MONITORING AND ENFORCEMENT OF THE NATS EN ROUTE LTD (NERL) LICENCE

Introduction

1. This document has two purposes. The first is to provide an explanatory description both of the Transport Act 2000 (the Act) as it relates to the licensing of air traffic services and of the Licence which will be granted to NATS En Route Limited (NERL). This document should be read in conjunction with both the Act and the NERL Licence (the Licence) as it does not purport to be a comprehensive or authoritative description of either¹.

2. The document’s second and main purpose is to explain the processes and procedures the CAA means to adopt for the monitoring and enforcement of the Licence. In developing the procedures the CAA has sought to establish clear principles of transparency and due process. It believes that this will help to secure more effective management of the Licence while increasing the confidence in the process of those affected by it. Many of the procedures to be followed are laid down in the Act but the CAA has discretion in its approach towards licence monitoring and enforcement in a number of areas.

3. While the monitoring and enforcement of the Licence is a new regulatory function for the CAA, various of its existing regulatory functions in respect of air traffic services will continue largely unchanged. For example, the CAA’s regulatory role under the Air Navigation Order in respect of safety in the provision of air traffic services will continue to be performed by the Safety Regulation Group (SRG). The CAA will also perform air navigation functions pursuant to directions issued under section 66 of the Act. These functions will be carried out by the Directorate of Airspace Policy (DAP), a new group and function for the CAA formerly carried out in the Ministry of Defence (MoD).

4. However, the scope of the Licence is significantly wider than, for example, permissions to levy airport charges held by airports under the Airports Act 1986. As a consequence the three regulatory groups within the CAA (the Economic Regulation Group (ERG), DAP and SRG) will have a close interest in the monitoring and enforcement of the Licence.

5. While the main focus of this document is on the monitoring and enforcement of the Licence, so as to provide a more comprehensive description of the CAA’s new responsibilities in the area of air traffic services it also describes the CAA’s new powers to be exercised concurrently with the Director General of Fair Trading in respect of the Fair Trading Act 1973 and the Competition Act 1998 (see paragraph 68).

¹Copies of the Act and the form of the Licence may be found respectively at http://www.hmso.gov.uk/acts/acts2000/20000038.htm and http://www.aviation.detr.gov.uk/nats/licence/index.htm
The Transport Act 2000

6. The Act received Royal Assent on 30 November 2000. The portion of the Act relevant to the monitoring and enforcement of the Licence is Chapter 1 – Air Traffic Services. With two important exceptions the relevant sections of Chapter 1 come into force on 1 February 2001. The exceptions are section 3, which makes it an offence to provide air traffic services without a licence or an exemption, and section 4 which deals with exemptions. It is planned that these would come into force on 1 April 2001.

7. The Act places similar duties on the Secretary of State and the CAA when exercising their functions under Chapter 1 (sections 1 and 2). For information, the duties of the CAA in section 2 of the Act are set out in Attachment 1.

8. The Act makes it an offence for a person to provide air traffic services in respect of a managed area unless authorised to do so by a licence or by an exemption. A managed area is the United Kingdom and any area outside the United Kingdom but in respect of which the United Kingdom has undertaken under international arrangements to provide air traffic services (section 3). At present the latter means the Shanwick Oceanic Control Area.

9. The Secretary of State may grant an exemption enabling a person to provide air traffic services. Exemptions may be individual or class exemptions (section 4). Subject to consultation, the Government proposes to issue a class exemption order covering all persons who are not providing an area control service from an area control centre.

10. A licence may be granted by the Secretary of State or by the CAA with the Secretary of State’s consent (section 6). The Secretary of State will issue the initial licence to NERL. This will give NERL exclusive rights for a period of 10 years to provide the “Core Services” (see paragraph 19 below). The Secretary of State has not given the CAA consent to grant licences.

11. A licence may include such provisions as the licence authority (the Secretary of State) thinks are necessary or expedient. Such provisions as the licensing authority thinks fit may be expressed as conditions (section 7). The significance of this is that only conditions may subsequently be enforced or modified under the provisions of the Act. For the purposes of the Licence a distinction is drawn between “terms” and “conditions” (see also paragraph 19 below).

12. Licensees are given statutory duties by the Act (section 8). These are set out in Attachment 2. The CAA is responsible for enforcing these duties which, as with the enforcement of licence conditions (paragraph 14 below), involves the making of provisional and final orders. The CAA may give notice that air traffic services specified in the notice are to be treated as not being “authorised services” and so are not subject to the licensee’s statutory duties (section 9).

13. Licence conditions may be modified by the CAA with the agreement of the licensee although the Secretary of State has power to direct the CAA not to make a
particular modification. The Act lays down procedures for making modifications including the publication by the CAA of a proposal to modify and the consideration of representations (section 11). Licence modifications may also be made after the CAA has made a reference to the Competition Commission and the Commission has reported on the reference. The Act makes detailed provision for the conduct of references and for the making of modifications following a reference (sections 12 to 18).

14. Licence conditions are enforceable by the CAA through the making of provisional or final orders following a statutory procedure (sections 20 to 25).

15. The CAA must maintain a public register to include licences that have been granted, exemptions from the requirement to hold a licence, all modifications to licence conditions, every requirement or determination made or direction, consent or approval given under the licence, any exemptions from the application of the licensee’s statutory duties and any provisional or final enforcement orders (section 35).

The NERL Licence

16. The Secretary of State will issue a licence to NERL under section 6 of the Transport Act. The Licence is planned to take effect from 1 April 2001 and a copy will be available for inspection on the General Register which will be maintained by the CAA at the address given in paragraph 21 below.

17. The Licence authorises NERL to provide:

(a) air traffic services within the En route (UK) Area which comprises:

- London Flight Information Region
- London Upper Flight Information Region
- Scottish Flight Information region
- Scottish Upper Flight Information Region
- Areas of adjacent airspace for which responsibility has been delegated to the United Kingdom by international agreement.

(b) air traffic services within the En route (Oceanic) Area which comprises:

- Shanwick Flight Information region
- Shanwick Oceanic Control Area

18. In respect of each of the areas in paragraph 17, the Licence may be terminated on the giving of notice by the Secretary of State in circumstances set out in Schedule 3 of the Licence. The Secretary of State must give at least 10 years’ notice but not before the Licence has been in effect for at least 20 years. The Licence therefore has a minimum duration of 30 years.

19. The Licence includes both “terms” and “conditions”. The distinction between the two is important since conditions may subsequently be modified in accordance
with Sections 11 to 19 of the Act. Terms may not. The terms are found in Part I of the Licence while the conditions are set out in Part II\(^2\). Part I authorises the provision of air traffic services in the areas described in paragraph 17 and the provision of the UK En route Air Traffic Control Service and the Oceanic En route Air Traffic Control Service. Under the Licence, NERL is given an exclusive authorisation to provide the “Core Services” (see below) for a period of ten years. Part I also prevents any licence modifications from reducing to a material extent the scope of the two En route services and specifies the duration of the licence and the means of revocation. Part II of the initial Licence includes 25 conditions and an index of them can be found at Attachment 3. Condition 1 provides definitions of various terms used in the Licence. Condition 2 sets out NERL’s general obligation to provide two types of service:

- “Core Services” comprising the UK En route Air Traffic Control Service, the Oceanic En route Air Traffic Control Service, the Advisory Control Service and the Terminal Approach Service specifically at Heathrow, Gatwick, and Stansted airports.

- “Specified Services” in Schedule 4 of the Licence. These include:
  
  (a) Aeronautical Messaging Network
  (b) Air Traffic Operational Telephone Network
  (c) Emergency Fixing Facility
  (d) Emergency Frequency Facility
  (e) Navigational Infrastructure Services
  (f) North Sea Helicopter Advisory Service
  (g) Nuclear and Chemical Accident Service
  (h) Surveillance Infrastructure Services
  (i) UK Aeronautical Information Service
  (j) UK Flight Information Service
  (k) UK Meteorological Information Service

Conditions 3 and 4 set out the general procedures for the modification to the scope of a Core Service or a Specified Service and with the addition or removal of a Specified Service. The more detailed procedures the CAA intends to adopt for dealing with modifications are discussed in paragraphs 31 to 48 below. Conditions 5-9 broadly cover financial and accounting matters. They regulate the disposal by NERL of key operating assets, specify regulatory accounting information, place restrictions on the activities of the Licensee, require the Licensee to maintain sufficient financial resources to meet its continuing obligations under the Act and the Licence, and prohibit anti-competitive cross-subsidies. Condition 10 concerns the preparation by NERL of business and other plans while Condition 11 deals with service standards. Conditions 12-19 cover a variety of different matters. Conditions 20-25 relate to controls on Eurocontrol and Oceanic charges, in the form of price caps, and on charges for the North Sea Helicopter Advisory Service and the Terminal Approach Service, through evidence of effective consultation with users. The charge control conditions are described in more detail in paragraphs 63-65.

\(^2\) Schedule 3, relating to revocation, is also expressed as a term of the Licence and so may not be modified.
General Licence Monitoring and Enforcement by the CAA

20. The scope of the Licence is broad and has a bearing on the activities of a number of different parts of the CAA, notably ERG, SRG and DAP. The CAA has therefore been developing internal procedures designed to ensure that the Licence is managed effectively and efficiently taking into account the variety of interests that will be involved. Central to the monitoring and enforcement of the Licence will be the roles of the Licence Manager and of the NATS Licence Management Coordination Committee (NLMCC).

The Licence Manager

21. The Licence Manager will have general responsibility for day-to-day licensing matters. He will act as the main focal point within the CAA for contacts between the CAA and external organisations, principally NERL and users of NERL services, on issues directly relating to the Licence including the modification and the enforcement of conditions. Correspondence and other material exchanges between the CAA on the one hand and NERL and other parties on the other relating to the Licence will be through the Licence Manager. He will also co-ordinate the CAA’s internal processes described below. Finally, the Licence Manager will maintain the public register required by section 35 of the Act (see paragraphs 24 to 26 below). The Licence Manager and his contact details are:

Paul Taylor  
Licence Manager  
K4 Gate 7  
Civil Aviation Authority  
45-59 Kingsway  
London WC2B 6TE

Telephone: 020 7453 6232  
Fax: 020 7453 6224  
E-mail: taylorpk@caaerg.co.uk

The NLMCC

22. The NLMCC is a sub-committee of the CAA Board. It comprises senior staff representatives from ERG, DAP, SRG and the CAA’s Legal Department. Its purpose is to monitor, review progress and keep the CAA’s Executive Committee (and through that the CAA Board) informed on licence monitoring and enforcement activities generally. The NLMCC will be responsible for taking decisions on licensing matters that involve the material interests of more than one of the three regulatory groups of the CAA.
23. The CAA will maintain a register available for inspection by the public at its main London offices in Kingsway. Under section 35 of the Act the register must include:

- the provisions of every exemption;
- the provisions of every licence;
- every modification of the conditions of a licence;
- every revocation or surrender of a licence;
- the provisions of every requirement or determination made or direction, consent or approval given under a licence;
- the terms of every notice given under section 9 (which allows the CAA to give notice to a licence holder that air traffic services specified in the notice are to be treated as not being authorised services and so not subject to the licence holder’s statutory duties in section 8);
- the terms of every final or provisional order made under section 20, every revocation of such an order, and every notice under section 22(10) or (11) (these all relate to the enforcement of licence conditions).

24. As well as documents that fall within these statutory requirements, the register will also contain other documents that the CAA believes should be made publicly available. This will include, for example, copies of documents, agreements, reports and returns that have to be produced under the conditions in the Licence and which are not subject to confidentiality constraints.

25. Anyone wishing to inspect the register should ring 020 7453 6225 to arrange a suitable time.

26. The CAA’s Official Record will be the principal means by which the CAA will make public information about the continuing monitoring and enforcement of the Licence. Information published in the Official Record will include, but will not necessarily be limited to:

- proposals that the CAA is obliged by the Act to publish in connection with a licence modification or with the enforcement of a licence condition;
- other proposals that may be made either by the CAA or by another party;
- notification of the CAA’s decisions;
- notification of new documents placed on the General Register.

27. Where the Act stipulates a minimum period within which the CAA may invite representations about a published proposal the CAA intends to allow the minimum period unless, in particular cases, there is sufficient justification for it to specify a longer period.

28. A new series of the Official Record is being created for notices concerning the Licence. The Official Record may be obtained, on subscription from:

Westward Documedia Limited
37 Windsor Street
Cheltenham
Glos. GL52 2DG

Telephone: 01242 283100

The CAA will be considering in due course whether it will be more effective to publish the series of the Official Record relating to the Licence in electronic form.

The Granting of Licences

29. Section 6(1) of the Act allows the CAA to grant licences to provide air traffic services only with the consent of the Secretary of State or with a general authority given by the Secretary of State. Given the initial period of exclusivity for NERL in Core Services, the CAA has been given no general authority by the Secretary of State.

Modifications within Licence Conditions

30. Section 7(5) of the Act provides that provisions in the licence relating to the modification of the licence shall have effect as well as the provisions in the Act relating to licence modifications. Two of the conditions in the licence contain within them specific modification arrangements. These are in Condition 3 (Modification to Core Services and Specified Services) and Condition 4 (Further Provisions Relating to the Modification of Specified Services). The modification arrangements in Condition 3 supplement the process that can lead ultimately to the making of a reference to the Competition Commission under section 12 of the Act. Those in Condition 4 provide for a determination process that does not involve a reference to the Competition Commission.

Condition 3

31. Special procedures apply where either the CAA or NERL wishes to modify the scope of a Core Service, add a new service to the list of Specified Services in Schedule 4 of the licence or modify the scope of an Infrastructure Service that would materially increase or reduce the scope of that service or the cost to the licensee of providing that service. The condition sets out the general procedures that need to be followed. The CAA proposes to supplement these by exercising discretion to allow
interested third parties to express their views within a transparent decision making
process.

i) On a proposal from NERL

32. The condition allows NERL, after consultation with the CAA, to make an
application to the CAA for a modification on at least four months notice. Depending
on the nature and scale of the modification being sought, the CAA will decide if third
parties should be given the opportunity to make representations on an application
from NERL. Where the CAA publishes an application it will consider all written
representations that it receives within a period of 21 days. The CAA will make
available copies of written representations, subject to confidentiality constraints.

33. The CAA has given careful thought to the circumstances in which it should be
possible for those who make written representations also to make oral representations.
Taking into account the objective of ensuring that applications are dealt with in a
timely and cost-effective manner the CAA has concluded that the opportunity to make
oral representations should be open to NERL as the applicant and to those users of
NERL’s services who have submitted written representations. (For this purpose a user
would be taken to be the same as where the same term appears in the Licence, namely
the owner or operator of an aircraft that uses a service or who wishes to use a service.)
Depending on the number of individual written representations that have been made
on a particular application the CAA may need to limit the number of those who make
oral representations. This could be achieved, for example, through established bodies
representing the views of particular NERL users. The CAA would not automatically
rule out the ability of parties other than NERL and its direct users to make oral
representations but they would need to make a compelling case. Oral representations
would be made individually and in private to appropriate members of NLMCC. They
would therefore not be formal “hearings” as such and no transcripts would be taken of
the proceedings.

34. Under Condition 3 the Licensee may implement the modification it has
proposed if, within six months of the application, the CAA has not:

a) Modified the Licence as proposed by NERL;

b) Served a counter-notice on NERL proposing an alternative change;

c) Served a counter-notice on NERL rejecting the change and, following a reference
to Members of the CAA (see paragraph 36), made a reference to the Competition
Commission; or

d) Following a reference to Members of the CAA, made a reference to the
Competition Commission relating to the proposed change.

35. Any counter-notice made by the CAA will include the reasons for the rejection
of NERL’s proposal and details will also be published in the Official Record and in
the General Register. Equally, where the CAA decides not to issue a counter-notice
it will publish reasons for its decision in those cases where third parties have
contested a NERL proposal.
36. Given the underlying objectives of transparency and due process where the CAA, through NLMCC, rejects an application from NERL by issuing a counter-notice, the Licence provides for a panel of CAA Members to decide whether or not the CAA should make a reference to the Competition Commission under section 12 of the Act. The CAA has proposed to DETR consequential amendments to the Civil Aviation Authority Regulations 1991 that ensure that references are conducted in a transparent manner and respect the rights of those who are likely to have an interest in the CAA’s decision. The panel will issue a written decision with reasons.

37. The procedures for a reference to the Commission are already prescribed in detail in sections 12-19 of the Act. The CAA will publish in the Official Record details of any reference it makes, publish the Commission’s report and, depending on the Commission’s conclusions, publish in the Official Record proposals to modify conditions. It will consider written representations from any interested party made within 28 days of the notice. It will also consider oral representations in accordance with paragraph 33 above. The CAA will publish a written decision with reasons for the modifications it intends to make. The Act specifies that the CAA must notify the Commission of the modifications it proposes to make and there is a statutory procedure where the Commission does not consider those modifications are the ones needed to remedy or prevent the adverse effects specified in its report. Ultimately the Commission has powers to make modifications of its own.

38. Details of any modifications following a reference to the Commission will be published in the Official Record and also recorded in the General Register.

ii) On a proposal by the CAA

39. Under Condition 3 the CAA may give NERL four months notice of a modification having consulted NERL. Where the CAA decides to seek comments from third parties on its proposal it will publish details in the Official Record at the same time as it serves notice on NERL. As with a proposal made by NERL written comments on the CAA’s proposal should be made by any interested party within 21 days and there will be similar provision for oral representations by NERL and NERL’s direct users as described in paragraph 33. This will not affect NERL’s ability under the Licence to issue a counter-notice within one month of the CAA’s notification giving detailed reasons and justification for its objection.

40. Where NERL has issued a counter-notice the CAA must, within four months, either modify the licence in accordance with NERL’s counter-notice or make a reference to the Competition Commission after having referred the matter to CAA Members as described in paragraph 36. If the CAA has done neither of these things, NERL will be under no obligation to comply with the CAA’s notice. The CAA will therefore consider written and any oral representations and will issue a written decision with reasons (and where necessary make a reference to the Competition Commission) within four months of any counter-notice from NERL. It will also issue a written decision with reasons where it has published a proposal that has drawn objections from third parties but where NERL has not issued a counter-notice.
**Condition 4**

41. Condition 4 applies where either the CAA or NERL wishes to modify the scope of a Specified Service (other than one to which Condition 3 applies) or remove a service from the list of Specified Services. The condition lays down the actions that one party needs to take where the other seeks to introduce a modification. As with modifications under Condition 3, the CAA intends to exercise discretion in allowing third parties to express their views within a transparent modification process.

i) On a proposal from NERL

42. Condition 4 enables NERL to give the CAA four months notice of a modification after having consulted the CAA. The CAA will decide on a case-by-case basis depending on the nature and scale of the modification whether to invite written representations from third parties. Where it does so decide it will publish details of NERL’s notification in the Official Record and allow a period of 21 days for written comments. The CAA will also allow NERL and its direct users to make oral representations as described in paragraph 33.

43. The CAA has to issue a counter-notice within four months of the original notice from NERL to prevent a modification taking effect. Any counter-notice made by the CAA will include the reasons for the rejection of NERL’s proposal and details will also be published in the Official Record and in the General Register. Equally, where the CAA decides not to issue a counter-notice it will publish reasons for its decision in those cases where third parties have contested a NERL proposal.

44. Under the licence condition, NERL may implement the modification if, within four months of the original notification, the CAA has not served a counter notice on it or, within eight months of NERL’s application (following a written request from NERL made within one month of the CAA’s counter-notice) had the matter determined by a panel of Members of the CAA pursuant to the 1991 Regulations as described in paragraph 36. In the case of modifications under Condition 4, a decision of the CAA panel can be appealed by the Licensee to the Secretary of State.

45. The CAA will publish a written decision with reasons where an application from NERL is initially rejected by the issuing of a counter-notice and the making of a reference for determination by a CAA panel. A reasoned decision will also be issued where the CAA approves an application that has been published and has attracted representations from third parties. The CAA will also publish particulars of the decision in the Official Record and place a record on the General Register.

ii) On a proposal by the CAA

46. Where the CAA wishes to initiate a change under Condition 4, after consultation with NERL, it has to give NERL four months notice. The CAA may wish to seek comments from third parties when it will publish in the Official Record details of the modifications it is seeking together with the reasons for them and allow 21 days for written comments. This will be supplemented, where necessary, by oral representations from NERL and its direct users as described in paragraph 33. This
will not prevent NERL from issuing a counter-notice within one month where it opposes the modification as the licence requires. The CAA can challenge a counter-notice from NERL only by making a reference to a panel of Members of the CAA pursuant to the 1991 Regulations as described in paragraph 36. The Licensee may appeal the panel’s decision to the Secretary of State.

47. The CAA will issue a written decision with reasons in cases where it has published a proposal that attracts representations from third parties and where it does not propose to challenge a counter-notice from NERL. It will also publish its reasons for making a reference to CAA Members under the 1991 Regulations.

**Modification of Licence Conditions**

48. The Act provides, in sections 11-19, for the modification by the CAA of conditions in the licence. Existing conditions may be modified, new ones added or existing conditions removed from the licence. Before modifying licence conditions the CAA must publish notice of a proposal, state its effect and the reason for the proposal and invite representations. The CAA has developed procedures where NERL makes a proposal to modify conditions or where the CAA seeks to change them. A modification proposed by the CAA could be of its own volition or it could be initiated by an approach to the CAA by a third party.

i) On a proposal by NERL

49. Where NERL makes a proposal to modify licence conditions the CAA will normally publish the application in the Official Record and invite representations from any interested party within a period of 28 days. The CAA may, in certain circumstances, decide not to publish an application made by NERL. This could apply where, for example, a change would, in the CAA’s opinion, clearly run counter to its statutory duties in section 2 of the Act. In such an instance the CAA will provide NERL with a written decision explaining the reasons why it does not intend to take forward the proposal.

50. Where the CAA publishes an application it will consider all written representations that it receives within the 28 day period. It will allow NERL as the applicant and those direct users of NERL’s services who have submitted written representations to make oral representations as described in paragraph 33.

51. Following its review of written and any oral representations, the CAA will publish a written decision with reasons. Particulars of the decision will be published in the Official Record and placed on the General Register. The decision could be to make the modification proposed by NERL, to refuse the application or to make a reference to the Competition Commission as provided in sections 12-19 of the Act. The CAA would normally contemplate a reference to the Commission only where the refusal of an application raises important public interest issues. Before the CAA takes a decision to make a reference to the Commission NERL would be given an effective right of appeal to Members of the CAA in the same way as for modifications under Condition 3 (see paragraph 36).
52. Any reference to the Commission will follow the procedures described in paragraph 37.

53. Details of any modifications will be published in the Official Record and also recorded in the General Register.

ii) On a proposal by the CAA

54. The procedures the CAA plans to follow where it wishes to modify licence conditions will be very similar to those set out above where NERL makes a proposal. The CAA will normally seek licence modifications of its own volition but there may be circumstances where an approach from an external party leads it to seek a modification. The CAA will publish its proposal in the Official Record and allow a period of 28 days for written representations. Oral representations will also be permitted as described in paragraph 33. The CAA will publish a written decision with reasons. One important difference, however, is that under the Act the CAA can modify conditions only where NERL consents to the modification. The alternative is for the CAA to make a reference to the Commission under section 12 of the Act. The CAA’s decision on a proposal it has made will therefore be to modify the licence conditions with NERL’s consent, not to make any modifications or to make a reference to the Competition Commission. In its written decision the CAA will give reasons for the particular course it intends to follow. Any reference to the Commission will be subject to the procedures explained in paragraph 37.

Enforcement

(a) Licence Conditions

55. Sections 20 to 25 of the Act deal with the enforcement of licence conditions by the CAA. In practice enforcement action may be initiated by the CAA either of its own volition or, more likely, following a complaint from an external party that NERL is acting in breach of a licence condition. Complaints alleging the breach of a licence condition should be made in writing to the Licence Manager setting out as fully as possible the nature of the alleged contravention and its effect on the complainant. The CAA is required by the Act to investigate alleged breaches of a condition made by an interested person unless the allegation is frivolous or vexatious. The CAA will notify the complainant if it believes these conditions apply and the reasons for its view.

56. Where the CAA decides to investigate a complaint it will normally copy the written complaint to NERL asking for a response. It may also ask the complainant to clarify or otherwise explain details of the complaint. In some cases, the CAA may also wish to invite views from third parties on a complaint. Such views will be sought via a notification in the Official Record where the CAA believes there is likely to be a broad range of interest in the subject matter of the complaint. Otherwise the CAA may make direct approaches to individual parties believed to have an interest in the complaint asking for their comments.

57. The statutory enforcement of licence conditions is implemented through the mechanism of provisional and final orders as applied to other regulated industries. Where it appears to the CAA that the licence holder is contravening or is likely to
contravene a licence condition a provisional order is designed as a rapid response to deal with those cases where a person is likely to sustain loss or damage arising from the breach. The CAA may therefore make a provisional order on the basis of a written complaint alone, where the evidence of a breach and of its impact on the complainant is sufficiently compelling, or following initial consideration by the CAA of written submissions. The CAA may not, however, make a provisional order where a duty in section 2 of the Act would preclude it from doing so or where it believes action under the Competition Act 1998 is more appropriate (see paragraphs 68 to 69 below). The CAA is not required to make a provisional order if the licence holder is taking steps to comply with the condition, the breach is trivial, the breach does not adversely affect the interests of aircraft operators, aerodromes, passengers or freight shippers or the Secretary of State has applied for an air traffic administration order under section 28 of the Act. The CAA recognises that because of the nature of a provisional order it may not always be possible to allow for oral representations before it reaches a decision. It will however, in all cases, give reasons for its decision to make or not to make a provisional order. Unless it is confirmed, a provisional order may not last for a period of longer than three months.

58. A provisional order must be confirmed if the CAA is satisfied that the licence holder is contravening or is likely to contravene a licence condition and that its confirmation is needed to secure compliance, but subject to the same provisos as above for the making of a provisional order. Before confirming a provisional order the CAA must publish a notice and invite representations. The Official Record will be used for this purpose allowing a period of 21 days for written representations. The CAA will allow NERL and direct users of NERL’s services who have made written representations to make oral representations before it decides on the confirmation of a provisional order. It will publish a written decision with reasons.

59. Where the CAA proposes to confirm a provisional order with modifications it will, consistently with section 22(3) of the Act, either obtain NERL’s consent to the modifications or allow NERL at least seven days to make representations unless the modifications are trivial. It will allow NERL to make oral representations and will publish written decisions with reasons.

60. The CAA has to make a final order generally if it is satisfied that the Licensee is contravening or is likely to contravene a licence condition but again subject to the same provisos as for the making of a provisional order. The CAA will adopt the same procedures for the making of final orders as for the confirming of provisional orders described above. A final order remains in force until the CAA revokes it.

61. The licence holder has a duty to comply with a provisional or a final order and that duty is owed to any person who may be affected by its contravention. A breach is actionable by any person who sustains loss or damage. Provisional and final orders can also be enforced through civil proceedings brought by the CAA.

(b) Licensee’s Statutory Duties

62. The CAA is responsible for enforcing the licence holder’s statutory duties in section 8 of the Act. The statutory procedures for enforcing these duties are identical to those for the enforcement of licence conditions through the making of provisional
and final orders. Accordingly, the CAA proposes to adopt the same procedures for enforcing statutory duties as are described in paragraphs 55 to 61 in respect of licence conditions.

**Charge Control Conditions**

63. Conditions 20 to 25 of the Licence deal with the control of the Licensee’s charges. Eurocontrol charges and Oceanic charges will be subject to separate price caps. Charges for the North Sea Helicopter Advisory Service and the Terminal Approach Service at the London airports will be subject to a looser form of regulatory oversight.

64. Once set for a period of five years, the price caps may only be varied in two clearly defined circumstances. The first is “Exceptional Circumstances” which are circumstances outside the licensee’s control and which have had or will have a negative effect on its financial position such that its ability to meet its current or future obligations under the Act or the Licence is, or is threatened to be, materially impaired. In general terms where the Licensee believes “Exceptional Circumstances” exist it may give the CAA at least three months notice suspending the price caps. In response to such a notice the CAA may agree to the suspension, make a reference to the Competition Commission relating to the modification of the charge control conditions or contest that “Exceptional Circumstances” exist. If the CAA follows the third of these courses the Licensee may require a reference to be made to a panel of the CAA Board under the 1991 Regulations for a final determination. The second situation when the price caps may be suspended or modified is during a “National Security Period” when the Secretary of State has issued directions under section 93 of the Act. Condition 25 sets out the detailed procedures that are to be followed when either “Exceptional Circumstances” or a “National Security Period” are invoked.

65. The CAA’s general approach towards price regulation is described in the consultation documents published by ERG in connection with the request from the Government for advice on the setting of the initial price caps. These are “National Air Traffic Services Public-Private Partnership: Setting the Charges for the First Five Years (December 1999)”, “National Air Traffic Services Public-Private Partnership: Setting the Charge Control for En route Services in UK Airspace for the First Five years (April 2000)” and “National Air Traffic Services Public-Private Partnership: Setting the Charge Condition for the North Atlantic Service provided by NERL for the First Five Years (June 2000)”. These documents are available on the CAA’s website at www.caaerg.co.uk.

66. The CAA will be responsible under sections 72-80 of the Act for publishing details of charges for “chargeable air services” as defined in section 77. The CAA will publish the relevant charges in the London Gazette, the Edinburgh Gazette and the Belfast Gazette. It will also publish them in the General Register.

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3 On 23 January 2001 the Government announced that the charge cap in condition 21(Control of Eurocontrol charges) would be RPI-2.2% in 2001, RPI-3.0% in 2002, RPI-4.0% in 2003 and RPI-5.0% in 2004 and 2005. The maximum delay term was set at £2 million per year for 2001-2002 and £5.7 million per year for 2003-2005.
Provision of Information by NERL

67. The Licence requires NERL to supply the CAA with specified information on a regular basis. The CAA will wish to ensure that this information is made widely available to users and to others with an interest in it. This information includes:

- Annual regulatory accounts and an auditors’ report (within six months of the year end).
- An annual statement on the availability of resources (within three months of the year end).
- Business Plans, Service and Investment Plans and periodic reports. The first 10 year Business Plan must be submitted within three months of the grant of the Licence and is to relate to the ten year period beginning on 1 April 2001. Subsequent 10 Year Business Plans must be submitted not less than twelve months before the Plan Renewal Date which is 1 April 2006 and then every five years thereafter. Service and Investment Plans and Business Plan Reports are to be submitted annually.
- Reports on the Licensee’s performance against the measures, indicators and service standards under condition 11 (at least every six months).

As noted in paragraph 24 above the CAA intends to place copies of these documents on the public register. It will also consider publishing notice in the Official Record when it has received an updated document.

Concurrency

68. Chapter V of the Transport Act confers on the CAA powers with effect from 1 February 2001 to enforce concurrently with the Director General of Fair Trading the prohibitions in Part 1 of the Competition Act 1998 and to apply the monopoly provisions of the Fair Trading Act 1973 in both cases to the extent that they relate to the supply of air traffic services. This gives the CAA equivalent powers to those already held by the other sector regulators to enforce the prohibitions in the Competition Act against anti-competitive agreements and against conduct that constitutes abuse of a dominant position. Concurrent powers under the Fair Trading Act allow the CAA to call for information, make a monopoly reference to the Competition Commission or propose to the Secretary of State undertakings as an alternative to a monopoly reference. The CAA’s concurrent powers exist not only in respect of air traffic services supplied by the licence holder but they apply equally to air traffic services supplied under an exemption.

Civil Aviation Authority
February 2001
CAA’s statutory duties under Section 2 of the Transport Act 2000

2. – (1) The CAA must exercise its functions under this Chapter so as to maintain a high standard of safety in the provision of air traffic services; and that duty is to have priority over the application of subsections (2) to (5).

(2) The CAA must exercise its functions under this Chapter in the manner it thinks best calculated –

(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;

(c) to secure that licence holders will not find it unduly difficult to finance activities authorised by their licences;

(d) to take account of any international obligations of the United Kingdom notified to the CAA by the Secretary of State (whatever the time or purpose of the notification);

(e) to take account of any guidance on environmental objectives given to the CAA by the Secretary of State after the coming into force of this section.

(3) The only interests to be considered under subsection (2)(a) are interests regarding the range, availability, continuity, cost and quality of air traffic services.

(4) The reference in subsection (2)(a) to furthering interests includes a reference to furthering them (where the CAA thinks it appropriate) by promoting competition in the provision of air traffic services.

(5) If in a particular case there is a conflict in the application of the provisions of subsections (2) to (4), in relation to that case the CAA must apply them in the manner it thinks is reasonable having regard to them as a whole.

(6) The CAA must exercise its functions under this Chapter so as to impose on licence holders the minimum restrictions which are consistent with the exercise of those functions.

(7) Section 4 of the Civil Aviation Act 1982 (CAA’s general objectives) does not apply in relation to the performance by the CAA of its functions under this Chapter.
The Licensee’s statutory duties under Section 8(1) of the Transport Act 2000

While a licence is in force its holder -

(a) must secure that a safe system for the provision of authorised air traffic services in respect of a licensed area is provided, developed and maintained\(^1\);

(b) must take all reasonable steps to secure that the system is also efficient and co-ordinated;

(c) must take all reasonable steps to secure that the demand for authorised air traffic services in respect of a licensed area is met;

(d) must have regard, in providing, developing and maintaining the system, to the demands which are likely to be placed on it in the future.

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\(^1\) Subsection 8(4) states that a system for the provision of services is safe if (and only if) in providing the services the person who provides them complies with such requirements as are imposed by Air Navigation Orders with regard to their provision.
Licence conditions:

1. Interpretation and construction
2. General obligation to provide Core Services and Specified Services
3. Modification to Core Services and Specified Services
4. Further Provisions Relating to the Modification of Specified Services
5. Disposal of relevant assets
6. Regulatory accounting requirements
7. Restrictions on activity and financial ring fencing
8. Availability of resources
9. Prohibition of cross-subsidies
11. Service standards
12. Restriction on use of En route Business information
13. Advice to the Secretary of State and the CAA in relation to the UK’s international obligations
14. Cooperation with other service providers
15. Secondment of air traffic controllers to the CAA
16. Consultation and complaint handling
17. Provision of information to the CAA for regulatory purposes
18. Payment of fees
19. Pre-notification of changes in shareholdings
20. Charge Control Conditions: explanatory provisions and definitions
21. Control of Eurocontrol charges
22. Oceanic charges
23. Charges for North Sea Helicopter Advisory Service and Terminal Approach Service
24. Information to be provided to the CAA in connection with the Charge Control Conditions
25. Suspension and Modification of Charge Control Conditions