensing powers were inappropriate or inadequate, the CAA would consider exercising its concurrent competition powers. If the CAA found that there were reasonable grounds for suspecting that Article 81 or Article 82 of the EC Treaty or the Chapter I or Chapter II prohibitions of the Competition Act had been infringed (i.e. the test set out under section 25 of the Competition Act is satisfied) the powers issue might have to be resolved by the courts;
- where a complaint is made in respect of NSL (or another provider of aerodrome air traffic services), and consequently the CAA's licensing powers do not apply, the CAA would consider exercising its concurrent competition

powers. If the CAA found that there were reasonable grounds for suspecting that Article 81 or Article 82 of the EC Treaty or the Chapter I or Chapter II prohibitions of the Competition Act had been infringed (i.e. the test of section 25 of the Competition Act is satisfied) the powers issue might have to be resolved by the courts;

- the CAA would review its licensing policies in respect of NERL in the light of the legal advice it obtained. In the meantime, it had no plans to remove or modify the existing conditions in NERL's licence that address competition matters; and
- the CAA's legal advice would inform the approach the CAA adopted in formulating its position on the detailed implementation of the EC legislation on Single European Sky ("SES").

2.16 The CAA also indicated that it had drawn the potential limitations of competition law in the air traffic services sector to the attention of the Department for Transport.

3. Summary of responses

3.1 The CAA received six responses to its consultation. These were from NATS, bmi, British Airways, Virgin Atlantic, BAA and BATA. The responses can be read on the CAA's website.[9] This section summarises the responses by issue.

Whether NERL and NSL are undertakings

3.2 Among the respondents, only British Airways and Virgin commented on whether NERL and NSL were undertakings.[10] Both accepted that safety was paramount to NATS' business. Virgin added that users were concerned with matters of quality of service and price, as well as safety. British Airways said that the responsibility to ensure a safe system rested with the CAA and Secretary of State rather than with NATS.

3.3 Both British Airways and Virgin disagreed that the provision of air traffic services was connected with the exercise of powers which were typically or necessarily those of a public authority. Both attached significance to the separation of powers under the Transport Act. NATS was given a role in supplying air traffic services, with a view to making profit, while the regulatory functions, relating to airspace control, national defence, safety and the environment, were reserved to the CAA and the Secretary of State. British Airways also said that the CAA had retained the regulatory powers to ensure that all the statutory duties and conditions imposed on licence holders were adhered to. Virgin mentioned that the provision of air traffic services at airports had been provided by private companies in a number of countries. It mentioned Serco, a private company, which provided such services at airports in the UK, USA, United Arab Emirates and elsewhere. Virgin said this suggested that these countries did not believe that the provision of air traffic services at airports was connected with the exercise of powers which were typically or necessarily those of a public authority.

3.4 In considering the precedent of the European Court of Justice and High Court decisions concerning Eurocontrol, Virgin drew attention to the differences between NATS and Eurocontrol.[11] Virgin said that Eurocontrol provided substantially different services than those provided by NATS. Eurocontrol managed capacity on a day-to-day basis in order to minimise the impact of delays on Europe-wide air traffic flows rather than providing air navigation services to individual companies. Virgin thought that the services Eurocontrol provided were similar to the services provided in the UK by the CAA's Safety Regulation Group (SRG) and Directorate of Airspace Policy (DAP). British Airways distinguished between Eurocontrol and NATS on the grounds that while NATS retained the fees it charged, payment for Eurocontrol was treated more as a tax levied by the Contracting States.

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[9] The responses are at www.caa.co.uk/erg/default.asp?page=3953
[10] Some respondents said that as they had not seen the legal advice obtained by the CAA they could not comment directly on the advice but only on the CAA's description of it in the consultation paper. However, the CAA's summary of its legal advice covered all material points.
[11] Case C-364/92 *SAT Fluggesellschaft mbH v Eurocontrol*

3.5 British Airways and Virgin claimed that by granting the CAA powers under the Competition Act, concurrently with the Office of Fair Trading, Parliament had clearly intended the CAA to have effective competition powers. The Transport Act also gave the CAA and the Secretary of State statutory duties enabling them, inter alia, to promote competition in the provision of air traffic services. Therefore, Parliament had envisaged that the provision of such services could be subject to competition. British Airways also said that an undertaking entrusted with operating services for the general economic interest could be relieved from the rules on competition. The Government, however, had not designated NATS or any part of its business as a service of general economic interest, either in competition legislation or in the Transport Act. British Airways, therefore, believed that NATS could not be excluded from competition law on the grounds that it provided a service of general economic interest.

3.6 BAA, British Airways and Virgin commented on whether the provision of air traffic services at airports took place in a competitive market. Virgin said that by not requiring suppliers of air traffic services at airports to be licensed, the Government had convinced itself that there was competition "for the market" at least over the longer-term. British Airways said that by not applying economic regulation to air traffic services at airports, the Government and the CAA had recognised that a market existed for these services which appeared to work reasonably well. BAA, said that it would be extremely difficult to find an alternative supplier for Heathrow, given the need to provide a safe service handling such large volumes of traffic. It added that it would not be cost-effective to take the service in-house at its smaller airports, and when it tendered at Edinburgh NATS had been the sole bidder.

3.7 Both British Airways and Virgin concluded that NERL and NSL were undertakings for the purposes of competition law.

Implications of the CAA's legal advice

3.8 The respondents did not all agree on whether the implications of the CAA's legal advice raised concerns with respect to NERL and NSL.

NERL

3.9 Respondents were not agreed on whether the CAA's licensing powers under the Transport Act would be sufficient to deal with any potential anti-competitive conduct by NERL. NATS and BAA thought that they would be sufficient. Some airlines and airline representative bodies, however, were more concerned about the matter. BATA was alarmed by the CAA's legal advice, finding it unsatisfactory that NERL, as a monopoly supplier of air traffic services, could be immune from competition law. British Airways did not consider the CAA's licensing powers to be an acceptable alternative to competition powers. It pointed out that although the NERL Licence contained provisions prohibiting discrimination between airlines and that the price cap should prevent excessive pricing, competition law covered a number of other possible types of infringement that were not explicitly covered by the Licence. British Airways also referred to the extensive powers available under European competition law and the Competition Act, including powers to require the production

of documents and information; to search premises; to impose interim measures and to impose fines. In British Airways' opinion, competition law was better designed to deal with anti-competitive behaviour than was NERL's Licence.

3.10 Respondents differed over whether the CAA's proposed approach to complaints against NERL should be adopted. Virgin and bmi thought that the proposals were reasonable, with bmi acknowledging that the issue of whether NERL was an undertaking may have to be resolved by the courts. However, British Airways thought that the CAA should proceed on the assumption that competition law does apply until or unless Parliament changes the law. It considered it unsatisfactory that a complainant would have to prove in the courts that NERL was an undertaking before the CAA would act under competition law. It added that NATS could challenge the applicability of competition law if a decision was made against it.

NSL

3.11 British Airways, Virgin, BATA and BAA each expressed concern that if NSL was not an undertaking then its activities would not be covered either by a licence or by competition law. Virgin and bmi agreed with the CAA's proposed approach in relation to NSL. Again, bmi acknowledged that if a complaint were made the legal issues might have to be resolved through the courts.

3.12 However, some other respondents thought that further action was required to ensure that possible anti-competitive behaviour by suppliers of aerodrome air traffic services could be handled effectively. British Airways suggested that a system of regulation should be set up for these services while BAA suggested that the CAA could be given some reserve regulatory powers, maybe similar to those found in section 41 of the Airports Act 1986. BAA wondered what the situation would be under any direct charging arrangement. It thought that, under such an arrangement, it would contract with NSL (as at present) but users would pay under airport charges which would be considered at the five-yearly airports price reviews. BAA asked whether, by this arrangement, section 41 provisions would apply to NSL via the contractual arrangements with its London airports. If so, BAA also wondered whether these arrangements could be extended to airports which were not subject to price control.

Monitoring and enforcement of the NERL licence

3.13 As mentioned in paragraph 3.10, NATS said that the CAA's licensing powers would be sufficient to prevent any potential anti-competitive behaviour. It added that any decision the CAA made in respect of its legal advice should be taken into account in its separate consideration of the NERL licence. British Airways did not understand why the CAA was reviewing its licence policies and procedures, but thought that the CAA's legal advice should not be used to justify change.

Wider policy development

3.14 British Airways and BAA urged caution on the possible use of regulations implementing the Single European Sky as a means of resolving the matter. Both thought that this might weaken the SES measures which would benefit the UK air

transport industry by improving the cost and operational efficiency of services. In contrast, Virgin wondered whether clauses in the SES implementing rules might provide a solution.

3.15 Some respondents wanted action to ensure that air traffic services were covered by competition law. BATA thought that the CAA should take urgent steps to remedy the anomaly. Virgin said that it would urge the Government to take measures to remove any ambiguity as soon as possible. It considered that this was necessary as it took a long time to use competition law to resolve air transport matters even when the question of powers did not need to be resolved. bmi, however, did not envisage a complaint under competition law since NATS operated to Eurocontrol and ICAO principles. It saw no reason why the CAA should take any further action (or incur additional costs) in further refining or enquiring into the processes involved until, and if, a complaint was made.

4. The CAA's approach to competition issues

4.1 This section sets out how the CAA intends to handle complaints about anti-competitive behaviour by suppliers of air traffic services in the light of the responses to the consultation. It describes how complaints against NERL will be dealt with, how complaints against NSL or a non-NATS supplier will be considered and the effects on the monitoring and enforcement of the NERL licence.

Whether NERL and NSL are undertakings

4.2 The CAA believes that the question of whether NERL and NSL are undertakings is a legal issue on which ultimately only the courts can provide a definitive answer. As doubts had been expressed on the status of providers of air traffic services in competition law, the CAA obtained legal advice that came to the conclusion that NERL was not an undertaking and that NSL was probably not an undertaking. Some respondents disagreed with this conclusion. British Airways obtained its own legal advice on the matter and provided the CAA with this advice, on a confidential basis, which came to a different conclusion from that in the CAA's own advice.

4.3 The CAA does not propose to respond in detail to the points that have been raised in submissions as the particular circumstances of a case may affect its view, and as the CAA's position would not be determinative. But the CAA would like to draw attention to arguments (both those made in the submissions and those which have arisen as a result of further consideration of the issues by the CAA) which would tend to support the view that NERL, NSL and other suppliers could be undertakings. These arguments are that:

- the clear separation of the functions of the former National Air Traffic Services into a service provider (NATS) providing services on a commercial basis and a regulator (the CAA) exercising public authority;
- NATS is a commercial entity, and therefore has an economic purpose as well as a safety objective;
- it was the clear intention of Parliament that the supply of air traffic services should be subject to competition law, as it granted the CAA concurrent competition powers, with the OFT, in chapter 5 of the Transport Act;
- European competition law has recognised that a company can be both an undertaking and not an undertaking dependent upon the specific function in issue at the time (e.g. Aeroports de Paris v ECP 2000 ECR II-3929[12]).

[12] This case was an appeal by Aeroports de Paris against a decision by the European Commission that the airport had contravened Article 82 (then Article 86) of the EC Treaty. One of the grounds of the appeal was that the Commission had wrongly decided that the airport company was an undertaking. The judgment said that on deciding whether Aeroports de Paris was an undertaking a distinction had to be made between "purely administrative activities, in particular supervisory activities" and "the management and operation of the Paris airports, which are remunerated by commercial fees" (paragraph 112).

- European competition law has recognised that an undertaking includes any organisation engaged in economic activity, regardless of its legal status or the way it is financed[13]; and

- as Eurocontrol is different in nature from NATS, the Eurocontrol decision should not be relied upon for cases concerning NATS.

4.4 The CAA has not reached a view on whether suppliers of air traffic services are undertakings. However, given the tenor of the responses to the June 2004 consultation and the CAA's further consideration of the issues, it believes that the arguments are more finely balanced in particular with respect to NSL than was apparent at the time of the consultation. However, only the courts can give a determinative view on the law, and the courts might be reluctant to decide on the extent of the CAA's jurisdiction without an actual complaint.

Implications for the enforcement of competition law

4.5 The CAA has to decide how it will handle any competition complaints made to it. Its conclusions are set out below.

4.6 NERL operates under a licence issued under the Transport Act while NSL and other suppliers of aerodrome air traffic services are exempt from licensing. The CAA believes that this distinction points towards different treatment in the application of competition law.

NERL

4.7 The CAA understands and shares the discomfort of airlines that NERL may not be an undertaking for the purposes of competition law. It agrees with British Airways that the Competition Act and European competition law might, generally, provide a more effective means of dealing with anti-competitive conduct than the licence. However, it also concurs with the views of NATS and BAA that its licensing powers should allow it to address many issues of anti-competitive behaviour. NERL's licence already contains three competition-related conditions. Under condition 2.7, NERL may not unduly prefer or discriminate against any person or class of person in respect of the operation of its systems, after taking into account the need to maintain the most expeditious flow of air traffic as a whole without unreasonably delaying or diverting individual aircraft. Under condition 2.8, NERL may not unduly discriminate against or give preferential treatment to any person or class of persons in respect of the terms on which services are provided, to the extent that such terms have or are intended to have or are likely to have the effect of preventing, restricting or distorting competition in any market. In addition, condition 9 is designed to prevent anti-competitive cross-subsidy. To the extent that anti-competitive behaviour is not already covered by the provisions of the Licence, the CAA also has general powers to add or modify conditions in NERL's licence, subject to meeting its statutory objectives, which include a reference to promoting competition as a means of furthering users' interests.

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[13] Case C-41/90 Höfner & Elser v Macrotron GmbH and Case T-319/99 FENIN v Commission; on appeal C-205/03P judgment pending.

4.8 As the arguments about whether NERL may be an undertaking now appear more finely balanced than previously considered, the CAA will decide on a case-by-case basis whether it is more appropriate to use its licensing powers or its less certain competition powers. Amongst the considerations to which the CAA could have regard are: the nature of the function being carried out; the urgency with which action might be required; and the ease and effectiveness of the alternative approaches. Enforcement of licence conditions is governed by sections 20 to 25 of the Transport Act. However, section 21 of the Act prevents the CAA from using its powers to enforce the Licence if it is satisfied that the most appropriate way of proceeding is under the Competition Act.

4.9 If the CAA uses its powers under the Competition Act and the conduct has an effect on inter-state trade in the European Union, the CAA would be obliged to apply European competition law instead of, or in addition to, the Competition Act.

4.10 Where the CAA considered it appropriate to use its competition powers, it could investigate the conduct on the assumption that NERL was an undertaking. Alternatively, the CAA could refer the question as to whether NERL was an undertaking to the courts. The decision as to which route to take (i.e. investigation versus referral to the courts) would need some consideration. For example, where the CAA seeks to refer the matter of whether NERL is an undertaking to the courts first, it would inevitably increase the time taken to handle the first complaint made against NERL. On the other hand, it could provide a sounder legal basis for carrying out any subsequent investigation, and subsequent complaints on related issues. The CAA would be more likely to refer the matter to the courts first if it believed that the conduct would not cause serious, or irreversible, damage if it was not remedied quickly.

NSL and other providers

4.11 The CAA agrees with some respondents that it is unsatisfactory that the provision of air traffic services at airports may not be subject to the constraints of competition law while, at the same time, the suppliers of those services do not operate under a licence. As the CAA has no licensing powers in relation to suppliers of aerodrome air traffic services, if it receives a complaint against such a supplier it would expect to consider this under competition law.

4.12 In its response BAA raised the specific question of the position were direct charging brought to an end at those airports where charges are currently levied by NSL on airlines[14]. In that event, such charges would come within the definition of airport charges in section 36 of the Airports Act and, at the BAA London airports, would thereby fall within the price cap set by the CAA every five years. BAA asked whether the provisions of section 41 of the Airports Act would apply to NSL via the contractual arrangements that would then exist. In the CAA's view, section 41 applies either directly to the conduct of the airport operator or indirectly, i.e. where the conduct of the airport operator has caused a contractor (or other party) to

[14] At present NSL levies charges directly on airlines at Aberdeen, Edinburgh, Gatwick, Glasgow, Heathrow and Stansted airports.

engage in conduct described in section 41. The CAA is therefore satisfied that section 41 could not be used directly in relation to a contractor at any airport.

4.13 In its consultation paper, the CAA mentioned that it had drawn to the attention of the Department for Transport the potential limitations of competition law in the air traffic services sector. Since, as a result of this consultation, the CAA believes that the arguments about the extent of its competition powers are more finely balanced than was previously considered to be the case, it does not, at present, see any need for the Department for Transport to pursue possible changes to legislation.

Use of the Enterprise Act 2002

4.14 None of the respondents specifically commented on how the CAA should use its powers to make a market investigation reference to the Competition Commission under the Enterprise Act in relation to the supply of air traffic services. The CAA confirms, therefore, that it will consider whether it would be suitable, in any particular case, to use its powers under the Enterprise Act to make a reference of this kind. In doing so, it would have regard to the OFT's guidance on market investigation references (OFT 511) (available at www.oft.gov.uk). Under section 131 of the Enterprise Act the CAA may make a market investigation reference to the Competition Commission where it has reasonable grounds for suspecting that any feature, or combination of features, of a market in the United Kingdom for goods or services prevents, restricts or distorts competition in connection with the supply or acquisition of any goods or services in the UK or part of the UK. In paragraph 2.1 of its guidance the OFT states that it would only make references to the Competition Commission when the reference test set out in section 131 of the Enterprise Act and, in its view, each of the following criteria have been met:

- it would not be more appropriate to deal with the competition issues identified by applying the Competition Act or other powers available to it;
- it would not be more appropriate to address the problem identified by means of undertakings in lieu of a reference;
- the scale of the suspected problem, in terms of its adverse effect on competition, is such that a reference would be an appropriate response to it; and
- there is a reasonable chance that appropriate remedies will be available.

4.15 The CAA will, as far as possible, adopt the OFT's criteria set out above when considering whether and how to use its Enterprise Act powers. The uncertainty over whether any air traffic services supplier is an undertaking does not extend to the CAA's Enterprise Act powers, which are not in doubt and therefore apply to both en-route and airport air traffic services.

Monitoring and enforcement of the NERL licence

4.16 In its consultation paper the CAA explained that it was reviewing its licence policies and procedures more generally as a separate exercise. Given the doubts about its competition powers the CAA proposed to retain, unmodified, the competition-related conditions in NERL's licence. There were no objections to this proposal. Accordingly, the CAA confirms that it has no present intention of removing or modifying licence conditions 2.7 or 2.8 on undue discrimination or condition 9 on cross-subsidy.

Wider policy development

4.17 The CAA notes the views of respondents concerning SES.

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Attachment 1 - Air Traffic Services

The area in which the CAA can exercise concurrent powers is limited to the supply of "air traffic services". These are defined in section 98 of the Transport Act 2000 as:

- providing instructions, information or advice with a view to preventing aircraft colliding with other aircraft or with other obstructions (whether in the air or on the ground);

- providing instructions, information or advice with a view to secure safe and efficient flying;

- managing the flow of traffic with a view to ensuring the most efficient use of airspace;

- providing facilities for communicating with aircraft and for the navigation and surveillance of aircraft;

- notifying organisations of aircraft needing search and rescue facilities, and assisting organisations to provide such facilities.

Services that fall within the scope of air traffic services are currently provided by a number of suppliers:

- En route air traffic services are supplied exclusively by NATS (En route) plc (NERL) from one of its area control centres.[15] It does so under a licence issued under section 6 of the Transport Act and which is monitored and enforced by the CAA.[16] NERL is obliged to provide a number of Core Services and Specified Services, details of which can be found in the Licence.

- Local air traffic services are supplied at individual aerodromes either directly by the aerodromes themselves or under contract to air traffic suppliers. The largest of these suppliers is NATS (Services) Ltd (NSL) which currently has contracts at 14 airports including each of BAA's UK airports. Measured by aircraft movements handled at UK airports that report movements to the CAA NSL has a market share of around 55%.

Air traffic services at aerodromes are not provided in accordance with a licence issued under the Transport Act as they have been exempted from licensing until 2011 by the Air Traffic Services (Exemption) Order 2001 (SI 2001 No.287).

Both en route and aerodrome air traffic services are subject to separate safety oversight by the CAA's Safety Regulation Group.

[15] Some en route services in UK airspace have been delegated to other suppliers including the Ministry of Defence and air traffic service providers outside the UK.
[16] Information relating to the NERL licence may be found on the CAA's website at www.caa.co.uk/erg/default.asp?page=585 . This includes the licence itself as well as a number of associated documents published by the CAA.