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British Airways response to CAP3174 "Update and consultation on the timetable and approach to Constructive Engagement for the next NATS (En Route) plc (NERL) price control review (NR28)"

Thank you for the opportunity to respond to the consultation on "Update and consultation on the timetable and approach to Constructive Engagement for the next NATS (En Route) plc (NERL) price control review (NR28)". We set out below our views and areas of feedback.

Executive Summary

We value the engagement of the airline community and stakeholders in this process and the opportunity to respond with our considered feedback:

- a) British Airways is fully engaged in NR28 and our primary aim is to ensure that NR28 yields an outcome in the interest of consumers and airlines using NERL's services.
- b) The CAA's updated timetable for NR28 presents a number of serious concerns and appears to lack appropriate consideration of the experiences in the H8 process.
- c) The proximity between milestones within the NR28 process, especially those in 2026, are concerning and present an apparent challenge to enabling appropriate stakeholder engagement with the compression of milestones allowing insufficient time for regulatory and stakeholder inputs to be reflected in planning and design of subsequent rounds of Constructive Engagement, creating the likelihood for the requirement of additional engagement later in the process that potentially risks untimely delay materialising and the delivery of the CAA's interim solution for the initial period of the price control.
- d) Other programmes deliverable in full, or part by the CAA including the GAL Commitments Framework Review, Capacity Expansion, Regulatory Reform and Airspace Modernisation should be taken into consideration in establishing the timetable for NR28, for direct overlaps and proximity of milestones but also for their

potential subsequent cross-programme effects of individual programme milestone delays.

- e) It would not be appropriate for the CAA's Initial Proposals have to be compromised in their extent and depth of assessment in order to meet an unnecessarily restrictive deadline.
- f) The CAA's proposed use of its Initial Proposals to form a holding cap for an initial period of NR28 presents serious concerns. In our assessment, holding caps introduce notable risks of unintended consequences and should only be used in exceptional circumstances.
- g) Considering the issues identified with the CAA's proposed timetable and alternative approaches to interim solutions and creating greater separation between the HAL and NERL price control reviews, it is our consideration that a 12-month extension of NR23, for 2028, is the most appropriate course to pursue and that any intervention to provide interim arrangements should be related with appropriate true-up mechanisms to reconcile interim allowances with final determinations.
- h) Regardless of the overarching approach to the NR28 timetable, there is an undeniable need for increased gaps between milestones especially evident in the Constructive Engagement process ahead of the publication of NATS' Business Plan, to allow appropriate and meaningful stakeholder engagement including planning and materials development to ensure effective and meaningful rounds of engagement. The experiences of H8 CE to date are illuminating as to the consequences of failing to adequately address these concerns and should be clearly considered in the CAA's planning of its NR28 timetable.
- i) There is a clear requirement for the CAA to undertake a fully engaged and active role in CE from the outset. The CAA need to ensure they deliver; timely arbitration and resolution of disagreements during rounds and provide enforcement of quality and timely information provision from the regulated entity, which can be enabled through the provision of consistent data and financial templates whilst ensuring consistent information is shared to all stakeholders.
- j) The utilisation of an approach that relies on a single Business Plan from the regulated entity requires planning for potential additional subsequent steps required if prior steps of CE hold unresolved issues. The requirement for these steps should be considered in addition to the application of a penalty only Business Plan incentive.
- k) We advocate for the CAA to establish the requirement for the appointment of an Independent Reporter, reflective of that implemented for the H8 process.

1. NR28 Timetable

- 1.1. **British Airways is fully engaged in NR28. Our primary aim is to ensure that NR28 yields an outcome in the interest of consumers and airlines using NERL's services.** However, we have concerns over the current economic regulation of NERL, NERL's high level of charges, the affordability and resilience of key infrastructure for UK consumers and the ability of NATS to deliver its capital investments in a timely, efficient and affordable manner, with concerns for their delivery implications on the ability for UK Airspace Modernisation to be achieved to the required standards and timelines.
- 1.2. We have keenly awaited an updated timetable and initial Constructive Engagement Guidance to be published by the CAA since delays to the original timetable, as set out in the Lessons Learned consultation, have emerged. The delays experienced to are undesirable and we support the CAA in addressing causal factors, to implement remedial actions and its pursuit of **a deliverable timetable that presents sufficient opportunity for meaningful and appropriate engagement of stakeholders.** The reasons for the delay experienced should be transparently consulted on with stakeholders, with a Lessons Learned exercise akin to that completed for NR23 and H7 seeming a reasonable action to reflect on the H8 and NR28 processes with the aim of improving future reviews.
- 1.3. The **delay to the NR28 timetable has resulted in reduced regulatory certainty as an interim solution will be required until the CAA's Final Decision is delivered.** Depending on the form an interim solution may take, this **could be expected to result in additional regulatory complexity due to the potential need to adopt adjustment mechanisms** to account for differences between an interim solution and Final Decision.
- 1.4. The CAA's updated **timetable for NR28 presents a number of serious concerns and appears to lack appropriate consideration of the experiences in the H8 process** and issues that have arisen. It would be informative for the CAA to review and consider the H8 CE process, taking note of the Independent Reporter's outputs, as insight to the potential process adjustments, potential topics that require greater attention and, or unresolved issues that could be required or appropriate to account for in the CAA's updated NR28 CE Guidance that we encourage is published as part of its Draft Method Statement or sooner.
- 1.5. The **proximity between milestones within the NR28 process, especially those in 2026, are concerning and present an apparent challenge to enabling appropriate stakeholder engagement** and delivering the objectives of Constructive Engagement. The compression of milestones appears to **allow insufficient time for regulatory and stakeholder inputs to be reflected** in planning and design of subsequent rounds of CE. This was evident in the H8 timetable and has resulted in challenges during the process, generating the need for further engagement and

process steps to be introduced later in the process. There are **a number of instances where this compression of timelines is apparent in the proposed timetable.**

- 1.6. Reviewing the timetable in sequential order from initiation, the first and at an imminent point of time is the **concern at the ability to incorporate the CAA's Draft Method Statement, including updated Constructive Engagement Guidance, into Round 1 planning and execution.** A greater separation of these milestones would be appropriate to enable planning to reflect this key input at this embryonic stage of CE. It is also reasonable to consider the time period requirement for the development of materials by stakeholders, including NATS, that would be subsequently required after planning has been agreed between airlines and NATS. The CAA's **proposed timetable does not allow an appropriate amount of time** for this to be incorporated.
- 1.7. Subsequently there is **serious concern regarding the proximity of the CAA's Final Method Statement with CE Round 2 and the direct challenge this presents to the ability to incorporate this critical regulatory direction to be taken into account in making preparations for this fundamental round of CE.** This presents a material risk in the misalignment between stakeholder input and regulatory expectations.
- 1.8. We are also **highly concerned that there is insufficient time for Round 1 outputs, including any additional inputs subsequent to Round 1 that would be emergent following stakeholder assessment of the CAA's Draft Method Statement, to be reflected in both planning and the material development for Round 2,** risking the effectiveness of Round 2 with knock-on effects to the rest of the process.
- 1.9. These **risk the progression of CE in delivering the appropriate outputs, if completed to the proposed timetable,** which can be considered likely to result in undesirable outcomes such as **creating the requirement for additional steps to be introduced to the process, as has been experienced in H8,** and, or a Business Plan being developed by NATS that has had insufficient time to incorporate stakeholders inputs. If this materialises it **raises risks to the CAA's timetable in 2027,** with potential for additional or extended CE rounds to find resolution to outstanding areas of disagreement or points that have been insufficiently addressed. Whether these points are addressed through CE or taken on as points for determination by the CAA in forming its Initial Proposals, this eventuality is **likely to cause timetable delays later in the NR28 process.** Under the CAA's proposal to use its Initial Proposals as an interim solution to start the price control period, **delays to the timetable appear to present a significant challenge to the feasibility of the CAA's proposed approach.**

- 1.10. It would not be appropriate for the CAA's Initial Proposals have to be **compromised in their extent and depth of assessment in order to meet an unnecessarily restrictive deadline.** Any reduction in scope or depth of assessment would **subsequently require addressing prior to a Final Decision, the CAA risk further increasing the regulatory complexity** generated from the adjustments it would need **to consider for accounting for the differences between its Initial Proposals and Final Decision.** This scenario could also reduce regulatory certainty if areas have been insufficiently assessed for an interim solution, and further to this **reduce the ability of the regulated entity to plan and efficiently deliver the regulatory period given the uncertainty presented in incomplete or uncertain regulatory controls.** This could lead to **unintended and negative consequences for consumers** through a variety of potential outcomes.
- 1.11. The CAA's proposed timetable also **raises concerns for the ability of stakeholders to effectively and sufficiently partake as well as CAA sufficiently resource due to the proximity and overlaps with H8 milestones.** Whilst we will endeavour to sufficiently support and engage with the NR28 process it must be noted that the **timetable clashes with the H8 review are highly undesirable** and present challenges and risks to the extent of our involvement in the NR28 process. The conflicts between the H8 and NR28 proposed timetable are most concerning across 2026, in particular; the overlap of H8 Initial Proposals and CE Round 4 with NR28 Final Method Statement and Round 2; followed by H8 Final Proposals and NR28 Business Plan publication overlapping in November with subsequent associated work ongoing on an overlapping basis in December and potentially January which then overlaps with the proposed start of NR28 CE Round 3.
- 1.12. It **should also be noted that the other programmes deliverable in full, or part by the CAA including the GAL Commitments Framework Review, Capacity Expansion, Regulatory Reform and Airspace Modernisation should be taken into consideration in establishing the timetable for NR28.** We would welcome the CAA establishing its updated thinking in response this consultation, including whether it continues to consider the proposed timetable a feasible approach, as well its contingency and off ramping plans.
- 1.13. The CAA's **proposed use of its Initial Proposals to form a holding cap for an initial period of NR28 presents serious concerns.** In our assessment, holding caps introduce **notable risks of unintended consequences** including price shocks, prefunding by consumers, the potential for significant windfall gains or losses, as well as the introduction of additional regulatory complexity to account for differences between an interim solution and Final Decision. Using Initial Proposals **risks prejudicing the determination of the Final Proposals and Final Determination**

before the completion of the process which would be highly undesirable. As a result, **a holding cap solution should only be used in exceptional circumstances** such as was necessary for H7 which was disrupted by covid-19.

- 1.14. Considering these issues, as well as those presented in our feedback on the proposed NR28 timetable and draft Constructive Engagement Guidance, **it is our consideration that a 12-month extension of NR23, for 2028, is the most appropriate course to pursue** given the evidence available for consideration and wider timetable concerns. Any intervention to provide **interim arrangements should be related with appropriate true-up mechanisms to reconcile interim allowances with final determinations.**
- 1.15. In reviewing its approach to the NR28 timetable, as well as differing methodologies and timings for achieving a greater separation of the HAL and NERL price control review timelines, **the CAA should consider the precedents of other regulatory interventions that could achieve these objectives and how they offer mitigation to the risks posed by the current timetable and approach.** The comments provided in this response do not represent a full breadth of review of these precedents and do not prejudice our further considerations of such regulatory interventions but present a sample of examples identified and the alternative approaches the CAA should consider and explore in completeness.
- 1.16. Examples of price control extensions include the System Operator for Northern Ireland (SONI) SRP20 Two-Year Extension 2025-2027¹ to accommodate ongoing work related to governance reforms and other key projects which maintained existing financial values such as the cost of debt and equity whilst minor adjustments were made to elements of opex, with the aim of providing regulatory certainty during the extension period.
- 1.17. Another **example is the Ofgem extension of the TPCR4 price control by one year before transitioning to the RIIO framework² to allow more time to develop and consult on the new regulatory model,** with the existing framework maintained but key inputs updated. Ofgem aimed for a proportionate approach during the one-year rollover, **recognising its short duration and the benefits of largely extending TPCR4 arrangements without new mechanisms which meant avoiding unnecessary complexity, disruption and regulatory burden while still reflecting recent policy developments and not delaying critical investment. A key challenge was ensuring that the short-term extension did not disincentivise necessary, critical investment in the network** with existing incentives, such as the Capital Expenditure (Capex) Incentive Mechanism, extended into the rollover year to provide regulatory certainty and encourage efficient delivery of projects. Consultant analysis was utilised to validate forecasts for changes in opex and capex and ensure that allowances were efficient and proportionate.

¹ <https://www.uregni.gov.uk/news-centre/decision-two-year-extension-current-soni-price-control>

² https://www.ofgem.gov.uk/sites/default/files/docs/2011/10/111021_tpcr4ro_informallicenceconsultation.pdf#:~:text=The%20most%20significant%20changes%20to%20the%20licences,licence%20drafting%20is%20included%20within%20this%20document.

- 1.18. **A more limited approach is presented by Ofgem's Gas Distribution Price Control (GDPCR) extension³**, which implemented a one-year extension to align with the new RIIO framework and featured a much more focused set of adjustments, primarily for inflation and known cost changes.
- 1.19. **As part of the CAA establishing its NR28 contingency planning and in establishing off ramps, alternative interim solutions may be considered more appropriate under differing scenarios emerging at differing points in time**, and we would welcome the CAA establishing its thoughts on this in its NR28 Draft Method Statement.
- 1.20. We would **welcome further engagement with the CAA in establishing its consideration of regulatory precedent and approaches** that can be considered to resolving the timetable issues and risks presented by the proposed timetable.

2. NR28 Price Control Length

- 2.1. In establishing an updated NR28 timetable, which is intrinsically linked to determining an appropriate approach to increasing the separation between the HAL and NERL price control periods, **the CAA should proactively establish its contingency plans and off-ramps to address potential risks that would affect the timely delivery of the price control process**. Such planning should be completed and consulted on with stakeholders in a timely manner to enhance regulatory certainty. It is currently unclear how delay within the NR28 timetable, materialising at varying points in the process, would be managed by the CAA and what the form of any associated consequential required adjustments to timetables, interim solutions and, or regulatory period length would be.
- 2.2. Beyond potential delay materialising at singular or multiple points within the NR28 process, **the interaction between NR28 with the CAA's other regulatory programmes timetables and potential delays within those programmes should be considered within the CAA's NR28 contingency and off ramp planning**. We encourage the CAA to consult stakeholders as soon as practicable on this topic and **consider the CAA's Draft Method Statement as an opportune point for the CAA's considerations to be set out**.
- 2.3. **We appreciate the CAA's efforts to reduce the overlap between the HAL and NERL regulatory reviews**. Despite the NR23-H7 Lessons Learned exercise, undesirable delays have materialised for the NR28 period. Whilst **a full range of contributory factors and any potentially appropriate adjustments for the approach and process design of future control period reviews are not fully apparent at this point in time**, it could be currently considered that the existing separation between the HAL and

³ https://www.ofgem.gov.uk/sites/default/files/docs/2006/12/16340-one-year-control-final-proposals-document-final_0.pdf

NERL price controls is insufficient and the CAA's proposed objective to create greater separation between the NERL and HAL price control periods appears to be a reasonable goal. **It appears under initial consideration that an additional 12-month separation between the HAL and NERL regulatory timelines would improve confidence in the delivery of regulatory review process timelines**, as the CAA and stakeholders would be able to focus resources onto each regulated entity's price control reviews sequentially with reduced overlap.

- 2.4. **In considering if creating a greater separation between future HAL and NERL price control reviews through adjustments at this point is an appropriate and timely action, the CAA should take account of considerations towards the anticipated timing of future price control reviews**, particularly H9 and NERL's post-NR28 price control, and assess the risks and consequences of these timings evolving. This appears to be a reasonable consideration for HAL and NERL price controls given the wider regulatory programmes under delivery by the CAA which could have implications for either entities framework requirements including Capacity Expansion and Airspace Modernisation among others. The future regulatory framework for GAL, due an upcoming review, is also unclear at present and should also be factored into the CAA's consideration of its future regulatory period timelines.
- 2.5. **Adopting a preferable approach to the NR28 timetable through extending the NR23 period by 12 months would enable the CAA to utilise a 5-year price control for the next regulatory price control period for NERL and achieve a greater separation of the HAL and NERL price control review periods, by an additional 12 months.**
- 2.6. If it is deemed that regulatory action is appropriate at this point in time to create greater separation of the HAL and NERL price control periods without adopting the approach of extending the NR23 period by 12 months, then extending the NR28 period to 6-years as an exceptional and unrepeated intervention, with subsequent periods reverting to 5-year durations, can be considered a preferable approach to the alternatives such as a 3+3 year, a 6-year with significant re-opener of mid-term review scope solutions or a 5+1 year NR28 period. In our deliberation a NR23 extension by 12 months or if necessary, a NR28 6-year period, could be considered to provide greater regulatory certainty and simplicity than alternative approaches.
- 2.7. **Considering the limited extent of the extension of the period proposed by the CAA, only by an additional 12-months, it appears there would be limited additional risk introduced and thus benefits to be generated from the introduction of additional re-openers** specifically designed to account for the longer regulatory period length. Such introductions would be contrary to supporting regulatory simplicity and proportionality and could detract from discussion on addressing other, more apparent areas of NERL's mechanisms as part of the price control process.
- 2.8. **The alternative approaches mentioned each face issues that we consider hold greater risk or immediately apparent undesirable consequences.** A 3+3 year approach, or introducing a mid-term re-opener approach to a 6-year period, would suffer likely overlap with the GAL framework review and potential overlap with the

beginning of the H9 process, as well as facing limitations to the ability for adoption of any Lessons Learned from the H8-NR28 processes. **These approaches could also be viewed as inefficient, presenting a significant divergence from the existing regulatory approach of a 5-year period and reducing regulatory certainty in the immediacy and beyond as well as reducing the ability of NATS to deliver the determination efficiently and reducing the incentive strength for NATS to outperform the determination.** A 5+1 year or use of a holding cap as an interim solution until the delivery of the CAA's Final Decision can be considered to introduce additional regulatory complexity and reduce regulatory certainty compared to a conventional 5-year period.

- 2.9. **The alternative approaches to a 6-year period for NR28 should be reviewed by the CAA before establishing its preferred approach to meeting its regulatory period separation objective.** In doing so, the CAA should assess the objective of the regulatory intervention taken, associated factors and their respective consequences before applying these experiences to the current issue attempting to be resolved and contemplating the potential anticipated outcomes. **The review of alternative approaches should be taken into account in the design of the CAA's NR28 contingency planning and off ramps as differing approaches may be appropriate depending on the scenario that evolves, and the timing of the evolution, in the NR28 process.**

3. Constructive Engagement Guidance

- 3.1. **We have highlighted our concerns regarding the proposed timetable for NR28 with regards to the delivery of a successful and meaningful Constructive Engagement process.** There is a **clear and unequivocal requirement for the timing of the rounds of CE to be addressed** within the proposed timetable, compounded by the wider considerations of the approach to the NR28 timetable that are most appropriate.
- 3.2. **Regardless of the overarching approach to the NR28 timetable, there is an undeniable need for increased gaps between milestones especially evident in the process ahead of the publication of NATS' Business Plan, to allow appropriate and meaningful stakeholder engagement** including planning and materials development to ensure effective and meaningful rounds of engagement. **The experiences of H8 CE to date are illuminating as to the consequences of failing to adequately address these concerns** and should be clearly considered in the CAA's planning of its NR28 timetable.
- 3.3. **There is a clear requirement for the CAA to undertake a fully engaged and active role in CE from the outset, to avoid a repetition of issues that have materialised in the H8 process.** **The CAA need to ensure they deliver; timely arbitration and resolution of disagreements during rounds and provide enforcement of quality and timely information provision from the regulated entity, which can be enabled through the provision of consistent data and financial templates whilst ensuring consistent information is shared to all stakeholders, regulatory and the airline community, in response to requests for information regardless of the source of the**

request. Furthermore, in the consideration of information **provision the timeliness and quality of information provided by NATS ahead of and during rounds, as well as reacting to information requests, will be critical in supporting the delivery of a meaningful CE process.**

3.4. The utilisation of an approach that relies on **a single Business Plan from the regulated entity requires planning for potential additional subsequent steps required if prior steps of CE hold unresolved issues or the extent and quality of information provided in the Business Plan, or as part of CE, is insufficient for stakeholders or the regulator.** This should be considered in addition to the **application of a penalty only Business Plan incentive.** Our considerations of a Business Plan incentive design have been previously shared with the CAA in its design of the H8 process and we would refer the CAA to review those representations for our considerations on such matters in and view them as equally relevant to the design of the NR28 process, if not greater following the experiences to date of the H8 process.

3.5. We also **advocate for the CAA to establish the requirement for the appointment of an Independent Reporter, reflective of that implemented for the H8 process.**

We look forward to engaging further on the development of the proposals and related consultations. Please feel free to approach us with any questions on our response to this consultation.

Yours sincerely,

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