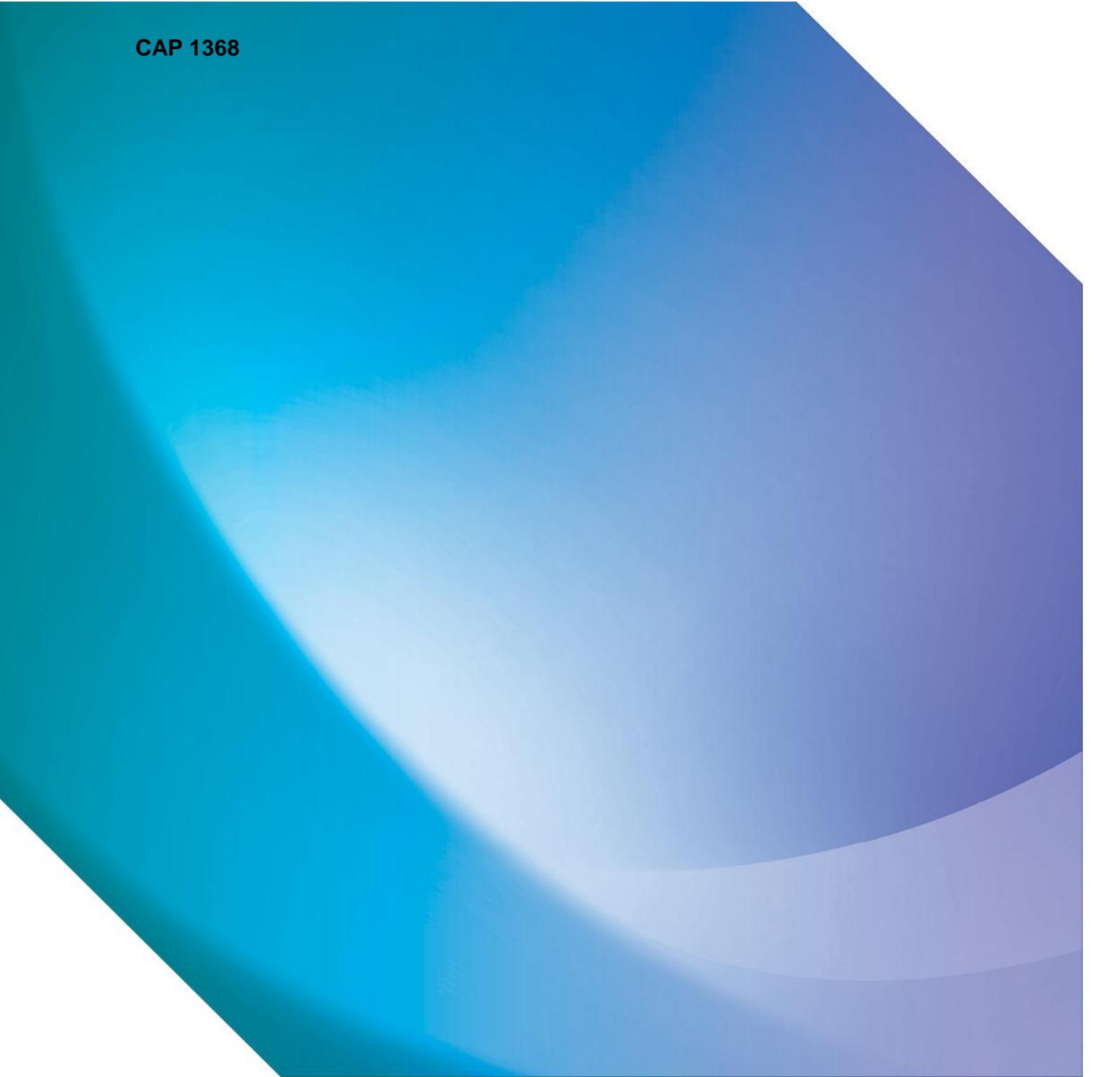


Proposal to modify the NATS (En Route) plc licence in respect of governance and ring- fencing: Notice under section 11(2) of the Transport Act 2000

CAP 1368

A large decorative graphic on the bottom half of the page, consisting of a blue gradient that transitions from a darker teal on the left to a lighter, almost white blue on the right, with a diagonal cut-off at the top right corner.

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Executive summary

Overview

1. As the UK's monopoly en route air traffic services provider, NATS (En Route) plc (NERL) is critical to the provision of a safe, efficient and sustainable air traffic service. NERL is subject to economic regulation by the CAA through a licence issued under the Transport Act 2000 (the Act).
2. The NERL licence includes conditions that are designed to ensure that the assets, cash flows and other financial resources of NERL are used solely for the benefit of its regulated monopoly business. These rules are designed to protect stakeholders (including passengers, whose fares ultimately fund the business) by making it less likely that NERL will suffer financial distress or failure. In that context, it has become clear in recent years that consumers are less willing to tolerate poor service or service disruptions, and so it is appropriate to consider whether the current ring-fencing arrangements are fit for purpose to manage the risks that could emerge from NERL getting into financial difficulties.
3. Currently, NERL is something of an anomaly in the UK regulation landscape. The CAA, as economic regulator of NERL, does not currently have significant regulatory oversight of corporate governance. Given the risks identified by the Ad-Hoc Review of NATS-related risks in 2012/3, the CAA felt it was appropriate to review the governance arrangements presently in place for NERL.
4. This review identified a number of issues with the governance and ring-fencing of NERL. These issues were outlined in our publication 'Initial proposals on modifications to NATS (En Route) plc licence in respect of Governance and Ring-fencing' ([CAP 1287](#)), published in April 2015.
5. Following a period of consultation, we have now developed a set of final proposals as to how we intend to modify NERL's licence. We consider that these modifications will significantly strengthen NERL's governance and

ring-fencing arrangements, and thus provide a higher level of protection for passengers through protecting NERL's financial and non-financial assets for the benefit of users and providing the CAA with more information about the financial strength of NERL.

6. On governance, we propose to mandate that NERL appoint all the non-executive directors of NATS to the NERL board. In addition, we propose to require NERL to appoint two Mandatory Independent Directors to the NERL board unless the CAA consents otherwise. We also propose to require that Directors of NERL will have regard exclusively to the interests of NERL, where potential conflicts exist between the interests of the NERL and those of any other group company
7. On the financial ring-fence, we propose to:
 - refocus the annual directors' resources certificate to give additional clarity and emphasis on operational and financial resources;
 - require new statements from the directors setting out the processes used and factors considered in issuing the certificates;
 - require new annual certificates from NERL's directors that the licensee has complied with specific elements of the ring-fence;
 - require certificates of compliance with the ring-fence conditions to be issued each time the licensee declares or recommends a dividend;
 - require the maintenance of an intervention plan to assist a special administrator in the event of insolvency.

Chapter 1

Introduction

Purpose of this document

- 1.1 This document sets out and explains the CAA's formal proposal to modify the air traffic services licence of NERL in relation to governance and ring-fencing with the object of ensuring that users are adequately protected from risks which arise outside of the regulated business.
- 1.2 The CAA published its initial proposals on this issue in April 2015. After consultation and careful consideration of stakeholders responses, the CAA is now publishing its formal proposals which:
- modify condition 1 – Interpretation and construction to require that compliance certificates are approved either at a board meeting at which all the directors of NERL present, or that the Certificates are issued under a written resolution signed by all NERL's directors;
 - modify condition 5 – Availability of Resources and Financial Ring-Fencing to:
 - re-focus the annual directors' resources certificate to separate NERL's certification that it has sufficient operational resources from its certificate of sufficient financial resources;
 - include new statements from the directors setting out the processes used and factors considered in issuing the certificates;
 - require new annual certificates from NERL's directors that the licensee has complied with specific elements of the ring-fence;
 - require certificates of compliance with the ring-fence conditions to be issued each time the licensee declares or recommends a dividend;
 - introduce a new licence Condition 7 requiring NERL to maintain an intervention plan to assist a special administrator in the event of insolvency;
 - introduce a new licence Condition 8 which will ensure the independence of the NERL board's decisions and contain a requirement that at least two 'Mandated Independent Directors' (MIDs) must sit on the NERL board unless the CAA consents otherwise;
 - modify Condition 9: Prohibition of cross-subsidies to clarify and simplify the prohibition against cross subsidies and ensure it aligns clearly with the parallel requirements of European law.

- 1.3 The CAA received four responses to its initial proposals, from NATS, NATS trade unions (NTUS), easyJet and Heathrow Airport Limited (HAL). These responses have been published [on the CAA's website](#). We have carefully considered the responses and consequently have made a number of changes to our proposals. The changes are explained together with our formal proposals in chapters 2 and 3.

Terms used in this document

- 1.4 This document and the preceding consultation are about the relationship between the various businesses that constitute the NATS group. For the purposes of this document, references to NATS relate to NATS Holdings Limited, which is the ultimate parent company of the NATS group of companies. For example, we have referred to NATS as the stakeholder that responded to the initial consultation, on behalf of NERL. References to NERL or the regulated or monopoly business relate to NATS (En Route) plc, which holds a licence for provision of en route services under the Transport Act 2000 (the Act). For example, we have referred to NERL exclusively when talking about the activities of the company. References to NSL relate to NATS (Services) Limited, which is a subsidiary of NATS that provides terminal air navigation services (TANS) at airports, as well as other commercial services in the UK and overseas.

Views invited

- 1.5 Under section 11(1) of the Act, the CAA may modify the conditions of a licence if its holder consents to the modifications.
- 1.6 Under section 11(2) of the Act, before making modifications to the licence, the CAA must publish a notice setting out the proposed modifications, their effect and the reasons for the proposal, and must state the period (of not less than 28 days) within which representations may be made regarding the proposed modifications. NERL has indicated that it will consent to the conditions appended to this consultation, which also serves as the statutory notice under section 11 of the Act. Accordingly, this document constitutes such a notice and the CAA welcomes comments on the proposed modifications. Any comments should be sent, if possible by e-mail, to economicregulation@caa.co.uk by no later than 9 March 2016. Alternatively, comments may be sent by post to:

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45 – 59 Kingsway

London, WC2B 6TE

- 1.7 The CAA would expect to make responses available on its website for other interested parties to read as soon as practicable after the period for written comments has expired. Any material that is regarded as confidential should be clearly marked as such. Please note that the CAA has powers and duties with respect to information under section 102 of the Act and the Freedom of Information Act 2000.
- 1.8 If you would like to discuss any aspect of this document, please contact Stephen Gifford (stephen.gifford@caa.co.uk) or Robert Toal (robert.toal@caa.co.uk).

Next steps

- 1.9 The CAA is allowing 28 days for comments on this document. Subject to the scale and nature of the responses received, the CAA would expect to publish its final decision in March 2016.
- 1.10 In relation to the proposed licence Condition 8 to require the appointment of MID's to NERL's board, on the basis of the engagement that we have had with NERL since the publication of our initial proposals in April 2015, we would expect NERL to apply for the CAA's consent to exempt it from complying with this Condition. We expect this application will be received alongside NERL's response to this consultation.
- 1.11 Thus, we anticipate granting and publishing our consent alongside a decision document as a result of this consultation in March 2016.
- 1.12 This would allow the modified conditions to take effect by 1 April 2016.

Structure of this document

- 1.13 The remainder of this document sets out:
- the revised proposals to strengthen governance arrangements of NERL (Chapter 2);
 - the revised proposals to strengthen the NERL financial ring-fence (Chapter 3);
 - an overall summary of the CAA's formal proposals (Chapter 4).

- 1.14 Appendix A contains the proposed text of the modified and new conditions with the amendments against the existing text of the relevant conditions (where applicable) marked.

Chapter 2

Governance

CAA's initial proposals

Issues identified

- 2.1 In setting out its initial proposals on governance, the CAA noted that the current licence did not include specific standards for board leadership and governance for NERL. Instead, the CAA had chosen to focus on ensuring that there was appropriate ring fencing of the regulated company to protect it (and therefore users) from risks arising elsewhere in the NATS group.
- 2.2 However, the CAA considered that there were good grounds for reassessing these arrangements not least as best practice in corporate governance, and the regulatory oversight of it, had evolved over recent years. In many regulated industries, corporate governance standards had been tightened. In some cases these changes had been made as a direct response to financial failures.
- 2.3 The CAA's [Ad-Hoc Review of NATS Related Risks during 2012/13](#) and subsequent analysis had revealed that there were weaknesses with the corporate governance of NERL including:
- the board of the regulated company did not contain any non-executive members;
 - board meetings of NERL were “nested” within the board meetings of the NATS group;
 - the existing structure of the NATS group did not ensure sufficient focus on the activities of NERL by its board.
- 2.4 More generally, the CAA considered that the structure of the Public Private Partnership (PPP) could lead to confusion over the governance of NERL for a number of reasons including:
- NERL was not obliged to comply with the Combined Code on Corporate Governance (as opposed to NATS Holdings which was required by the PPP to comply with the Code);
 - the non-executive Partnership Directors (PDs) of NATS Holdings appointed by the DfT to represent the financial interests of the government did not have any role in ensuring regulatory compliance by NERL;

- the non-executive members of the NATS Holdings board, although they represented the shareholders, were subject to the same potential conflicts of interests as the executives;
- the incentive and bonus structures of managers and board directors of NERL may cause them to have regard to the impact of their activities and decisions on the wider NATS group of companies, rather than focussing solely on the regulated business.

2.5 Overall, the CAA considered that these weaknesses with the corporate governance of NERL could lead to users' interest being harmed in the event of certain scenarios, such as if NERL experienced financial stress. Though the probability of such events occurring may not be high, they would be likely to have a high impact.

CAA's proposal

2.6 After considering and assessing a number of options to improve the oversight of NERL's governance arrangements, the CAA took the view that its concerns could be best addressed by NERL's board containing independent members. In this way, the CAA could be more confident that the management of NERL would be sufficiently focused on that business rather than on the broader interests of the NATS group. The CAA considered that the presence of independent directors would be expected to have a number of benefits including that:

- independent directors would be better placed to challenge any management decisions that prejudiced the interests, or conflicted with the obligations of NERL, particularly at times of difficulty;
- independent directors would be well placed to weigh up the issues dispassionately if there were conflicts of interest between the interests of NERL and the interests of NATS or other companies within the group;
- independent directors should enhance the overall oversight and culture of regulatory compliance, including the efficiency of the ring-fence regime, by bringing "fresh eyes" and independent oversight, especially in relation to the compliance certificates NERL produces for the CAA;
- even if the likelihood of NERL suffering financial stress may not be high, high quality independent directors would bring benefits to the business through their board work irrespective of whether NERL was subject to an event of financial distress;
- although they would not be able to block a corporate decision, provided that NERL was required to inform the CAA of an independent director's resignation and the reasons for it, even a

minority of independent directors would provide an extra warning signal that there were issues that needed to be investigated;

- the presence of independent directors could be expected to drive better corporate governance standards generally.

2.7 In summary, the CAA took the view that there was a strong case for NERL to appoint a minimum of two competent independent directors to the NERL board, to set quorum rules so as to include these directors in decisions, and to reiterate in the licence that the directors of NERL should focus on the interests of NERL alone.

Responses to the initial proposals

NATS

2.8 In its response on governance, NATS suggested that if the CAA were to impose the requirements set out in the initial proposals, then it would have failed to act in accordance with its specific statutory duties or those imposed by public law more generally.

2.9 In particular, NATS considered that the CAA's powers were restricted to introducing changes to conditions that were necessary and expedient and the CAA's proposals would not meet these tests. Specifically, NATS considered that the proposals did not comply with these requirements in a number of ways:

- they failed to have regard to the protections and benefits already afforded by the PPP arrangements;
- they did not convincingly identify the need for such significant change while the PPP arrangements remained in place;
- the CAA had not properly turned its mind to the question of the minimum requirements that would address the concerns that it had identified.

2.10 NATS further argued that the additional requirements, with their associated costs would be inconsistent with the CAA's duty to promote efficiency and economy on the part of licence holders.

2.11 NATS indicated that it could be helpful to include explicit recognition in the licence that NERL directors (when acting in that capacity) owe their duties to NERL.

2.12 In NATS' view, the existing PDs were as expressly independent as the MIDs proposed by the CAA as well as holding significantly greater powers. NATS further observed that:

- NERL remained the core asset of the NATS group and so NATS Holdings would give significantly greater weight to the interests of NERL than any other company in the NATS group;
 - Government's role in governance and oversight and in any insolvency situation as regards NERL meant that decision making at the NATS Holdings level would always remain rational;
 - the NERL licence contained a gearing target and gearing cap which provided both an early warning to the CAA of any potential financial stress on NERL and for the CAA oversight of a remedial plan.
- 2.13 NATS considered that the presence of both MIDs on the NERL board and PDs on the NATS Holdings board would provide two parallel regimes of independent oversight. The respective responsibilities of each group of independent directors could create possible conflict and confusion should they reach different (independent) conclusions on a matter.
- 2.14 NATS put forward an alternative proposal which involved all non-executive directors of NATS Holdings, with the exception of any executive director with responsibility for NSL, joining the NERL board. This would include both the independent PDs appointed by Government and the user representatives appointed by the Airline Group.
- 2.15 NATS also suggested that it may be possible to add to the terms of the Mission Statement for PDs to clarify the application of the requirements for independence and transparency to NERL as well as to NATS Holdings.
- 2.16 NATS' proposal also included scope for trigger mechanisms which would affect an automatic licence change in certain circumstances e.g. should Government cease to exercise or lose its right to appoint independent PDs to the NATS Holdings board.
- 2.17 NATS considered that this alternative approach (and taking into account the enhanced ring-fencing certification requirement that the CAA was also proposing), would have the effect of ensuring that NERL's own governance directly included:
- directors whose express responsibility was to be independent, with a clear statement that those directors must focus on the interests of NERL and consider the resources available to NERL expressly when the issue of a certificate to the CAA was required;
 - other directors with a direct user perspective of the core en route activities undertaken by NERL.
- 2.18 However, it would also ensure that the existing strengths of the PPP were carried forward. These strengths included independent directors with a real role, responsibility to ensure transparency and real vetoes, together with

non-executives who understood and could speak powerfully and directly for the interests of users.

2.19 Following further discussions, NATS subsequently set out in greater detail how a trigger mechanism might work for appointing MIDs to NERL's board.

2.20 NATS outlined the potential circumstances in which the Government did not appoint at least two PDs to the NERL board. These were:

- the Government lost the right to appoint PDs because of a reduction in its shareholding below the 25 per cent required to exercise this right, or because of an unforeseen change to or application of law that prevented the Government from exercising this right; or
- the Government failed to take action to appoint PDs at all, or in a timely manner.

2.21 In both these scenarios, NATS outlined that trigger mechanisms could be put in place to ensure MIDs were appointed to replace PDs. If the Government lost appointment rights, for either reason, this would occur with substantial warning, and hence the trigger for the replacement of PDs would be instantaneous. NATS would have sufficient time to recruit and appoint two MIDs in advance of the loss of the PDs. This could also occur in the unlikely event the Government's right to appoint PDs was reduced to a single position, so NATS would only appoint one MID to the NERL board.

2.22 Following discussion, the CAA also invited NATS to consider a trigger mechanism based on a scenario where NSL grew significantly in size within the NATS group. NATS suggested that the proportion of NSL turnover (including subsidiaries) compared to NATS group turnover was an easily measurable proxy to be used in a trigger mechanism to address this risk. Such a trigger could be structured in the following manner:

- **Red threshold** - if NSL and its subsidiaries' turnover increased to a level at which the focus of all NATS group directors could no longer be assumed to be on NERL, then there would be automatic requirement for two MIDs to be recruited in addition to the PDs, within 12 months of the publication of the annual accounts. NATS suggested that a rational trigger level should be 50 per cent or more of NATS group turnover accounted for by NSL and its subsidiaries. This would be an automatic trigger with no further consideration of surrounding circumstances;
- **Amber threshold** – this level of trigger recognised that there may be a lower level of NSL turnover which did not breach the red threshold but where there would need to be discussion between NATS and the CAA. CAA could then assess the risk of potential conflict for PDs in the event of distress of more than one NATS group company. NATS

suggested an Amber level of 45 per cent or more of NATS group turnover being accounted for by NSL and its subsidiaries.

- NATS considered that if the CAA agreed to the use of turnover as a proxy for director focus, then the triggering of the thresholds identified above would give the CAA the discretion to require the appointment of MIDs in addition to PDs.

NTUS

- 2.23 The NTUS is the trade union body representing staff within NATS, and is made up of three constituent groups, Air Traffic Control Officers, Air Traffic Systems Specialists, and Support Staff, through two recognised trade unions, Prospect and PCS.
- 2.24 NTUS had concerns with the CAA's governance proposals. NTUS did not believe the comparison of NERL to other regulated industries was entirely appropriate, and thus did not support proposals justified by this comparison. NTUS considered that the regulatory environment that NATS and NERL operated in had been deliberately designed differently to other utilities, and that the PPP provisions provided a level of protection that exceeded the comparative industries cited by the CAA. NTUS considered that the CAA had not fully recognised the roles of the partnership directors and the Airline Group, and that these positions had significant influence meaning NATS and NERL were subject to strong scrutiny.
- 2.25 NTUS considered there was not a need for further independent directors specifically for NERL, and suggested that having an overview of all of NATS' activities, not just NERL, allowed the partnership directors to have an understanding of the whole business and thus receive an early warning of any issues that may occur. They were concerned that directors appointed solely to NERL may not have a wider overview, and hence take a 'silo' approach. NTUS asked the CAA to consider alternative arrangements using the PDs' existing power and responsibilities, to address the governance concerns. They suggested the NERL board could operate in a more transparent way to avoid 'nesting', if necessary.

easyJet

- 2.26 easyJet made no specific comments on the proposals, believing it to be inappropriate given its shareholding in NATS through the Airline Group.

HAL

- 2.27 HAL supported the CAA's aim to enhance the regulatory oversight of the NATS licence and had no further comment on the governance proposals.

CAA's final proposals

- 2.28 The CAA has carefully considered the responses to our initial proposals. We remain concerned that members of the board of NERL are at risk of being exposed to conflicts as a result of their duties in other companies within the NATS group.

- 2.29 However, following consultation with stakeholders, we have developed a revised approach. This approach will allow NATS and the CAA better to meet their relevant statutory duties.

Independent PDs on NERL's Board

- 2.30 As set out in our initial proposals, we still consider that independent directors are needed to promote good governance for NERL.
- 2.31 We therefore consider that the appointment of all non-executive directors of NATS Holdings (being the independent PDs appointed by Government and those appointed by Airline Group and LHR Airports) to the NERL board would be a positive step forward. Given the current constitution of the NERL board, this would mean that all of the existing directors of NATS Holdings would also be members of the NERL board. These directors will bring their responsibilities to be expressly independent directly on to the NERL board. The appointment of independent board members is likely to have important benefits such as encouraging higher standards of corporate governance and increased focus on the activity of the NERL business. We do not consider that it would be appropriate for any executive who may be appointed to the board of directors of NATS who is predominantly responsible for operating the NSL business should be a member of the NERL board.
- 2.32 However, this development only brings these benefits for as long as the PPP arrangements provide for the appointment of PDs who can be appointed to the NERL board. Thus, we propose to modify NERL's licence to the effect that NERL is required to appoint two MIDs unless the CAA gives consent otherwise. We expect NERL formally to request consent to not be required to appoint MIDs as part of its reply to this consultation in anticipation that the CAA modifies the licence as proposed. The circumstances under which we will not grant consent to NERL (or any

consent granted to NERL would lapse) are outlined below, and will also be confirmed in any consent granted to NERL. We expect to publish such a consent alongside our decision document following this consultation, in March 2016. The key principle is that NERL needs to demonstrate in seeking consent is that it has arrangements in place that provide for equivalent assurance in relation to corporate governance as the appointment of MIDs would provide.

- 2.33 NATS has also suggested that the Mission Statement for PDs could be modified to clarify that the requirements for independence and transparency apply to the NERL board in addition to the wider NATS group. We have decided not to take this suggestion forward. This is because this Statement is agreed between NATS and DfT. As such, it is not for the CAA to modify this Statement. Therefore, we intend to incorporate in the licence a clear obligation to require NERL to ensure its board acts independently of the interests of affiliates of NERL when serving on the NERL board. We consider that this is a useful step as it ensures greater consistency with the PPP governance arrangements, and emphasises that the focus of the NERL board is on the activities of NERL, and not the wider NATS group.

Trigger mechanism for appointing MIDs to NERL’s Board

Appointment of PDs

- 2.34 One risk of addressing our concerns around governance by appointing the independent PDs to NERL’s board is that such PDs may not in the future be appointed, or PDs may not provide the required level of assurance given the changing profile of the NATS group.
- 2.35 In our assessment, there should always be a minimum of two independent directors (either PDs or MIDs) on NERL’s board. We propose to make any consent related to this requirement subject to a condition that if Government loses the right to appoint PDs or fails to begin the appointment or re-appointment process of PDs after a time period to be agreed with Government then, NATS will be required to appoint MIDs instead.
- 2.36 Since the development of these triggers, the Government announced in the [Spending Review and Autumn Statement 2015](#) that it intends to explore the sale of its 49 per cent shareholding in NATS. We consider that this trigger is even more important should the sale take place.

The relative size of NSL

- 2.37 NATS' suggested trigger mechanism for the risk that the size of NSL increases compared to NERL is a threshold relating to NSL turnover as a proportion of NATS group turnover. CAA agrees with this in principle but does not consider that 50 per cent would be the appropriate level for the trigger. We consider that there is credible risk that the focus of the NATS group directors could shift away from NERL to NSL at a point when NSL still represents markedly less than 50 per cent of the overall NATS business, particularly as NSL's unregulated activities may be considerably more profitable than the regulated revenues that NERL earns. This effect may be exacerbated by the potentially 'lumpy' nature of changes to NSL's turnover, for example due to gaining specific contracts or partnering arrangements.
- 2.38 Additionally, as the ratio will be measured based on audited accounts, we note that there will be a substantial lag of between 12-18 months from the beginning of the relevant period and the time when the accounts on which the ratio is calculated are reported. For these reasons, we consider that the red threshold should be set at 45%.
- 2.39 We also had concerns with NATS' proposed amber threshold triggering the ability of the CAA to review the continuation of the consent. We consider that the CAA has an ongoing ability to review the activities of NATS and whether the consent to exempt NERL from complying with the licence conditions requiring MIDs remains appropriate. Thus, we do not consider that the amber threshold is required.
- 2.40 If the red threshold was reached, MIDs or PDs are required to be part of the quorum for a board meeting and for approval of compliance statements.
- 2.41 We consider that these changes are necessary given our concerns regarding the weaknesses in NERL's governance and that this proposal is consistent with our statutory duties. Furthermore, we expect that this approach will strengthen NERL's financial resilience and help mitigate the risks that were raised by the CAA's Ad Hoc Review of NATS in 2012/13.

Chapter 3

Final proposals on the financial ring-fence

CAA initial proposals

Issues identified

3.1 In the initial proposals, we provisionally identified that the existing financial ring-fence may not be sufficiently robust in its current form. We were concerned that in its current form, the ring-fence may not ensure that NERL maintained sufficient financial and non-financial resources to conduct its regulated activities. It should also avoid exposing users to unacceptable risks arising outside the regulated business. In particular:

- the reporting and certification of resources obligations in the licence did not provide the CAA with sufficient transparency over the ongoing stability of the business including whether it was operating effectively in accordance with its obligations. For example, the certification obligation at present requires the directors of NERL to give a single certificate in relation to both financial and operational resources. We considered that this dilutes the effectiveness of this certificate because it did not ensure that the licensee had sufficient focus on each of its financial and operational risks;
- while NERL provided an annual certificate that it had sufficient resources to continue operation for the next two years, it did not have to explain how it reached this conclusion nor the factors it had taken into account in providing the certificate. As such (and especially in relation to operational risks), the CAA had no visibility as to how the directors came to the decision to give the certificate in question. The CAA therefore did not, as a matter of course, get sufficient information about the internal processes of NERL in order to allow it to make any kind of assessment of the appropriateness and effectiveness of those systems. This has an adverse effect on its ability to regulate and, consequently, on the level of protection given to stakeholders and consumers through the regulatory regime;
- NERL currently has no obligations to certify compliance with specific licence obligations either annually or prior to declaring a dividend or other distribution of capital. As such, the ring-fence did not drive a culture in which compliance with the obligations set out in the licence was considered regularly by the board;

- Some of the obligations in the licence (for example in relation to cross subsidies) were insufficiently clear either for NERL to comply with them easily, or the CAA to oversee and enforce them;
- NERL did not have any plans in place to provide appropriate assistance to an administrator in the event of it entering an Air Traffic Administration.

3.2 In summary, the CAA does not have sufficient ongoing oversight of the activities of NERL in order to gain assurance that NERL was complying with its obligations in relation to the ring-fence and that it had sufficient resources available to it on an ongoing basis.

CAA proposal

3.3 After considering and assessing a range of additional certification and reporting obligations for NERL, the CAA developed a number of proposals aimed at addressing the problems identified, to increase transparency and certainty on the part of NERL, and to ensure that the CAA was provided with an appropriate level of information and assurance by NERL as a matter of course on an ongoing basis. These proposals were to:

- re-focus NERL's annual directors' resources certificates to give additional clarity to and emphasis on operational as well as financial resources by requiring separate certification of financial and operational resources;
- require the certificates to be supported by statements from the Directors setting out the processes used and the factors considered in issuing them;
- require new annual certificates from NERL's directors to confirm that the licensee had complied with specific elements of the ring-fence (i.e. the obligation not to enter into cross-defaults, not to give or receive cross-subsidies and to comply with information requests);
- introduce a new requirement to re-state these certificates of compliance before declaring a dividend or other capital distribution;
- require NERL to maintain an intervention plan to assist an administrator in the event of it entering an Air Traffic Administration;
- simplify the obligations of NERL in relation to the provision or receipt of cross subsidies.

Responses to the consultation

NATS

- 3.4 In its response, NATS agreed with the CAA that ring-fencing was an important component in ensuring proper and appropriate regulation of its en route activities. NATS outlined several factors that were taken into account when the PPP was set up, and remained significant:
- there were important operational and safety interfaces between NERL and NSL activities at UK airports. Thus, ring-fencing should not create artificial barriers which may inhibit safe and efficient operation at those interfaces;
 - the Airline Group and Government were both directly interested in the maintenance of safety, continuity and efficiency in the provision of en route service, and these interests would always outweigh shareholders financial interests;
 - there were efficiency benefits to be gained in operating a “single management services” based structure for shared activities and staff, as this enabled efficient deployment, training and reassured highly skilled and specialist staff.
- 3.5 NATS also highlighted that while it recognised there had been an increased focus on corporate governance since the time of the PPP, the relative size and natures of the NSL and NERL businesses were in line with projections made then. NATS argued that there had been no developments in NSL’s business model since the PPP which would suggest a more onerous ring-fencing was required.
- 3.6 NATS accepted the majority of the changes suggested by the CAA on ring-fencing. Specifically, NATS agreed with the proposals to:
- certify financial and operational resources into two separate certificates;
 - explain the processes used by it in providing a certificate, if the language was tailored to the NERL regulatory regime in line with the drafting changes suggested by NATS;
 - reissue a certificate to the CAA prior to declaring a dividend or other capital distribution, except if a dividend or distribution was declared within six months of a prior certification;
 - prepare an intervention plan in the form proposed by the CAA.
- 3.7 On the intervention plan, NATS noted that it expected there would be advance warning of the scenario where an intervention plan may be

needed, and that the current arrangements provide the CAA early warning of any potential financial stress on NERL.

- 3.8 However, NATS was concerned about the CAA's proposals regarding the cross subsidy prohibition. NATS considered that the CAA's objections to the current language in NERL's licence were misplaced. This was particularly so on the CAA's statement that Condition 9 ensured that trading between NERL and associated companies such as NSL was on an arms-length and normal commercial terms. NATS view was that this obligation on NERL was actually reflected in Condition 5 of the licence, and thus would be redundant if it were included in Condition 9.
- 3.9 NATS considered that Condition 9 was designed to ensure that transactions across the regulatory ring-fences, such as those between the en route and oceanic businesses, were not structured in a manner that may involve a competition-distorting cross subsidy. This was relevant because some elements of NERL ring-fenced business were not monopolies, e.g. there are other potential providers of aeronautical and meteorological information to aviation. NATS was of the view that in practice these procedures were about ensuring that transactions involving NERL were transparent and objectively justified.
- 3.10 NATS noted that the provision of Article 15 of the EU Service Provision Regulation (550/2004) stated that cross-subsidies were allowed between different air navigation services which operated in the different terminal services and en-route services categories when justified for objective reasons and subject to clear identification. Thus, NATS considered that an absolute and unqualified prohibition on cross subsidies as suggested by the CAA would be inconsistent with the EU Regulation. Furthermore, NATS considered it may find itself in breach of its licence for an immaterial breach of a technical test of cross subsidy.
- 3.11 NATS considered there may be examples where NERL undertook a transaction with NSL which may be unclear whether or not that position represented a cross subsidy. NATS highlighted that it was in NERL's interests to support NATS' staff as they represent a valuable resource. Having an absolute prohibition on cross subsidies may not allow such support from NERL.
- 3.12 Therefore, NATS considered that modifying Condition 9 such that any cross subsidy would be a breach of the licence would expose NERL to excessive and unnecessary risk. NATS proposed instead that Condition 9 is modified with a new qualification added to the effect that cross subsidies are permitted if they can be justified by reference to objective criteria. This would explicitly reflect in Condition 9 the wording of the EU Regulation.

NTUS

- 3.13 The NTUS were broadly supportive on the proposals for greater clarity and information within the resource certificates to demonstrate that NATS had adequate operational and financial resources. On the issue of the prohibition against cross subsidies, the NTUS considered that the CAA should reconsider its approach. The NTUS were concerned that the proposed change had potential unforeseen consequences, and that the burden to demonstrate compliance with the amended licence would be significant.
- 3.14 The NTUS, in agreement with NATS' response, considered there were certain circumstances where a technical argument may be made that a perception of cross subsidy was a breach of licence, such as in some of the PPP arrangements. Instead, NTUS proposed the existing wording should be kept, or the rewording should reflect that there were limited and justifiable circumstances where a perceived or specific cross subsidy could exist.

easyJet

- 3.15 easyJet were supportive of additional requirements for NERL's ring-fence. easyJet specifically supported the requirement to issue separate certificates for financial and operational resources; to provide more information setting out the process to justify certificates; to restate compliance statements prior to paying dividends; and to maintain an intervention plan. easyJet was also comfortable with the requirement on NERL regarding cross subsidies, particularly as easyJet considered this requirement to be redundant due to competition law.

HAL

- 3.16 HAL also supported the CAA's aims in enhancing regulatory oversight, and agreed that our proposals would bring NATS in line with other regulated industries.

CAA final proposals

- 3.17 The CAA has carefully considered all of the responses received. We remain concerned that we do not have sufficient ongoing oversight of the activities of NERL to gain assurance that NERL is complying with its

obligations in relation to the ring-fence and that it has sufficient resources available to it on an ongoing basis.

- 3.18 The CAA recognises that while NATS considers current regulation is appropriate given the relative sizes of NSL and NERL, and that there are important safety, operational and efficiency benefits from the current arrangements.
- 3.19 However, NATS agreed that all the suggested changes to the ring fence were reasonable, with the exception of the proposal relating to cross subsidies.
- 3.20 The CAA has further explored the concerns NATS raised about facing increased risk of a licence breach if the proposed wording of Condition 9 was implemented. During further correspondence between NATS and the CAA, it was agreed that the prohibition of cross subsidies within the NATS group should be amended so that it expressly does not prejudice the application of Article 15(2)(e) of Regulation (EC) No 550/2004 on the provision of air navigation services in the single European sky. Furthermore, given the significant detail that NERL has provided to the CAA about its arrangements for dealing with potential cross subsidies during the Ad-hoc Review, and the consultation process leading to these proposals, the CAA considers that a more forward-looking approach is appropriate in order to avoid NERL being required to provide significant amounts of information in relation to arrangements it has already discussed with the CAA.
- 3.21 Thus, in addition to the financial ring-fence proposals NATS agreed to, the CAA proposes to amend NERL's licence to reflect that after 1 April 2016, NERL must disclose to the CAA if it enters any new cross subsidy arrangement that it considers is permitted by the Regulation 550/2004. Once supplied with the detail of the cross-subsidy, the CAA may issue any directions necessary to ensure compliance with Condition 9, which NERL must implement.
- 3.22 We are of the view that such a modification, especially when coupled with the obligation to certify compliance with this condition that the CAA intends to introduce as part of Condition 5, will provide appropriate assurance to the CAA that NATS' internal processes are designed to avoid the creation of cross subsidies.

Chapter 4

Summary and next steps

Summary

- 4.1 The CAA's Ad Hoc Review of NATS raised a number of risks and concluded that further work would be required to examine the options for strengthening NERL's financial resilience in the areas of governance and financial ring-fencing. The CAA's detailed work in this area led to the assessment of a number of such options.
- 4.2 After consultation with all interested stakeholders, the CAA has finalised a series of proposals to support NERL in the areas of governance and financial ring-fencing.
- 4.3 On governance, the CAA's final proposal is to modify NERL's licence such that two MIDs are required to be appointed to the NERL board unless the CAA gives consent otherwise, and to ensure that directors of NERL act independently. The independent directors will also be required for a quorum at board meetings and to approve compliance certificates. We expect to grant a consent, and allow it to remain in place unless either of the following trigger conditions are met:
- a) Trigger 1 occurs if either Government lost the right to appoint PDs to the board due to a reduction in its shareholding below 25% or due to a change in the law;
 - b) Trigger 2 occurs if the proportion of NSL turnover (including subsidiaries) compared to NATS group turnover increases to 45% or more of NATS group turnover there would be an automatic requirement for two MIDs.
- 4.4 On the financial ring-fence, the CAA's final proposal is to modify the licence such that NERL is required to:
- re-focus the annual directors' resources certificate to introduce separate certificates of adequacy for each of operational and financial resources;
 - explain the processes used by it in providing these certificates;
 - certify compliance with specified elements of the ring-fence annually;

- reissue a certificate to the CAA prior to declaring or distributing a dividend, except if a dividend or distribution was declared within six months of a prior certification;
- prepare an intervention plan to assist an administrator in the event of it entering an Air Traffic Administration;
- comply with a simplified prohibition against cross subsidies and disclose to the CAA if it enters any new cross subsidy arrangement that it considers is permitted. On reviewing any such disclosure, the CAA will be able to issue any directions necessary to ensure compliance with the prohibition which NERL must implement.

4.5 The initial proposals document also identified a number of areas which had been considered through the Ad Hoc review where the CAA considered that on reflection no changes would be required. NATS agreed with the CAA's views on these matters; that the current level of oversight is suitable. No other stakeholders commented on these proposals. Thus, there are no changes to those matters as outlined in the initial consultation.

Next steps

- 4.6 This document is the statutory notice of the CAA's licence modification proposals. Any representations about the proposed modifications to NERL's licence set out in Appendix A should be made to the CAA by 9 March 2016.
- 4.7 In anticipation that the CAA would modify the conditions as proposed in this document, we expect NERL will wish to apply for the CAA's consent exempting it from compliance with proposed Condition 5 at the same time as it responds to these proposals.
- 4.8 Unless there are significant responses, we expect to reach a final decision on the licence modifications in March 2016 so that the amended licence would take effect from 1 April 2016. We would expect to publish any consent issued by the CAA as part of the decision. We would also expect NERL to issue the relevant compliance certificates in the new form from that date.

APPENDIX A

Modification to the Air Traffic Services Licence for NATS (EnRoute) PLC ("NERL")

This Appendix sets out the modifications to NERL's air traffic services licence (the "Licence") that the CAA is consulting on under section 11 Transport Act 2000 in relation to:

- Condition 1: Interpretation and construction - to include a new definition of "Compliance Certificate";
- Condition 5: Availability of Resources and Financial Ring-Fencing - to implement the additional certification obligations described in the main body of this document; and
- Condition 9: Prohibition on cross subsidies - to clarify and simplify the obligation contained in it.

The changes to Conditions 5 and 9 are marked against the existing text of those conditions.

This Appendix also sets out the text of modifications to the Licence that the CAA is proposing to insert the following new conditions:

- Condition 7: introducing a requirement to maintain an intervention plan; and
- Condition 8: introducing requirements for NERL to appoint mandated independent directors and in relation to NERL's corporate governance.

For the avoidance of doubt, the existing obligations set out in paragraphs 9 to 30 of Condition 5 would be retained without modification. Those paragraphs set out the obligations of NERL in relation to:

- Restriction on Activity and Financial Ring-Fencing;
- Amendments to the Finance Documents;
- Disposal of Relevant Assets and Indebtedness;
- Ultimate Holding Company Undertaking;
- Credit rating of Licensee; and
- Financial Indebtedness.

The text of the proposed modifications is set out on the following pages. The text of paragraphs of the relevant Licence conditions that is not the subject matter of the proposed modifications is not reproduced.

PART II THE GENERAL CONDITIONS

Condition 1: Interpretation and construction

Insert after the definition of “Auditors”:

- “Compliance Certificate” means a certificate that is addressed to the CAA and:
- (a) approved by a resolution of the board of directors of the Licensee either:
 - (i) at a meeting of the board of directors of the Licensee at which all directors of the Licensee are present; or
 - (ii) by a written resolution of the board of directors of the Licensee signed by all the directors of the Licensee; and
 - (b) signed by a director of the Licensee.

Condition 5: Availability of Resources and Financial Ring-Fencing

Summary

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

This paragraph 1 provides a descriptive summary of the provisions which follow in this Condition. This paragraph 1 is not part of the Condition nor is it intended to add to the provisions which follow, and, for the purposes of interpretation, it is the detailed provisions which prevail.

Availability of Resources

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

Compliance Certificates in relation to financial resources

3. ~~With effect from 1 April 2016, t~~The Licensee shall submit a Compliance Certificate ~~certificate addressed to the CAA, approved by a resolution of the board of directors of the Licensee and signed by a director of the Licensee pursuant to that resolution. Such certificate shall be submitted~~ within four months of the end of the Licensee's financial year. ~~Each certificate shall be~~ in one of the following forms:

(a) **Certificate 1F**

“After making enquiries based on systems and processes established by the Licensee appropriate to the purpose, the directors of the Licensee have a reasonable expectation that the Licensee will have available to itself, after taking into account in particular (but without limitation) any dividend or other distribution which might reasonably be expected to be declared or paid by the Licensee, any amounts of principal and interest due under any loan facilities and any actual or contingent risks which could reasonably be material to their consideration, sufficient financial ~~resources and other resources~~ and financial ~~and operational~~ facilities ~~to enable the Licensee to carry on the Permitted Purpose activities and to comply with its obligations under the Act and under this~~ its Licence ~~to which the Licensee is aware or could reasonably be expected to make itself aware it is or will be subject (as amended from time to time)~~ for a period of two years from the date of this certificate.”

or

(b) **Certificate 2F**

“After making enquiries based on systems and processes established by the Licensee appropriate to the purpose, the directors of the Licensee have a reasonable expectation, subject to what is said below, that the Licensee will have available to itself, after taking into account in particular

(but without limitation) any dividend or other distribution which might reasonably be expected to be declared or paid by the Licensee, any amounts of principal and interest due under any loan facilities, and any actual or contingent risks which could reasonably be material to their consideration, sufficient financial ~~and other~~ resources and financial ~~and operational~~ facilities to enable the Licensee to carry on the Permitted Purpose activities and to comply with its obligations under the Act and under ~~this~~its Licence ~~to which the Licensee is aware or could reasonably be expected to make itself aware it is or will be subject~~(as amended from time to time) for a period of two years from the date of this certificate. However, they would like to draw attention to the following factors which may cast doubt on the ability of the Licensee to carry on the Permitted Purpose activities and to comply with its obligations under the Act and under such Licence for that period.....”

or

(c) Certificate 3F

“In the opinion of the directors of the Licensee, the Licensee will not have available to it ~~self~~ sufficient financial ~~or other~~ resources and financial ~~and operational~~ facilities to enable the Licensee to carry on the Permitted Purpose activities and to comply with its obligations under the Act and under ~~this~~its Licence ~~to which the Licensee is aware or could reasonably be expected to make itself aware it is or will be subject~~(as amended from time to time) for a period of two years from the date of this certificate.”

4. ~~[Paragraph deleted]~~The Licensee shall ensure that the Compliance Certificate given to the CAA under paragraph 3 is accompanied by a statement of the main factors that the Licensee’s directors have taken into account in giving that certificate including reference to:
 - (a) the systems and processes established by the Licensee to support the giving of the certificate by the directors;
 - (b) the main financial resources and financial facilities available to the Licensee; and
 - (c) the most recent management projected cash flows of the Licensee together with a report prepared by its Auditors stating whether or not the Auditors are aware of any inconsistencies between, on the one hand, that certificate and the statement submitted with it and, on the other hand, any information which they obtained during their audit of the relevant year end accounts of the Licensee.
5. ~~The Licensee shall inform the CAA in writing as soon as practicable if the directors of the Licensee become aware of any circumstance which causes them no longer to have the reasonable expectation expressed in the then most recent certificate given under paragraph 3(a) or 3(b).~~

Compliance Certificate in relation to operational resources

- ~~6. The Licensee shall obtain and submit to the CAA with each certificate provided for in paragraph 3 a report prepared by its Auditors stating whether or not the Auditors are aware of any inconsistencies between, on the one hand, that certificate and the statement submitted with it and, on the other hand, any information which they obtained during their audit of the relevant year end accounts of the Licensee~~
5. With effect from 1 April 2016, the Licensee shall submit a Compliance Certificate to the CAA within four months of the end of the Licensee's financial year in one of the following forms:

(a) Certificate 1R

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

or

(b) Certificate 2R

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

However, the directors of the Licensee would like to draw attention to the following factors, which may cast doubt on the Licensee's ability to carry on the Permitted Purpose activities and to comply with its obligations under the Act and under this Licence [followed by a description of the factors concerned]."

or

(c) Certificate 3R

"In the opinion of the Licensee's directors, the Licensee will not have available to itself sufficient operational resources including management, personnel, fixed and moveable assets, rights, licences, consents, and facilities to enable the Licensee to carry on the Permitted Purpose activities and to comply with its obligations under the Act and under this

Licence (as amended from time to time) for a period of two years from the date of this certificate.”

6. ~~[Paragraph deleted]~~The Licensee shall ensure that the Compliance Certificate given to the CAA under paragraph 5 is accompanied by a statement of the systems and processes established by the Licensee to support the giving of the certificate by the directors and the main factors that the Licensee’s directors have taken into account in giving that certificate.

Compliance Certificate in relation to certain Conditions

7. With effect from 1 April 2016, the Licensee shall submit a Compliance Certificate to the CAA within four months of the end of the Licensee’s financial year in one of the following forms:

(a) Certificate 1C

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

or

(b) Certificate 2C

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

8. The Licensee shall inform the CAA in writing as soon as reasonably practicable if:

(a) the directors of the Licensee become aware of any circumstance that causes them no longer to have the reasonable expectations expressed in the most recent certificate given under paragraph 3(a), 3(b), 5(a) or 5(b); or

(b) the directors of the Licensee consider that any adverse factors that caused them to give the CAA a Compliance Certificate in the form of under paragraph 3(b), 3(c), 5(b) or 5(c) and referred to in that certificate have materially worsened.

Certificates for the CAA in relation to dividends

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

8B. The first requirement is that the Compliance Certificate shall be in the following form:

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

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

and

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

8C. The second requirement is that the Compliance Certificate shall have been approved by the Licensee’s board of directors not more than 14 days before the date on which the declaration, recommendation, or payment is to be made.

8D. The Licensee need not give the CAA a Compliance Certificate of the type required by paragraph 8A in circumstances where:

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

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

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

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

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

carries on the En route Businesses with information on any significant contractual arrangements, including those that impose obligations on the Licensee;

- (h) any arrangements under which the Licensee has delegated any part of the En route Businesses to any affiliate of the Licensee;
 - (i) any contractual rights to receive cash or other financial assets from any affiliate of the Licensee or any other person;
 - (j) any contractual obligations to deliver cash or other financial assets to any affiliate of the Licensee; and
 - (k) the Licensee's arrangements and procedures for ensuring compliance with legislative requirements relating to the provision of air traffic services and with its obligations under this Licence, including the conditions set out in Part III of this Licence.
4. The form, scope and level of detail of the intervention plan prepared in accordance with paragraph 1 shall be approved by the CAA (such approval not to be unreasonably withheld or delayed).
5. The Licensee shall keep the intervention plan under review at all times and, at least annually, shall review the appropriateness of the intervention plan and submit to the CAA a Compliance Certificate within four months of the end of the Licensee's financial year in the following form:

"The Licensee has reviewed its intervention plan as required by condition 7 of its Licence. In the opinion of the directors of the Licensee, the intervention plan is fit for purpose and complies with the Licensee's obligations under that condition."

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

1. Where potential conflicts exist between the interests of the Licensee and those of any affiliates or related undertakings of the Licensee, the directors of the Licensee, in discharging their responsibilities as directors of the Licensee shall act independently of the interests of any affiliate or related undertaking of the Licensee and ensure that they have regard exclusively to the interests of the Licensee.
2. Subject to paragraph 13, the Licensee shall ensure that at all times after a date which is 12 months after this condition comes into effect, it has at least two non-executive directors who meet the criteria set out in paragraphs 3, 4 and 5. In this condition such directors are referred to as “mandated independent directors”.
3. A mandated independent director shall:
 - (a) be a natural person;
 - (b) in the reasonable opinion of the Licensee, have the skills, knowledge, experience, and personal qualities necessary to perform effectively as a non-executive director of the Licensee and participate fully in the decision making of the board of directors of the Licensee;
 - (c) not have any executive duties within the Licensee’s business; and
 - (d) be of sufficient standing to ensure that directors of the Licensee, in discharging their responsibilities as directors of the Licensee, act independently of the interests of any affiliate or related undertaking of the Licensee and ensure that they have regard exclusively to the interests of the Licensee.
4. A mandated independent director shall not be, and shall not have been during the 12 months before his appointment as a director of the Licensee or the coming into force of this condition (whichever is the later):
 - (a) an employee of the Licensee; or
 - (b) a director or employee of an associate of the Licensee.
5. A mandated independent director shall not:
 - (a) have, or have had during the 12 months before his appointment as a director or the coming into force of this condition (whichever is the later), any material business relationship with the Licensee or any associate of the Licensee;
 - (b) hold a remit to represent the interests of any particular shareholder or group of shareholders of the Licensee or the interests of any associate or the interests of any particular shareholder or group of shareholders of any associate of the Licensee; or

- (c) receive remuneration from the Licensee or any associate of the Licensee apart from a director's fee and reasonable expenses.
- 6. For the purposes of sub-paragraphs 5(a) and 5(c) respectively:
 - (a) the holding of a small number of shares or associated rights in the Licensee or any associate of the Licensee shall not, of itself, be considered a material business relationship; and
 - (b) the receipt or retention of any benefit accrued as a result of prior employment by or service with the Licensee or any associate of the Licensee shall not be considered to be remuneration.
- 7. The Licensee shall notify the CAA of the names of its mandated independent directors appointed pursuant to paragraph 2 within 14 days of the date on which they are appointed.
- 8. The terms of appointment of each mandated independent director shall include a condition stipulating that both the Licensee and the appointee will use their best endeavours to ensure that the appointee remains independent during his term of office, having particular regard to the criteria set out in paragraphs 3, 4 and 5.
- 9. A term of appointment for a mandated independent director may not be for longer than eight years, but an individual may be reappointed thereafter provided that he continues to meet the criteria set out in paragraphs 3, 4 and 5.
- 10. The Licensee shall notify the CAA in writing within 14 days if any mandated independent director is removed from office or resigns, giving reasons for the removal or (to the extent that they are known to the Licensee) the resignation. For the purposes of this requirement, the reasons for a resignation may, if applicable, be stated to be personal reasons.
- 11. If at any time the Licensee has fewer than two mandated independent directors because of a removal or resignation or other reason (including death or incapacity), the Licensee shall use reasonable endeavours to ensure that a new director is, or new directors are, appointed to fulfil the obligation in paragraph 2 as soon as is reasonably practicable to bring the number of mandated independent directors up to at least two.
- 12. Where mandated independent directors have been appointed to fulfil the obligation in paragraph 2, the Licensee shall ensure that (save where necessary to meet urgent safety or operational matters of the Licensee) meetings of its board of directors are:
 - (a) quorate only if attended by at least one of those mandated independent directors; and
 - (b) clearly distinct, and held at a separate time, from any meeting of the board of directors of any associate of the Licensee.
- 13. Paragraph 2 shall not have effect where and to the extent that the CAA consents otherwise. The CAA may grant such consent where it considers

that the corporate governance arrangements applicable to the Licensee provide equivalent assurance to the CAA in relation to any potential conflicts between the interests of the Licensee and those of any affiliates or related undertakings of the Licensee as if the mandated independent directors required by paragraph 2 had been appointed. Any consent granted by the CAA pursuant to this condition may be on such terms as the CAA considers appropriate in all the circumstances.

14. Nothing in this condition shall be construed as requiring any director of the Licensee to act in a manner that is not consistent with that director's legal obligations as a director.

Interpretation

15. In this condition:

“associate” means:

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

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

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

- (a) that other person holds a participating interest in the person; or
- (b) the person is subject to a participating interest by a person who is himself subject to a participating interest by that other person; and
- (c) “participating interest” has the meaning given in section 421A of the Financial Services and Markets Act 2000.

Condition 9: Prohibition of cross-subsidies

1. Without prejudice to the provisions of Article 15(2)(e) of Regulation (EC) No 550/2004 on the provision of air navigation services in the single European sky (the "Service Provision Regulation"), ~~t~~The Licensee shall procure that no Separate Business or part of a Separate Business gives any cross-subsidy (whether in money or money's worth) to, or receives any cross-subsidy from, any other business or part of any other business of the Licensee or any affiliate or related undertaking of the Licensee (whether or not a Separate Business) ~~where such cross-subsidy has or is intended to have or is likely to have the effect of preventing, restricting or distorting competition in any market for the provision of air traffic services.~~

2. Where, on or after 1 April 2016:
 - (a) the Licensee enters into any new cross subsidy arrangement; or
 - (b) any cross subsidy arrangement which has been entered into prior to 1 April 2016 but which has not been implemented or has not come into effect prior to that date, is implemented or comes into effect

and any such arrangement, in the Licensee's opinion, is justified for objective reasons and so would be permitted under the Service Provision Regulation, the Licensee shall submit in writing to the CAA a clear identification and explanation of those objective reasons.

3. Where the CAA is satisfied the Licensee is giving or receiving, or has given or received, any cross-subsidy prohibited by paragraph 1 ~~above or~~ the Service Provision Regulation, the Licensee shall take such steps, set out in any directions that may be issued by the CAA, as are necessary to ensure that it complies with paragraph 1 and the Service Provision Regulation.