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INVESTIGATION UNDER section 34 Transport Act 2000:  
**PROJECT PALAMON** - DRAFT DECISION OF THE CIVIL AVIATION AUTHORITY  
("CAA")  
*comments submitted on behalf of*  
RYANAIR DAC  
19 OCTOBER 2020

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**NB:**

- (1) *The Chapter numbering reflects the numbering of Chapters in the Civil Aviation Authority's draft Palamon decision published on 17 September 2020 and available in redacted form [here](#).*
  
- (2) *Ryanair adopts the abbreviations set out in **Appendix A** to the CAA's draft Palamon report, unless otherwise stated.*

## SUMMARY: RYANAIR'S KEY CONCERNS WITH THE DRAFT PALAMON DECISION

1. Ryanair's key concerns with the draft Palamon report ("**the Decision**") are as follows.

### NERL's failure, in the Relevant Period, to provide adequate staffing to meet demand: Section 8(1)(c) of the Transport Act 2000 and Condition 5.2 of the Licence

- a. The Oberon Report published on 3 August 2017 identified serious concerns with NERL's performance. The CAA's decision that there had been no breach of NERL's duties was described as a "*finely balanced decision*".<sup>1</sup>
- b. The Palamon report shows that not only have those concerns not been addressed, they have worsened: (i) NERL continues to fail to provide normal levels of staffing resilience for the Stansted approach, (ii) its failings are "*persistent and significant*", and (iii) NERL has no credible plan to address these failings until, at the earliest, 2023.<sup>2</sup>
- c. Ryanair emphasises that traffic would not have to rebound to 2019 levels for several areas to be congested: traffic in 2016 was notably lower than in 2019, yet NERL's staffing delays generated more than 17,000 minutes of delay at Stansted alone.
- d. It follows that NERL is *very* likely to contravene section 8(1)(c) and Condition 5.2 of its Licence when demand recovers. These findings trigger the CAA's statutory duty to take enforcement action under section 20 of the Transport Act 2000 ("**the 2000 Act**").
- e. Despite these findings, the CAA has provisionally decided to take no enforcement action at all. That would be unlawful: (i) section 20(1) of the 2000 Act requires the CAA to make a final order if "*satisfied that a licence holder is contravening or is likely to contravene a section 8 duty or a licence condition*". There is no requirement in section 20 for the "*likely*" breach to be imminent. Further or alternatively, (ii) it "*appears*" that NERL is "*likely to contravene*" section 8(1)(c) and Condition 5.2 once

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<sup>1</sup> CAP1578, § 1.14.

<sup>2</sup> Decision, § 6.49, bullet points 3-4, § 6.52; Summary, § 19, bullet point 4, § 22.

demand recovers: at the very least, this lower threshold is met and the CAA “*must*” make a provisional enforcement order: section 20(2) of the 2000 Act.

- f. The CAA’s refusal to take enforcement action is also irrational, given: (i) the “*persistent and significant*” nature of NERL’s failings, (ii) its lack of improvement in the 3 years since Oberon, and (iii) the lack of any credible plan to redress these issues within the *next* 3 years. The sole reason given for not taking enforcement action is that Covid-19 suddenly, and unexpectedly, reduced demand. But that is happenstance; temporarily low demand is all the more reason to require NERL to take action *now*. Long-term planning is clearly needed to achieve an acceptable service, and immediate action is clearly required to avoid another, entirely predictable ‘spike’ in staffing-related delays when demand starts to recover. The refusal, if maintained, is further undermined by the CAA’s recognition that its Oberon ‘recommendations’ proved insufficient to ensure an adequate service.
- g. Finally, the refusal to take any enforcement action ignores relevant factors: namely the likelihood that: (i) demand will recover in a ‘lumpy’ or heterogenous fashion; (ii) the Covid-19 crisis will *exacerbate* NERL’s staffing issues in the long-term; and (iii) NERL will fail to meet its obligations even if traffic *only* recovers to 2016 levels.

**NERL’s continuing failure to plan for *future* demand: Section 8(1)(d) of the 2000 Act**

- h. The Decision finds that NERL was, throughout the period January 2019 to March 2020, in breach of its statutory obligation to have regard to likely *future* demand, and to provide, develop and maintain a system for providing air traffic services accordingly. Ryanair agrees. This was because, *inter alia*, NERL has no credible plan to remedy staffing issues within the next 3 years.<sup>3</sup>
- i. The provisional decision that, due to Covid-19, the CAA will take no enforcement action in respect of NERL’s breach of section 8(1)(d) is an illogical *non sequitur*. Covid-19 may have reduced *current* demand in the short-term; but NERL remains duty-bound to anticipate *future* demand: it has to act for the long-term. The Decision has already found NERL in breach of that future-oriented duty: as at September 2020, NERL had no credible plan to address its staffing shortfalls. It

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<sup>3</sup> Summary, § 19-20.

ought to be providing and/or developing a system with regard to the future, when normal demand resumes. It is not.

- j. It follows that NERL “*is contravening*” its *future-oriented* duty in section 8(1)(d) of the 2000 Act; and as such, the CAA “*must*” take immediate enforcement action under section 20(1) or (2) of the 2000 Act in respect of that breach: see (e) above. The Decision is, at present, unlawfully and unreasonably short-termist.

**Order sought under section 20(1), alternatively section 20(2), of the 2000 Act**

2. Ryanair urges the CAA to rescind its unlawful, irrational provisional decision as to enforcement. Instead, the CAA should order NERL to do the following in its *final* Decision:
  - a. Immediately adopt PRC best coding practices.
  - b. Immediately roll out the rostering tool<sup>4</sup>.
  - c. Begin attributing staffing-related delays to shortages against actual demand<sup>5</sup>.
  - d. Begin sharing dynamic Sector Opening Times with Eurocontrol.
  - e. Within the next 6 months, adopt a binding 5-year Staffing Resilience Plan to be consulted upon on (at least) an annual basis with airlines and other stakeholders.
  - f. Ascertain the costs incurred by airlines and consumers as a result of the “*persistent and significant*” NERL-attributable delays at Stansted since 2016, and devise a mechanism for reimbursing those costs: Ryanair suggests that NERL should begin to deduct that sum from airline user charges in 2021, and make a donation to a relevant consumer association.
3. Ryanair considers these to be eminently reasonable and readily achievable steps, most of which could be implemented at little cost to NERL, and all of which NERL ought properly to have taken at a much earlier stage.

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<sup>4</sup> Decision, § 4.13

<sup>5</sup> Decision, § 5.49

## INTRODUCTION

### (i) Project Oberon

4. Project Palamon is the second investigation pursuant to section 34 of the 2000 Act into NERL in 3 years. The first investigation, Project Oberon, was opened in September 2016 in response to complaints by Ryanair and Stansted that NERL had failed to provide sufficient resources to manage the London Approach Service ("LAS"), and that NERL was unlawfully preferencing airspace users at Heathrow over airspace users at Stansted. The outcome of that investigation was the publication in August 2017 of the (redacted) Oberon Report (CAP 1578).
5. On balance, the CAA found no breach by NERL of the 2000 Act or its Licence conditions "as currently drafted"<sup>6</sup>, but noted that the decision was "finely balanced" and that there were "a number of areas where NERL needs to improve, and where the CAA needs to review its oversight of the company".<sup>7</sup>
6. As to staffing, the CAA found that the lack of sufficient operational staff was causing delays in the LAS.<sup>8</sup> NERL had failed to adequately consider and provide staff contingency plans and there were flaws in the planning and management of its voluntary redundancy programme and its decisions to reduce the number of trainee air traffic controllers. NERL had also failed to be proactive in developing a Service Delivery Plan for Stansted<sup>9</sup>, all of which contributed to delays. Remedial action was required to improve resilience in NERL's operations.<sup>10</sup>
7. As to discrimination, the CAA identified "significant additional delay at Stansted attributable to NERL staffing in 2016"<sup>11</sup>, and a notable lack of resilience at Stansted in comparison to Heathrow, but this was said not to be due to "decisions on the part of NERL to unduly prefer or discriminate against any party".<sup>12</sup> Nevertheless, NERL needed to take

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<sup>6</sup>Oberon Report, § 5.30

<sup>7</sup>Oberon Report, § 1.1, see also §§ 5.29-5.30, 6.8-6.13, 6.15

<sup>8</sup> Oberon Report, § 1.8

<sup>9</sup> Oberon Report, §§ 5.62, 6.15

<sup>10</sup>Oberon Report, §§ 1.13, 5.7 and Chapter 6

<sup>11</sup>Oberon Report, § 5.54

<sup>12</sup>Oberon Report, § 1.12

care to ensure that its “actions (or lack of action) does not result in a particular group of airspace users experiencing undue discrimination”.<sup>13</sup>

8. Although the CAA found no breach of the 2000 Act or the Licence at that time, the CAA expected NERL to learn lessons from the investigation, and said that whether or not it had done so would be taken into account by the CAA “in coming to a view on what is reasonable in any potential future allegation of a breach of its [NERL’s] licence or [the 2000 Act]”.<sup>14</sup> If NERL failed to implement the recommendations in the Oberon Report, the CAA threatened to “revisit this decision or take other action as appropriate”.<sup>15</sup>

(ii) Project Palamon

9. Since the first CAA investigation, the problems at Stansted have only worsened, with a 50% increase in NERL-attributable delays from 2016 to 2018. In one case the sickness of a single air traffic controller at Stansted necessitated the closure of the entire Essex airspace for three hours.<sup>16</sup> This strongly suggested that the lack of resilience identified by the CAA in the Oberon Report is persisting in NERL’s Stansted operation. The absence of equivalent increases in NERL-attributable delays at Heathrow indicated continued discrimination by NERL in favour of Heathrow.
10. On 7 September 2018 Ryanair made a further complaint to the CAA, alleging: (i) failure by NERL to meet a reasonable level of demand for Air Traffic Control (“ATC”) services, including by failing to improve the resilience of its operations in breach of the CAA’s clear demands to that effect; (ii) preferential treatment for air traffic at Heathrow to the detriment of airspace users at Stansted; and (iii) discrepancies between the reported and actual reasons for ATFM delays.<sup>17</sup>
11. In a letter to Ryanair dated 22 October 2018, the CAA confirmed that it would open an investigation pursuant to section 34 of the 2000 Act, to be named “Project Palamon”. In its letter of 7 December 2018, the CAA informed Ryanair that the CAA had decided to appoint Eurocontrol to analyse certain facets of the investigation – namely matters

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<sup>13</sup> Oberon Report, § 1.10

<sup>14</sup> Oberon Report, §§ 1.13-1.14

<sup>15</sup> Oberon Report, §§ 6.4, 6.17

<sup>16</sup> See Ryanair’s letter to the CAA of 7 September 2018: KDN03.

<sup>17</sup> On 14 January 2019, Stansted also made a complaint to the CAA regarding breaches by NERL of its licence, the Transport Act 2000, and the requirements of the Oberon Report: KDN04.

relating to 12.b and 12.f below. Matters not addressed by Eurocontrol were to be covered by the CAA.

12. The final scope of the CAA's Palamon investigation was:
  - a. whether NERL had carried out its action plan in compliance with the recommendations made by the CAA in the Oberon Report (the "**Oberon recommendations**") and the impact of such action or inaction;
  - b. whether NERL has correctly coded delays associated with the LAS;
  - c. the cause and impact of any delays in the LAS, particularly on aircraft using Essex airspace;
  - d. whether NERL has taken, or is taking, all reasonable steps to ensure it has sufficient staff to provide the LAS, and in particular to meet the reasonable demand of aircraft using Essex airspace, and whether NERL could take any other appropriate action in that regard;
  - e. whether NERL has taken, or is taking, all reasonable steps to ensure sufficient capacity is provided within the Essex airspace for the provision of the LAS, and whether NERL could take any other appropriate action in that regard; and
  - f. whether NERL has unduly discriminated between any person or class of persons in providing its LAS.
13. Ryanair requested in its complaint to the CAA dated 7 September 2018 that the CAA re-open its investigation and extend the scope to include violations of competition law. Ryanair reiterated this request in a letter to the CAA dated 12 October 2018. Where there has been a violation of Articles 101 and/or 102 of the Treaty on the Functioning of the European Union ("**TFEU**") the CAA has a legal duty to act. However, the CAA decided that "*the enforcement tools under [the 2000 Act] would be more likely to achieve a comprehensive solution to the aspects of the complaint, rather than one discrete allegation under the [Competition Act 1998]...*" but stated it would keep this under review (§2.26).
14. Ryanair is surprised and disappointed that, having refused to investigate competition law breaches purportedly in pursuit of a "*comprehensive solution*", the CAA has provisionally decided not to take any enforcement action against NERL.

15. The representations that follow reflect the structure of the Decision.

## **CHAPTER 2: LEGAL FRAMEWORK**

16. The CAA's Guidance on Enforcement of Economic Licences (CAP 1234) provides that the CAA *"will prioritise [its] enforcement work on the likely impact on relevant users, the strategic and regulatory importance of taking action, the likelihood of a successful outcome and the resources we have available... in deciding whether to take enforcement action, we will act ...in line with our statutory duties and strategic objectives."*<sup>18</sup>

17. The CAA's Regulatory Enforcement Policy (CAP 1326) provides that its policy is *"designed to use enforcement to secure the behaviours that we want to encourage and monitor, in a cost effective way. Its primary purpose is to protect consumers and the public by: [a] encouraging compliance with the rules, both by the aviation community generally and in individual cases; [b] deterring non-compliance"* (p.4). Further, that the CAA will take *"independent, evidence-based decisions"* (p.5).

### **(i) The 2000 Act**

18. We agree with the CAA's assessment that it is obliged by section 34 of the 2000 Act to investigate Ryanair and STAL's complaints, and that those complaints are neither frivolous nor vexatious<sup>19</sup>.

19. The 2000 Act further provides relevantly as follows:

- a. Section 2 imposes statutory duties on the CAA to *"maintain a high standard of safety in the provision of air traffic services"* (section 2(1)), to *"further the interests of operators and owners of aircraft [and] persons travelling in aircraft"* (section 2(2)(a)), and to *"promote efficiency and economy"* on the part of licence holders (section 2(2)(b)).
- b. If the CAA *"is satisfied that a licence holder is contravening or is likely to contravene"* a duty imposed on it under section 8 of the 2000 Act, or a Licence condition, the CAA *"must make a final order containing provision it thinks is needed to secure compliance with the duty or condition"*: section 20(1) (emphasis added).

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<sup>18</sup> CAP 1234, § 1.14.

<sup>19</sup> Decision, § 2.3-2.5

- c. If the CAA “is not so satisfied but it appears to it that a licence holder is contravening or is likely to contravene a section 8 duty or a licence condition and that a provisional order is needed, it must make a provisional order containing provision it thinks is needed to secure compliance with the duty or condition”: section 20(2).
- d. There are exceptions: the CAA cannot make a final or provisional order *inter alia* if it is satisfied that its duties under section 2 preclude it from doing so (section 21(1)(a)).
- e. The licence holder’s duties under section 8 of the 2000 Act include the following:
  - i. It must take all reasonable steps to secure that the demand for authorised air traffic services in respect of a licensed area is met (section 8(1)(c)),
  - ii. It must have regard, in providing, developing and maintaining the system, to the demands which are likely to be placed on it in the future (section 8(1)(d)).

(ii) **Licence obligations**

20. Ryanair agrees with the CAA’s overview of NERL’s relevant Licence obligations.<sup>20</sup> *Inter alia*:

- a. **Condition 2.7:** In providing services under Condition 2.1 the Licensee shall not unduly prefer or discriminate against any person or class of person in respect of the operation of the Licensee’s systems.
- b. **Condition 5.2:** the Licensee shall at all times act in a manner calculated to secure that it has available to it sufficient resources, including staff resources, as shall ensure that at all times it is able to (a) carry out its Permitted Purpose activities (which include providing the UK En Route Air Traffic Control Service, the Advisory Control Service, the LAS and the Specified Services), (b) comply in all respects with its obligations under the 2000 Act and its Licence.

(iii) **The CAA’s conclusions**

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<sup>20</sup> Air Traffic Services Licence for NERL (En-Route) Plc, June 2018

21. The Decision concludes that for over a year NERL has been breaching its obligations under both section 8(1)(c) and (d) of the 2000 Act and Condition 5.2 of its Licence: January 2019 until March 2020 (“**the Relevant Period**”). In summary, the CAA’s reasons are: “*the significant increase in ATC staffing delays in 2019, the persistent lack of staffing resilience on the LAS to Stansted and Luton airports over time and the failure to implement adequate and timely steps to resolve these issues*”. These were “*persistent and significant failings in NERL’s historical performance with respect to staffing resilience*” for the Stansted approach.<sup>21</sup>
22. The evidence of NERL’s persistent breach of its duties includes:<sup>22</sup>
- a. NERL does not have an appropriate number of validated ATCOs for the Stansted approach “*which remain below NERL’s optimum and below 2016 levels (that were already inadequate to meet the lower levels of demand at that time)*”.
  - b. In 2019, there were significant increases in staffing delay to a total of 29,281 minutes at Stansted, which was much higher than in 2016.
  - c. NERL’s own forecasts of staffing for the Stansted approach consistently shows the demand for operational staff exceeding supply and, in the absence of the Covid-19 crisis, anticipated that such shortfalls would continue until *at least* 2023.
23. This is further evidenced by the following:
- a. In the Oberon Report, the CAA identified “*significant additional delay at Stansted attributable to NERL staffing in 2016*” (§5.54) and a notable lack of resilience at Stansted in comparison to Heathrow.
  - b. In the CAA’s opinion, and taking a generous approach, NERL has complied with the recommendations of the Oberon Report<sup>23</sup>. Yet staffing delays at Stansted have increased from an already unacceptably high level in 2016 (17,041 minutes) to an even higher level in 2019 (29,281 minutes).<sup>24</sup>

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<sup>21</sup> Summary of the CAA’s Provisional Conclusions, § 20.

<sup>22</sup> Decision, §6.49; Summary §§ 19-22.

<sup>23</sup> Summary of Decision, § 11

<sup>24</sup> Decision, §§ 3.34, 6.49.

c. Furthermore, any steps taken by NERL post-Oberon to improve staffing resilience clearly “did not deliver the desired outcomes in 2019 and early 2020”.<sup>25</sup>

d. It is clear that: “absent the [Covid-19] pandemic, the evidence points towards a situation where that shortfall would have continued without effective measures to address it until at least 2023, which would have indicated a likely future contravention of its obligations.”<sup>26</sup>

(iv) **The likely FUTURE breach of section 8(1)(c) of the 2000 Act and/or Condition 5.2 of the Licence**

24. The Covid-19 pandemic has, since March 2020, temporarily and unexpectedly reduced demand. But for these extraordinary – and unforeseen – circumstances, NERL would still be contravening its obligations under section 8(1)(c) of the 2000 Act and Condition 5.2 of the Licence right now.

25. There is no evidence that NERL will be in any position to ensure acceptable staffing resilience once demand recovers. On the contrary, the CAA states that: “NERL has not presented to us a recovery plan that credibly demonstrates it can close the gap on supply of ATCOs meeting demand for non-Heathrow London airports”.<sup>27</sup> [Emphasis added]

26. There is no requirement under section 20 of the 2000 Act for the “likely” breach to be imminent. In any event, Ryanair submits that on the CAA’s own conclusions there is ample evidence that, absent any order under section 20 of the 2000 Act, Stansted will suffer unacceptable levels of staffing-related delays again in the near to medium-term. The CAA concluded that NERL’s underlying problems will not be resolved until, *at the earliest*, 2023 (and that does not appear to account for any delays occasioned by the Covid-19 crisis). The CAA’s refusal to take enforcement action is vitiated by an error of law and logic: that, because it cannot say with exact certainty *when* demand will recover from Covid-19, therefore it is relieved from its statutory obligation to take enforcement action. That is an obvious mistake.

(v) **The ongoing, PRESENT breach of section 8(1)(d) of the 2000 Act**

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<sup>25</sup> Decision, § 6.50.

<sup>26</sup> Summary, § 22.

<sup>27</sup> Decision, § 6.50; Summary, §§ 20, 34.

27. The Decision finds that NERL was, throughout the period January 2019 to March 2020, in breach of its statutory obligation to have regard to likely *future* demand and to provide, develop and maintain a system for providing air traffic services accordingly. Ryanair agrees. This was because, *inter alia*, NERL has no credible plan to remedy staffing issues within the next 3 years.<sup>28</sup> The Decision that, due to Covid-19, the CAA will not take *any* enforcement action in respect of NERL's breach of section 8(1)(d) is unlawful and/or irrational. Covid-19 may have reduced *current* demand in the short-term; but NERL remains duty-bound to anticipate *future* demand. It must plan for the long-term. The Decision has already found NERL in breach of that future-oriented duty: NERL has no credible plan to address its staffing shortfalls.<sup>29</sup> NERL ought to be at this moment providing and/or developing a system with regard to the resumption of normal demand. On the CAA's own findings it has failed to do so, as it has no 'credible'<sup>30</sup> plan for addressing the staffing shortfall when normal demand resumes.

28. It follows that NERL "is contravening" its *future-oriented* duty in section 8(1)(d) of the 2000 Act; and as such, the CAA "*must*" take immediate enforcement action under section 20(1) or (2) of the 2000 Act in respect of that breach: see paragraph 19(b) above. The Decision is, at present, unlawful and focuses unreasonably on the short-term.

(vi) *The CAA must take immediate enforcement action against NERL*

29. In light of its own findings in the Decision, the CAA should have found that NERL is:

- a. "**Likely to contravene**" section 8(1)(c) of the 2000 Act and/or Condition 5.2 of its Licence, as soon as 2016 levels of demand return.
- b. "**Is contravening**" section 8(1)(d) of the 2000 Act, the duty to 'have regard' to *future* demand in providing and developing its air traffic system.

30. Ryanair submits that the CAA ought to make a final order against NERL because there are extant breaches ('likely' *and* current): section 20(1) of the 2000 Act. The CAA's approach to enforcement, by which NERL escapes *any* enforcement because of the

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<sup>28</sup> Decision, § 19-20

<sup>29</sup> Decision, § 20

<sup>30</sup> Decision, § 6.50.

happenstance of Covid-19, is irrational, erroneous in law, and/or ignores relevant factors:

- a. The CAA is basing its recommendations only on a premature, short-term traffic forecast. This will inevitably cause delays when traffic returns.<sup>31</sup>
- b. Even before demand recovers to 2019 traffic levels, Ryanair considers that several areas are *very likely* to be congested: traffic in 2016 was notably lower than in 2019 yet NERL's staffing delays caused over 17,000 minutes of delay at Stansted alone. This situation was only solved through the usage of overtime.<sup>32</sup>
- c. It is unlikely that traffic will return homogenously.
- d. NERL is postponing or cancelling most of its investments in response to the Covid-19 pandemic. This means it will be unable to resolve this situation even by 2023 as the CAA estimates, unless enforcement action is taken now.
- e. The CAA itself recognises that there is no evidence that NERL will be able to resolve these issues and manage 2016-2019 levels of traffic adequately (emphasis added):<sup>33</sup>
  - i. *"absent the pandemic, the evidence points towards a situation where that shortfall would have continued without effective measures to address it until at least 2023, which would have indicated a likely future contravention of its obligations".*
  - ii. Further, *"the number of validated Air Traffic Controllers ("ATCOs") decreased in 2019 compared to 2018 and the number of non-Heathrow approach ATCOs absent with long term health conditions increased in 2019 to 7.7% of the workforce".*
  - iii. As a consequence, there were *"Significant increases in staffing delay to a total of 29,281 minutes at Stansted in 2019".*

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<sup>31</sup> See e.g. Figure 3.2 and § 3.5 of the Decision: *"At least in the short term, traffic levels will be very significantly below 2019 levels"*. Ryanair disputes that "2019 levels" is the correct reference point as explained herein at § 30.

<sup>32</sup> Summary, § 19, points 2, 3 and 4

<sup>33</sup> Decision, §§6.47-6.52.

f. Recent data for the first quarter of 2020 shows that staffing delays on the STN and Luton approaches were persisting in what is normally a more favourable quarter for delays.<sup>34</sup> There were no such delays in the first quarter of 2019.<sup>35</sup>

31. Ryanair urges the CAA to make an enforcement order under section 20(1) of the 2000 Act, in light of the foregoing, which requires NERL to take the following limited, reasonable and achievable steps:

- a. Adopt PRC best coding practices.
- b. Immediately roll out the new rostering tool referred to at § 4.13 Report.
- c. Attribute staffing delay to shortages against actual demand.<sup>36</sup>
- d. Start sharing dynamic Sector Opening Times with Eurocontrol.
- e. Within 6 months of the CAA's final Report, adopt a binding 5-year Staffing Resilience Plan to be consulted on at least annually with airlines and others.

32. Further, Ryanair urges the CAA to order NERL to ascertain the precise costs that airlines and consumers at Stansted airport have incurred because of the "*persistent and significant*" NERL-attributable delays since 2016. The CAA should order NERL to devise a mechanism to reimburse those costs: Ryanair suggests that NERL could begin to deduct that sum from airline user charges in 2021 and make a donation to a relevant consumer association. The losses attributable to NERL-attributable delays are undoubtedly significant, being a share of the £41 million that the CAA has quantified in the Decision (see Chapter 3 of the Decision).

33. In the alternative, Ryanair urges the CAA to make an order under section 20(2) of the 2000 Act. In the light of the foregoing, at the very least, it clearly "*appears*" to be the case that NERL is *very likely* to breach its obligations under Condition 5.2 of the Licence and/or section 8(1)(c)-(d) of the 2000 Act as soon as 'normal' demand returns; indeed,

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<sup>34</sup> Oberon Report Indicators (up to and including Q1/2020), [https://www.caa.co.uk/uploadedFiles/CAA/Content/Accordion/Standard\\_Content/Commercial/Airspace/Air\\_Traffic\\_Control/Oberon%20Report%20Indicators%20to%20March%202020.pdf](https://www.caa.co.uk/uploadedFiles/CAA/Content/Accordion/Standard_Content/Commercial/Airspace/Air_Traffic_Control/Oberon%20Report%20Indicators%20to%20March%202020.pdf)

<sup>35</sup> Decision, § 3.38; Oberon Report Indicators (up to and including Q1/2019), [http://publicapps.caa.co.uk/docs/33/Oberon%20Report%20Indicators\\_Q119.pdf](http://publicapps.caa.co.uk/docs/33/Oberon%20Report%20Indicators_Q119.pdf)

<sup>36</sup> Decision, § 5.49

as explained above, NERL was unable to cope even with the much lower, 2016 levels of demand before experiencing unacceptable staffing shortfalls.

### **CHAPTER 3: DELAYS & COSTS OF NERL-ATTRIBUTABLE DELAYS**

34. The key findings in Chapter 3 of the Decision are:<sup>37</sup>
- a. As traffic has grown rapidly at Stansted, delays have worsened significantly. In 2018, on average, arrivals were delayed by **22 minutes** at Stansted: “*some of the highest average delays per flight in Europe*”. Stansted was the worst airport in Europe for arrival and departure delays in the second and third quarters of 2018: see Figure 3.5 in the Decision.
  - b. On the LAS, delays attributable to NERL are typically in the 20-30 seconds range per flight. Most of those delays are staffing-related.
  - c. The imposition of ATFM regulations, however, has a much more pronounced impact on affected flights: in 2019, NERL staffing shortages caused an average delay on arrival of **26 minutes** for the flights affected, across Stansted and Luton airports.
  - d. Staffing delays increased from 51,000 minutes in 2015 to a high of 210,000 minutes in 2019. In 2019, NERL-attributable staffing delays were the highest single cause of delay.
35. The CAA estimates the costs of delays attributable to NERL’s staffing failings (which are “*persistent and significant*”<sup>38</sup>) at around £5 million to £9 million annually in the years that have seen significant staffing delays. Figure 3.13 of the Decision also reveals that:
- “NERL attributable delays (capacity, staffing and special events) may have caused around £41 million of detriment to airlines and consumers at Stansted and Luton, with around £20 million of this arising in 2018”*. (Emphasis added)
36. Ryanair welcomes the CAA’s quantification of the mounting costs, to both airlines and consumers, of NERL’s unacceptably poor performance. It would however increase transparency significantly if, in the *final* Decision, the CAA disaggregates losses:

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<sup>37</sup> Decision, § 3.20-3.25, 3.46; Summary, § 8.

<sup>38</sup> Decision, § 6.52; Summary, § 22.

- a. between airports, so that the impact on Stansted specifically is transparent; and
- b. between airlines and consumers.

37. The mounting costs of NERL-attributable delays to airlines and consumers demonstrates that formal enforcement action is now necessary to staunch these losses. Ryanair has incurred considerable costs as a result of NERL's persistent failings: particularly under EC Regulation No. 261/2004, compensation for flight delay. NERL must be held accountable for those costs and the CAA is urged to make provision for reimbursement for users of Stansted in its final Order against NERL: see §32 above. NERL must calculate the losses borne by users of Stansted and devise a mechanism for reimbursement: Ryanair contends that the obvious choice is a significant reduction in its charges for airlines going forward. Users of Stansted airport should not be forced to bear millions of pounds of NERL-attributable losses.

#### **CHAPTER 4: THE OBERON REPORT**

38. The background to the Oberon Report is summarised in the Introduction above. In summary, the Oberon investigation was opened to examine delays arising in 2016 due to lack of resilience in NERL's provision of operational staff, in particular on the LAS.
39. The Oberon Report was published in August 2017. Whilst the CAA declined to find any breach of NERL's duties under the 2000 Act or its Licence, NERL clearly needed to improve resilience levels in its operations and as such was required to deliver on a series of remedial actions.
40. Ryanair's complaint dated 7 September 2018 stated (emphasis added):

*"it is now clear that NATS has failed to comply either with the specific recommendations made in the Oberon report or with the spirit of the CAA's guidance..."<sup>39</sup>*

41. STAL's complaint to the CAA dated 14 January 2019 was similar (emphasis added):

*"STAL considers that this [the continuing poor performance by NERL in respect of the LAS] is due to a combination of the following: a failure by NERL to adequately*

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<sup>39</sup> KDN03.

*implement the Oberon Report recommendations and/or that the Oberon Report recommendations themselves were not sufficient to improve delay performance..."<sup>40</sup>*

42. Ryanair's and STAL's concerns have now been vindicated by the Decision. In particular, Chapter 4 reveals the following:

- a. NERL's actions to date have been insufficient to prevent further, material problems arising, both in terms of performance and its resourcing.<sup>41</sup> *"The total NERL attributable delay has ... increased significantly since 2015"*.
- b. Staffing delays increased from 51,000 minutes in 2015 to a high of 210,000 in 2019. In 2019, NERL-attributable staffing delays were the highest single cause of delay.
- c. Despite the 2016 delays, despite the Oberon and Palamon investigations, and despite NERL being told 3 years ago that it needed to tackle its problems with staffing resilience, it has failed to do so.
- d. NERL has no plan to tackle its staffing problems until 2023 at the earliest.

43. In light of the foregoing, it is now clear beyond doubt that the Oberon recommendations were unfit for purpose. The Oberon investigation has failed to achieve any meaningful change. As such, the CAA is obliged to take enforcement action now in respect of NERL's *"persistent and significant"* staffing failings from 2016 onwards.

44. The CAA has taken an unduly generous approach to assessing compliance with the Oberon recommendations; given that its Decision confirms that NERL has not always acted in a responsible, transparent manner:

- a. *"NERL has not always directly made [the CAA] aware of all performance areas in specific areas of its operation, for example it did not specifically inform us of the increases in staffing delay it has seen affecting the STN approach service in 2019"*. In the *final* Decision the CAA should specify how many times NERL failed to inform the CAA of 'performance' failings. In itself, NERL's decision not to inform the CAA of the 2019 staffing problems is troubling.

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<sup>40</sup> KDN04.

<sup>41</sup> Decision, § 4.24; Summary, § 11.

- b. NERL did not begin to roll out a new rostering tool until April 2018. More than two years on, that tool is still not fully rolled out.
- c. NERL has failed to “*formally*” appoint a Service Delivery Manager.

[REDACTED]

- e. The CAA observes that training new ATCOs can take “*up to three years*”. The relevance of that comment is hard to understand. More than three years have passed since the Oberon Report.

45. In light of the abovementioned failures, the CAA should not have succumbed to NERL's premature decision to no longer submit monthly reports after May 2018 and nor should the CAA have dispensed with this requirement and its obligation to monitor NERL's progress so quickly.<sup>43</sup> The CAA's oversight of NERL has, in Ryanair's view, proven insufficient.

46. The CAA suggests that overall, NERL has “*acted upon the Oberon recommendations and action plan*”.<sup>44</sup> Even if correct, again, this further confirms: (a) the inadequacies of those recommendations; and (b) the likelihood that further voluntary recommendations will achieve little or nothing, and the need for enforcement action to ensure that history does not repeat itself.

## CHAPTER 5: CODING OF ATFM DELAYS

47. NERL's coding of ATFM delays has long been a source of grave concern for Ryanair. The miscoding of delays was identified as a key area for investigation in its initial complaint dated 7 September 2018. This issue also causes STAL significant concern.<sup>45</sup>

48. The CAA engaged Eurocontrol's Performance Review Unit (“**the PRU**”) to carry out a detailed investigation into NERL's coding of ATFM delays on the LAS between 2013 and 2018. Ryanair addressed the problems with the resulting draft report and revised report (“**the Draft PRU Report** and “**the Revised PRU Report**”) published by the PRU

[REDACTED]

<sup>43</sup> Decision, § 4.9

<sup>44</sup> Decision, § 4.23

<sup>45</sup> KDN03 and KDN04.

in detailed submissions made by Ryanair in July 2019. By a letter dated 16 August 2019, the CAA assured Ryanair<sup>46</sup> that those concerns would, albeit belatedly, be taken into account, but the Decision fails to do so in any detail. Ryanair therefore repeats its principal concerns below, at paragraph 49 (a) to (d).

49. At the outset, Ryanair makes the following, overarching observations:<sup>47</sup>

- a. The Decision concludes, based on the analysis in Chapter 5 and Appendix E, that NERL did not “*intentionally*” mislead stakeholders with its delay coding practices. Whether intentional or not, the fact is that NERL’s coding practices misled stakeholders. That ought to be a major concern for the CAA.
- b. The PRU concluded that NERL follows current coding guidelines. That is of little significance in itself. The Decision is right to say that these “*are not very prescriptive*” and “*can lead to inconsistencies and difficulties*” in monitoring performance.
- c. NERL does not code delays according to best practice, i.e. the PRC coding principles; in particular, by attributing staffing delay to shortages against its own schedule, *not* against actual demand.<sup>48</sup>
- d. The proper allocation of ATFM delays cannot properly be linked to a ‘low’ or ‘high’ level traffic scenario; miscoding is a problem either way. NERL ought to be using the unusually low levels of traffic to review internal procedures, start applying best practices, and begin sharing dynamic Sector Opening Times with Eurocontrol.
- e. Accordingly, it is clear that the CAA needs to take mandatory action: see Summary section of these Submissions, above.

(a) **The inadequacy of NERL’s internal guidance**

50. The Draft PRU Report noted the publication by NERL of new, self-issued internal guidance in April 2017.<sup>49</sup> In this self-issued guidance, NERL purported to adjust its procedures so that delays should only be attributed to staffing where there is

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<sup>46</sup> “when formulating its provisional findings, the CAA will take into account the parties’ substantive comments in deciding what comments to draw from the Revised PRU report. *Please be assured, therefore, that the CAA will take your client’s comments dated 5 July 2019 fully into account*” (emphasis added).

<sup>47</sup> Decision, § 5.49-5.53; Appendix E.

<sup>48</sup> Decision, § 5.49

<sup>49</sup> Draft PRU Report, page 13

insufficient staffing to meet NERL's planned sector configuration.<sup>50</sup> In its submissions on the Draft PRU Report dated 5 July 2019 ("**the 5 July Submissions**"), Ryanair made it clear that an obvious problem with this approach is that NERL's planned sector configuration is determined by NERL and, therefore, may itself be inadequate to meet airspace demand. Ryanair noted that if NERL's planned sector configuration is the measure for staffing shortfalls, the accuracy of that plan is critical.<sup>51</sup> Further, it was striking that, given the PRU's apparent conclusion, NERL did not provide its planned sector configurations to the PRU.

51. Ryanair commented that the Draft PRU Report had failed to draw the obvious link between the publication of NERL's new internal guidance and two phenomena with which it coincided: (i) a marked decrease in delays reportedly attributed to staffing; and (ii) a marked increase in delays reportedly attributed to capacity.<sup>52</sup> That direct correlation strongly suggested to Ryanair that, rather than addressing the underlying staffing issues, NERL had simply changed its practice for self-reporting the reasons for delays – without addressing the underlying causes of these delays. Specifically, many delays that would previously have been attributed to staffing were, from April 2017, attributed to capacity. This demonstrates that NERL had been inaccurately coding delays, which had the effect that its performance only *appeared* to have improved. Given the incentives on NERL to create the impression that its performance issues were resolved, Ryanair requested a further investigation by the CAA as to whether the categorisation of self-reported reasons were accurate.
52. Ryanair is unclear from the Decision exactly why the CAA has concluded that capacity coding has *not* been used to conceal staffing issues, especially in light of its conclusion on those staffing-related delays. The CAA purports to have carried out an additional analysis into the categorisation of delays based on additional data provided by NERL, the results of which are contained in Appendix E to the Decision. However, it appears that the CAA's investigations have been limited in scope, which undermines the credibility of the

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<sup>50</sup> Draft PRU Report, pages 13, 22 and 44

<sup>51</sup> Ryanair also referred to the PRU's finding that "[b]asing the sector opening scheme, and the number of available ATCOs, on what has been previously declared in a plan... instead of basing it on traffic demand means that the available capacity is highly dependent on the accuracy of the plan in identifying the peak demand periods as well as instances when capacity will be reduced" at page 13 of the Draft PRU Report

<sup>52</sup> Draft PRU Report, pages 14-18

conclusions. In particular, the investigation into the coincidence of capacity coded delays and periods of understaffing at Luton and Stansted airports described at paragraph E13 of Appendix E onwards was restricted in scope to the four ‘peak’ months in 2018. This is despite the fact that ATC capacity delay was clearly recorded by NERL in the other months for which data had been provided by NERL. Ryanair is concerned with delays across the entire year, not just in peak months. Ryanair requests that in the *final* Decision, the CAA applies the same analysis to *all* the months of data provided to NERL.

53. Ryanair’s 5 July Submissions noted that NERL’s practice of measuring delay against its planned sector configuration and not traffic demand was misleading and had serious adverse consequences:

- a. Persistent staffing shortfalls could be factored into the *ex ante* plan, and as long as the (low) thresholds were met, “staffing” would rarely, if ever, show up in delay attribution codes. This practice allowed NERL to avoid the risk of financial penalties in respect of excessive “internal” delays.
- b. ATC staffing delays have an asymmetric cost. Where staffing levels are adequate, costs are passed on by the ANSP to airspace users. However, where staffing levels are inadequate there are significant costs for airspace users but no direct costs for ANSPs (and, in fact, a correlative saving for ANSPs through lower salary costs). In Ryanair’s view it was obvious that NERL’s purported re-categorisation of the reasons for delay was both misleading and erroneous as the question for airspace users, consumers and the CAA was not whether NERL’s *ex ante* predictions proved to be correct, but rather whether traffic demand was met, and if not, why. The proposal from the Eurocontrol Performance Review Commission (“**the PRC**”) for ATFM delay attribution principles would address this problem by focussing on internal constraints inhibiting the achievement of maximum declared capacity (staffing, equipment etc) in place of planned capacity as the guiding principle.<sup>53</sup>
- c. NERL’s revised internal guidelines obscured independent analysis and oversight. The revised guidelines provided no way for stakeholders to verify the

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<sup>53</sup> Draft PRU Report, pages 12-13

adequacy of the plan to meet actual traffic demand. As noted in Ryanair's original complaint of 25 August 2016, which initiated the Oberon investigation, NERL had systematically underestimated Stansted traffic, which resulted in NERL also underestimating the staffing required. Transparency has been a perennial issue for NERL. The CAA must impose *mandatory* steps to combat this: see recommendations (c), (d) and (e) at paragraph 2 above.

54. Despite the CAA specifically asking the PRU to consider whether NERL's processes "*are robust and follow existing best practice guidance?*"<sup>54</sup>, the Draft PRU Report did not make any finding as to whether NERL's procedures were either robust or in line with best practice. On the contrary, the Draft PRU Report made it clear that there were "*inconsistencies and opacity in monitoring capacity performance*"<sup>55</sup>, although the Draft PRU Report noted that these could be traced back to problems with the guidelines themselves. The Draft PRU Report therefore concluded that "*there might be benefits from considering a verification process for the attribution of ATFM delay*".<sup>56</sup>
55. Ryanair requested that the PRU should expressly recommend that (i) NERL amend its internal delay attribution guidance to conform to the PRC's suggested approach; (ii) the amended delay attribution processes be made mandatory with breaches subject to sanction; and (iii) the CAA introduce a robust and independent verification process for ATFM delay attribution without delay. Although these recommendations were included in the Revised PRU Report, it is clear that the CAA has disregarded both the PRU's and Ryanair's suggestions on this point. In particular, although the CAA has endorsed the PRU's recommendation that the PRC's principles for ATFM delay attribution should be adopted in full by NERL, it does not actually require NERL to do this. It is Ryanair's view that NERL must adopt the PRC's proposal. Further the CAA appears to have disregarded Ryanair's suggestions concerning the implementation of the amended delay attribution process, with breaches of that process subject to sanction, and the implementation of an independent verification process for ATFM delay attribution. Ryanair invites the CAA to reconsider these legitimate concerns, which were also shared by the PRU.<sup>57</sup>

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<sup>54</sup> Draft PRU Report, pages iii and 45

<sup>55</sup> Draft PRU Report, page 45

<sup>56</sup> Draft PRU Report, pages 22, 44 and 47

<sup>57</sup> Revised PRU Report, pages 24, 46 and 49

(b) Inaccurate and misleading delay attribution

56. The Draft PRU Report identified four examples that appeared to reflect NERL's systemic practices of recording inaccurate and misleading delay attribution. First, there appeared to be examples of situations in which NERL had set sector capacity artificially low, as was demonstrated by the fact that such sectors were being regulated above the level of their declared capacity. Second, NERL appeared to have attributed delays to capacity even where the airspace was operating at less than maximum capacity. Third, NERL had in some cases attributed delays to capacity or weather in collapsed sectors despite the collapsing of the sector having caused the initial capacity constraint. In that regard the Draft PRU Report identified a very significant increase in delays experienced in collapsed sectors between 2017 and 2018, including *"nearly 100k of delay attributed to ATC capacity"*.<sup>58</sup> In particular, *"2/3 of the total ATC capacity attributed delays in 2018 were in a collapsed sector, REDFA & LOREL sector"* which figures included some 90,000 minutes of capacity-attributed delays in the REDFA & LOREL sector, which we now understand to be classified by NERL as a *"conjoint"* sector, alone.<sup>59</sup> Fourth, NERL demonstrated patterns of delay attribution that lacked prima facie objective justification. By way of example, the Draft PRU Report identified a pattern at Stansted by summer 2017 of delays being *"concentrated in the first arrival wave of the day (i.e. 7 to 9AM local time)"*.<sup>60</sup> Ryanair noted that even delays attributed to weather *"show a similar concentration early in the morning"*, despite the absence of any plausible explanation from NERL.

57. In the 5 July Submissions Ryanair asked the CAA to investigate the abovementioned four instances of misleading delay attribution by NERL. Despite this request, and despite the obvious importance of investigating this issue, it is apparent from the Revised PRU Report and from the Decision that neither the PRU nor the CAA has carried out any further investigations into the underlying reasons relating to these misleading practices. It is further apparent that both the PRU and the CAA failed to heed the suggestions put forward by Ryanair concerning the minimum numbers of ATCOs or collapsed sectors that should be allowed in order to minimise delays and,

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<sup>58</sup> Draft PRU Report, page 17

<sup>59</sup> Draft PRU Report, page 18

<sup>60</sup> Draft PRU Report, page 28

crucially, it is apparent that the CAA has failed to grasp the seriousness of the situation by only *recommending* that NERL should adopt the PRC best practice principles in the Decision.

(c) *Lack of transparency by NERL*

58. In the 5 July Submissions Ryanair noted that EU law requires ANSPs (such as NERL) to provide the Network Manager with information including the number of available sectors and sector configuration/opening scheme per season, day of the week and time of day.<sup>61</sup> This requirement is now contained in Article 11(4) and Appendix I of EU Regulation No. 2019/123. Despite this requirement, Ryanair noted in its 5 July Submissions that NERL does not update the Network Manager with the opening or closing of individual sectors.<sup>62</sup> Ryanair noted that NERL's lack of transparency was in clear breach of EU legislation and rendered it impossible for external stakeholders to monitor the deployment of ATC resources against the traffic demand, or to determine whether a sector was being operated in collapsed (or, as it since transpires, in conjoint) mode at the time the regulation was applied by NERL.<sup>63</sup> Ryanair registered its deep concern about NERL's breaches of EU Regulation No. 677/2011 in this respect, which is now a breach of EU Regulation No. 2019/123, which was clearly a concern shared by the PRU. Despite both Ryanair and the PRU expressing their concern on this point, however, the CAA has failed to take robust action to remedy this breach, and instead has simply endorsed the PRU's recommendation that NERL should report sector opening times to the Network Manager; this is not sufficient to secure compliance in the circumstances and the CAA must go further.

59. The Draft PRU Report also showed that the PRU was unable to consider the deployment of ATC resources, such as staffing versus traffic demand, due to the use of short term ATFM measures ("**STAMs**") by NERL.<sup>64</sup> Ryanair noted that this further masked the restrictions that NERL applied routinely to Ryanair flights and therefore reduced transparency as a result. NERL claimed that the use of STAMs increases efficiency, but Ryanair noted that if that position was correct then NERL should not

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<sup>61</sup> See Annex V, Appendix 1 of the Draft PRU Report

<sup>62</sup> Draft PRU Report, pages 9 and 44

<sup>63</sup> Draft PRU Report, page 10

<sup>64</sup> Draft PRU Report, page i

resist full disclosure of the STAMs in question to the PRU, and indeed to Ryanair. NERL has not to date disclosed the STAMs to either the PRU or Ryanair.

60. The Draft PRU Report also noted that the PRU had “no means of confirming the correct allocation of the reason for the regulations” as a result of NERL’s lack of transparency.<sup>65</sup> Ryanair registered its concern with that conclusion in the 5 July Submissions given that whether or not NERL was correctly recording and attributing delays comprised a central part of the CAA’s investigation and a key objective of the PRU’s report. Ryanair noted that it was imperative for NERL to provide sufficient information to allow the PRU, the CAA and Ryanair to identify and understand the relationship between staffing levels, sector capacity, and delay. Without that information, the CAA would be unable to ascertain whether NERL was attributing delays incorrectly so as to disguise staffing issues, which in turn would constrain Ryanair’s ability to make meaningful representations to the CAA. In spite of Ryanair’s concern, it is clear that neither the PRU nor the CAA has taken any further steps to interrogate the reasons given for the allocation of regulations by NERL, meaning that there has not been any increase in transparency from NERL since Ryanair provided its comments in the 5 July Submissions. This obviously limits Ryanair’s ability to provide meaningful comments on the Decision.
61. Ryanair also noted that the Draft PRU Report dealt with the UK’s growth in traffic in 2018 superficially. According to Figure 3-1 on page 5 of the Draft PRU Report, in 2018 there was a 0.9% increase in average daily flights in the UK and 0.7% in London, but in the same period there was an increase in delays of 70% and 158% respectively. The Draft PRU Report did not contain any analysis as to the reasons for this vast disconnect and Ryanair requested an explanation of this by NERL. It appears that no such explanation has yet been provided by NERL on this issue.

(d) Other concerns

(i) ‘Conjoint’ airspace

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<sup>65</sup> Draft PRU Report, page 26

62. The Revised PRU Report introduced the concept of “conjoint airspace”. The term “conjoint airspace” was new to Ryanair’s Operations Team, who are extremely familiar with air traffic control concepts, as well as to the PRU.

63. In a letter to the CAA dated 26 July 2019, Ryanair’s representatives observed as follows:

- a. The inclusion of ‘conjoint’ airspace in the Revised PRU Report had supplanted a significant part of the discussion of collapsed sectors in the Draft PRU Report. Based on the Revised PRU Report, it appeared that NERL’s practice was to self-report so-called “conjoint airspace” as “collapsed sectors”.<sup>66</sup> This is a concerning illustration of NERL’s lack of transparency: see further, Ryanair’s 5 July Submissions.
- b. NERL had claimed that this confusing practice was simply the result of technical problems with the reporting system. The fact that NERL had waited until it was presented with the damning conclusions of the Draft PRU Report concerning delays in “collapsed” sectors before raising this alleged technical issue is telling and significant. NERL’s re-categorisation of collapsed sectors as “conjoint airspace” appeared to be a tactic to avoid having to take concrete steps to address the underlying problems. Indeed, on page 47 of the Revised PRU Report the PRU noted that it had identified a number of (emphasis added) “*anomalies in attributing delays to ‘conjoint airspace’, which although being made for acceptable operational reasons, reduce transparency for post-operations analysis.*” This makes it clear that even the PRU was of the view that NERL’s practice of using ‘conjoint’ sectors put a serious question mark over the issue of NERL’s transparency.
- c. That NERL’s miscoding of conjoint sectors as collapsed on the system has occurred unknown to the CAA demonstrated a lack of adequate regulatory oversight exercised by the CAA (despite its undertakings to improve its supervision of NERL in the Oberon Report) and a worrying lack of transparency.
- d. There is, in practical terms, no material difference between “conjoint” and collapsed airspace. Rather, the Revised PRU Report made it clear that both involve an artificial reduction of capacity in two sectors by NERL. NERL’s choice of

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<sup>66</sup> Revised PRU Report, page 11

labelling makes no difference to airspace users, who are only concerned with the underlying reasons for the restriction.

- e. The significant increase in delays in “collapsed” sectors and “conjoint” airspace is a matter of real concern. It is incumbent on the CAA to investigate the underlying reasons for those increasing delays. Despite Ryanair’s request to do so, it is now clear from the Decision that the CAA has not investigated the underlying reasons.
- f. The Revised PRU Report also referred to significant traffic increases at Luton and Stansted of just under 40%. NERL had failed to adequately forecast and plan for this increase, nor to adapt to it appropriately despite the massive delays that were being generated. This underlined the importance of the CAA obtaining and considering full staffing records from NERL. However, it is now apparent from Appendix E to the Decision that the CAA’s analysis on this area is superficial. Although the CAA clearly noted that there had been an increase in demand on the LAS, and that ATC capacity delays appeared to coincide with peaks in that demand, no attempt is made in any way in either the Decision or Appendix E by the CAA to examine in any depth why NERL has failed to properly predict the growth of demand. For example, at paragraph E6 of Appendix E the CAA notes that “*ATC capacity regulations tend to coincide with an arrival peak of 1830-1930 hours*” and that “*The average number of arrivals during this period has grown steadily over the three years of the analysis.*”

(ii) *The CAA’s implementation of the Revised PRU Report*

- 64. Ryanair is concerned that the analysis in Chapter 5 and Appendix E of the Decision appears, for the most part, superficial and/or to adopt PRU’s conclusions without having taken into account the significant concerns raised by Ryanair in its feedback on the PRU’s investigation.
- 65. This is reflected in the CAA’s Decision that NERL only needs to take two actions in order to resolve the issues surrounding its coding of delays. First, the CAA recommends that NERL should adopt the principles proposed by the PRC for coding delays. Second, the CAA endorses the PRU’s recommendation that NERL should provide dynamic Sector Opening Times to the Eurocontrol Network Manager. As to which:

- a. “Recommendations” are clearly no longer sufficient. The CAA is invited to make a final, alternatively a provisional, order to enforce compliance by NERL with the PRC’s coding principles, in other words to make the best practice mandatory and avoid miscoding in future. The failure by NERL to abide by these principles has caused confusion, particularly as a consequence of the ‘conjoint’ airspace labelling.
- b. As regards the reporting of dynamic Sector Opening Times to the Network Manager, again this should be more than a ‘recommendation’. It is already a requirement of EU Regulation No. 2019/123 that NERL should provide this information to the Network Manager. The CAA should make reporting Sector Opening Times mandatory. In addition Ryanair requests that the CAA consider and explain, in its *final* Decision, whether it is necessary to report NERL’s shortcoming in this area to the Network Manager for the purpose of considering whether remedial measures need to be implemented by the Network Manager pursuant to Article 10 of EU Regulation No. 2019/123.

66. Finally, Ryanair raised a number of additional miscellaneous concerns in the 5 July Submissions, none of which has been addressed in the Decision, and thus appear to have been ignored by the CAA.<sup>67</sup>

## **CHAPTER 6: STAFFING**

67. The Decision concludes that NERL contravened its obligations under sections 8(1)(c), 8(1)(d) and Condition 5.2 of its Licence throughout the ‘**Relevant Period**’. Ryanair concurs. For the reasons set out in detail in Chapter 2 of these Submissions, however, Ryanair submits that the breach of NERL’s ‘future-oriented’ planning duty under section 8(1)(d) is ongoing; Covid-19 is no excuse. Further, Ryanair maintains that NERL is *very* likely to be in breach of section 8(1)(c) and Condition 5.2 when ‘normal’ levels of demand resume.

68. The CAA’s key findings are:<sup>68</sup>

- a. The steps taken by NERL to redress its persistent and significant staffing problems have not had the desired effect.

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<sup>67</sup> Amending the Draft PRU report to make clear that the reasons cited by NERL were unverified; omitting the TTT analysis from the Revised PRU report; removing the pejorative description of Stansted as a “*seasonal*” airport; and changing the final sentence at page 43.

<sup>68</sup> Decision, Summary, § 19-20 and 34; Decision, § 6.46 and § 6.54.

- b. The underlying issues on which NERL relies to defend its poor performance are *“relatively long-standing and reasonably foreseeable”*.
  - c. In 2019, staffing-related delays reached a total of **29,281** minutes at Stansted.
  - d. This is much higher than the **17,000+** minutes of staffing-related delays at Stansted in 2016, which was of course already completely unacceptable.
  - e. *“NERL’s own forecasts”* show that absent Covid-19, unacceptable levels of staffing shortfalls would have persisted until at least 2023.
  - f. Ryanair contends that there is every reason to expect NERL’s underlying problems with staffing resilience to continue beyond 2023 given that Ryanair has learned that, because of the pandemic, NERL has been cancelling and postponing investments. Indeed, it is obvious that the pandemic is likely to *worsen*, rather than ameliorate NERL’s underlying problems: the CAA gives no reason to think otherwise in its Decision.
  - g. In any event: *“NERL has not presented to [the CAA] a recovery plan that, absent Covid-19, credibly demonstrated that it could have closed the gap on supply of ATCOs meeting demand for non-Heathrow London airports in the near future”*.
69. Ryanair welcomes the CAA’s Decision on staffing failings and the key findings above, in particular.
70. Nonetheless, this is a hollow finding: the exact same problems are liable to repeat themselves if no enforcement action is taken by the CAA now.
71. It is apparent from the ‘implementation’ by NERL of the Oberon Report that voluntary recommendations are not sufficient to achieve meaningful change; as explained in detail in Chapter 4 of these Submissions above.
72. Ryanair recognises that, given current difficult circumstances, NERL has to exercise some caution in terms of its recruitment process and that NERL must also reduce costs over the coming years, as indeed must airlines, which are also facing very serious challenges.

73. **However:** Covid-19 also presents NERL with unique *opportunities* to remedy its persistent and significant breaches of its obligations, both statutory and under its Licence. In other words, Covid-19 presents NERL with a chance to remedy its inexcusable levels of staffing-related delays and prevent repeated ‘spikes’ in delays, as were seen in 2016 and 2019.
74. NERL should be using the current low levels of traffic to devise and implement a coherent, long-term Staffing Resilience Plan. It should take the opportunity, *inter alia* to:
- a. review its staffing operations in detail;
  - b. review its staffing procedures and obvious and highly foreseeable staffing problems, notably:
    - i. short-term illnesses;
    - ii. early retirements; and
    - iii. effective resource planning that allows some margin for error; and
  - c. put in place other measures that require limited investment and would, in Ryanair’s view, enable NERL to better manage foreseeable traffic increases, namely:
    - i. fully rolling out the rostering tool cited in the NERL Action plan;
    - ii. reducing the length of time required to train new ATCOs and/or using the current unusually low levels of traffic and demand to train more ATCOs;
    - iii. increasing the use of overtime where needed and amendments to collective labour agreements where that is possible;
    - iv. flexible rosters and associated changes to increase the utilisation and efficiency of staff; and
    - v. making better use of the latest technology and operational developments to increase efficiency of NERL’s operation, such as SESAR solutions.
75. NERL is postponing or cancelling most of its investments in response to the Covid-19 pandemic. There is no sign that it is taking any of the measures Ryanair has set out

above, or indeed that it is taking any measures at all that would ‘credibly’ address the shortfall.

76. This is unacceptable in light of NERL’s historical performance on staffing: as the Decision recognises, “*significant spikes in staffing delays for two out of four years is difficult to justify and demonstrates that NERL’s actions have failed to improve its resilience on a consistent and sustained basis...*”.<sup>69</sup>

77. In light of the foregoing, the CAA is urged to make an order under section 20 of the 2000 Act as explained in detail in Chapter 2 of these Submissions. That Order must include the following limited, reasonable and achievable steps to tackle ongoing problems with staffing resilience:

- a. adopt PRC best coding practices;
- b. immediately roll out the new rostering tool referred to at § 4.13 Report.;
- c. attribute staffing delay to shortages against actual demand<sup>70</sup>;
- d. start sharing dynamic Sector Opening Times with Eurocontrol; and
- e. within 6 months of the CAA’s final Report, adopt a binding 5-year Staffing Resilience Plan to be consulted on at least annually with airlines and others.

78. Ryanair’s proposed approach to enforcement is the only rational, lawful approach once all relevant factors are taken into account:

- a. The Revised PRU Report recommended steps (a) and (d) in 2019.<sup>71</sup> It is incumbent on the CAA to compel NERL to take these reasonable steps. See also Chapter 5 of these Submissions as to miscoding.
- b. Better rostering practices and the use of PRC coding best practices will be useful in both low and high traffic level scenarios, and only require limited resources.
- c. NERL is able to start planning immediately how it should optimise its resources, taking advantage of current, low traffic levels to do so.

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<sup>69</sup> Summary, § 19

<sup>70</sup> Decision, § 5.49

<sup>71</sup> Revised PRU Report, page 49

- d. The long-term planning required to ensure adequate staffing resilience also shows that immediate enforcement action is needed, rather than waiting to see if NERL complies with *further* recommendations: *by way of example*, Ryanair observes that the training period for an ATCO in the UK is around 2-3 years.
- e. The experience of the Oberon Report – i.e. the CAA making voluntary ‘recommendations’ which have done nothing to address the underlying problem – further evidences that formal enforcement action is the only rational approach.

## **CHAPTER 7: ATC CAPACITY ISSUES**

79. Ryanair welcomes the CAA’s conclusion that “*the AD6 [project] could have been initiated in a timelier manner*” and that the delay represents an obvious “*lapse*” on the part of NERL.<sup>72</sup>
80. Ryanair further endorses the recommendation that NERL ought to be engaging constructively with airlines to make best use of limited airspace capacity and to facilitate bringing forward long-overdue redesigning of the congested Essex airspace.
81. Ryanair is fully cognisant of the multilateral and complex nature of airspace change. Nonetheless, NERL failed to engage with airlines in discussions about LAMP Phase 2 and AD6 until 2018: that is, 8 years after the TC North project had been abandoned. That is clearly too little, too late.<sup>73</sup>
82. Further, Ryanair draws attention to the following key factors:<sup>74</sup>
- a. The traffic growth in 2015-2019 was “*in line with the STRATFOR high case*” such that “*it is difficult to argue that growth at Stansted and Luton was unexpected, particularly given that traffic essentially rebounded to the peak levels previously seen in 2007*”.<sup>75</sup> The Decision rightly recognises that it was to be expected that Stansted traffic would eventually recover to pre-recession levels.
  - b. NERL’s failure to foresee and plan for what was a highly predictable development – i.e. the rebounding of traffic to ‘normal’ levels after the recession – underlines the

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<sup>72</sup> Decision, § 7.39

<sup>73</sup> Decision, § 7.34

<sup>74</sup> Decision, § 7.30, 7.34

<sup>75</sup> Decision, § 7.35, third bullet point

importance of the CAA ordering NERL to take steps now, before traffic recovers to pre-Covid-19 levels.

- c. Ryanair emphasises that, as the Decision admits, “*in the medium to long term the current airspace serving Stansted and Luton airports will be, without wholesale change, inadequate*”.<sup>76</sup>

83. NERL’s delays in taking action on airspace redesign, and its general intransigence and opacity in its dealings with Ryanair and other interested parties, underline the importance of the CAA’s recommendation at § 49 of the Summary to the Decision (emphasis added):

*“[In] correspondence Ryanair repeatedly asked for staffing and other information from NERL ... We note that Ryanair and other airlines using Stansted and Luton are a very important group of NERL’s customers and could provide useful and timely inputs that would inform and assist NERL in formulating its demand forecasts and resource allocation. **NERL should engage more pro-actively and transparently with its customers and key stakeholders including Ryanair and STAL.**”*

84. It is airlines and customers which bear the brunt of NERL’s failure to bring forward plans for redesigning and modernising complex airspace in a timely fashion. The onus lies on NERL to ensure that the urgent airspace changes required to alleviate the persistent traffic problems in the Stansted and Luton approaches are brought forward, and that a significant increase in ATC capacity is delivered, as soon as possible. Ryanair emphasises that NERL’s inaction in this respect now dates back 10 years.

85. Ryanair urges CAA to make clear, in its *final* Decision, that NERL is required to engage constructively with stakeholders and to deliver on the promised reforms in the near to medium-term.

86. Furthermore, the *final* Decision ought to clarify that failure to do so will be strong evidence of a failure by NERL to discharge its Licence and statutory obligations to ensure that it provides sufficient capacity to meet reasonable demand for the LAS from users of Stansted.

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<sup>76</sup> Decision, § 7.32

## CHAPTER 8: DISCRIMINATION AGAINST RYANAIR BY NERL

### (i) Discrimination against Ryanair and/or undue preference towards Heathrow

87. As Ryanair explained to the CAA in its letter of 7 September 2018:<sup>77</sup>

*“NERL continues to give preferential treatment to air traffic at Heathrow to the detriment of consumers using Stansted Airport, in breach of Art. 102 TFEU and conditions 2.7 and 2.8 of the Licence. As you will see from the CAA [Oberon] Report Indicators (attached for convenience), Stansted suffered 52% of all NERL-attributable delays in London from January to March 2018 while Heathrow had zero delays, despite handling three times as much traffic. This is a clear demonstration of NERL’s ongoing discrimination against airlines operating at Stansted.”*

88. Ryanair provided further evidence of discriminatory treatment against airlines operating at Stansted and/or undue preference towards Heathrow by NERL in its letter to the CAA dated 25 January 2019:

- a. First, *“there is a gross disproportion in the reported impact of weather at Stansted and Heathrow. As demonstrated below in table 1, while the weather delays at Stansted have increased by 320% from 2015 to 2018, there has actually been a decrease of over 25% in weather delays at Heathrow for the same period.”* The letter included the following table:

**Table I: Weather Delay between 2015 and 2018 (Minutes)<sup>78</sup>**

	<b>Heathrow</b>	<b>Stansted</b>
2015	470,787	25,497
2016	440,471	85,197
2017	449,881	90,896
2018	347,411	107,116
<b>Difference 2015 v 2018</b>	<b>-26.2%</b>	<b>+320%</b>

- b. Second, *“it is clear that the airspace changes conducted in phase 1 of the NATS London Airspace Modernisation Project in 2016 have resulted in a performance increase for Heathrow at the expense*

<sup>77</sup> KDN03.

<sup>78</sup> Letter of 25 January 2019. Source: Eurocontrol data available at <http://ansperformance.eu/>

*of all other London airports. As demonstrated by table 2, the overall delays at Heathrow decreased between 2015 and 2016 following implementation of LAMP1 in February 2016 while overall delay at all other airports increased.” This concern is reinforced by NERL’s delays in bringing forward modernisation of airspace to relieve congestion/ LAMP Phase 2: discussed above in Chapter 7 of these Submissions.*

- c. Third, *“NATS's preferential treatment of Heathrow extends even to the orderly form of delays encountered at Heathrow as compared to other airports. As per the Oberon Q3 Indicators, 99.7% of the reported delays at Heathrow were on the basis of a scheduled NATS systems upgrade (as compared to only 10% at Stansted). As this upgrade was planned in advance, the consequential delays are far more systematic than the chaotic disruptions caused by unanticipated capacity and staffing failures. Accordingly, the CAA should give little weight to the so-called "Special Event" delays reported by NATS in the Oberon Indicators.”*

**(ii) The PRU Report**

89. The Draft PRU Report correctly identified that delays attributed to capacity had *“increased significantly over the past five years”*<sup>79</sup>, and that there had been *“significant”* deterioration in arrival punctuality at Luton and Stansted while the performance at Heathrow and Gatwick had remained broadly unchanged<sup>80</sup>. Ryanair pointed out that there were apparently multiple causes of the increased delays at Luton and Stansted, but *“regulations originating within the London TMA played a significant part”*.<sup>81</sup> Ryanair noted in the 5 July Submissions that the PRU should have sought to understand the true extent of that effect and asked the CAA to identify and analyse the effect forthwith. Unfortunately it now appears that the CAA has failed to do so.

90. The Draft PRU Report was wrong when it contended that Heathrow was subject to the highest delay of London airports. On page ii of the Draft PRU Report, the PRU noted that *“different operational procedures and techniques”* were used by each London airport in order to deal with the different *“particularities of operations”* present at each location. The PRU went on to suggest that Heathrow and Gatwick used different methods to, for example, Luton and Stansted; the former two making greater use of

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<sup>79</sup> Page 17 of the Draft PRU Report

<sup>80</sup> Page 37 of the Draft PRU Report

<sup>81</sup> Page 40 of the Draft PRU Report

tactical arrival management, the latter two relying more upon ATFM regulations to balance demand and capacity. This comparison led the PRU to conclude that, in its view, Heathrow was subject to the greatest delays once all ANS-related delays were taken into account. Ryanair disputed this conclusion. Instead of looking at “*all ANS-related delay*” and expanding the review to include other locations in Europe, the Draft PRU Report should have focussed on the actual underlying reasons for the capacity, staffing and weather regulations self-reported by NERL and originating in London only. This error in focus was not corrected in the Revised PRU Report.

91. In light of those findings, the superficiality of certain of the PRU’s conclusions, and the fundamental lack of transparency identified in Ryanair’s 5 July Submissions, the conclusion in the Draft PRU Report that there was no evidence of discrimination between airspace users in different sectors is unsustainable. It is therefore disappointing that this conclusion was sustained in the Revised PRU Report and appears now to have been uncritically adopted by the CAA in the (provisional) Decision.

**(iii) The CAA’s conclusions**

92. The CAA’s conclusions were in summary as follows:

- a. “*We have carried out additional analysis of the pattern of delays and have found no evidence of systematic miscoding from the patterns of capacity, staffing or weather delays.*”<sup>82</sup>
- b. The Decision acknowledges, however, that the Revised PRU Report found evidence of examples where “*regulations were applied in collapsed sectors and delays were attributed to adverse weather, although collapsing of [the] sector had caused the initial capacity constraint*” (quite possibly because of NERL’s staffing problems, which had been miscoded as an extraneous constraint).<sup>83</sup>
- c. The Decision suggests, in Ryanair’s view implausibly, that these clear examples of miscoding did not have a “*material effect*” on NERL’s reporting of its performance

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<sup>82</sup> Summary, § 14

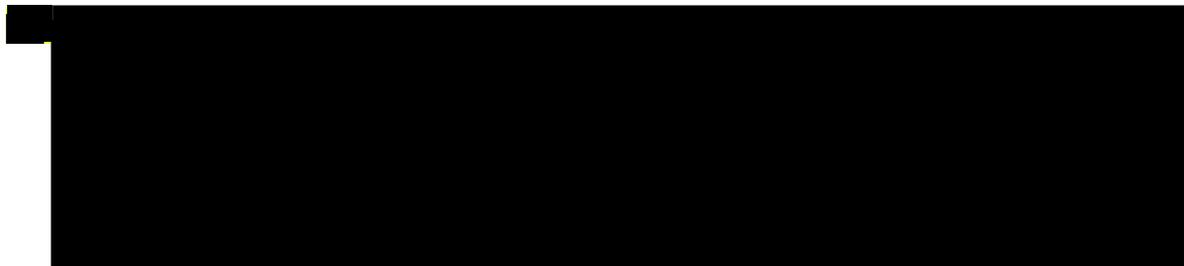
<sup>83</sup> Decision, § 5.17

in 2018.<sup>84</sup> Ryanair urges the CAA to explain in greater detail exactly why and how it has concluded that these troubling examples of miscoding were ‘immaterial’.

- d. Moreover, the Decision concludes that “*We have seen no evidence of deliberate or wholesale attribution of delay to weather causes to misrepresent NERL’s performance*”.<sup>85</sup> As explained above, the Decision reveals a misplaced focus on the CAA’s part on the ‘deliberateness’ (or otherwise) of NERL’s misleading practices around coding of delays.
- e. The Revised PRU Report found that in the LTMA there was “*approximately 4000 minutes per year of adverse weather attributable delay in collapsed sectors*”. In Ryanair’s view this is very clearly inconsistent with best practice (the PRC principles) which requires the “*primary focus*” to be on “*identifying any ANSP-internal constraints that prevent the deployment of maximum declared capacity*”.<sup>86</sup>

(iv) **Conclusions**

93. Ryanair is disappointed that the Decision fails to provide proper justification for the CAA’s **implicit** rejection of each of Ryanair’s three arguments as to discriminatory treatment set out above.
94. The clear disproportion between the level of delays at Stansted and those encountered at Heathrow is *prima facie* evidence of discrimination, which it is incumbent on the CAA to investigate and NERL to rebut. The credibility of the PRU’s conclusion on discrimination is, furthermore, undermined for the reasons set out in detail above.



96. The conclusion that there has been no discrimination against Ryanair is further undermined by the fact that NERL’s shareholders include British Airways, Virgin

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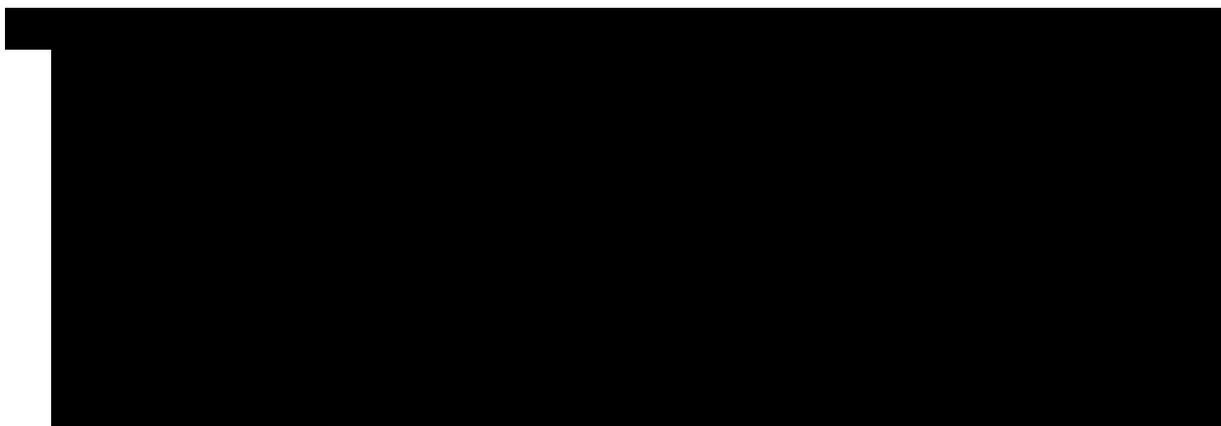
<sup>84</sup> Decision, § 5.18

<sup>85</sup> Decision, § 5.50

<sup>86</sup> Decision, § 5.22-5.23

Atlantic and Lufthansa, all of whose operations focus on Heathrow and Gatwick. This creates a clear incentive for NERL to give preference to those airports over Luton and Stansted. This does not appear to have been drawn to the PRU's attention and does not feature in the Decision at all, despite the fact that Ryanair clearly raised the issue in its 5 July Submissions.

## CHAPTER 9: PROCEDURAL UNFAIRNESS/CORRESPONDENCE



98. Ryanair has previously expressed its concern regarding the CAA's conduct of the Palamon investigation and failure to ensure procedural fairness and full transparency to Ryanair. The CAA has repeatedly<sup>88</sup> stated that Ryanair's procedural rights, as complainant, are not as extensive as NERL's. However, the CAA has failed to grant Ryanair even the bare minimum of the procedural rights that it is entitled to in this investigation.
99. A table of key correspondence between the CAA and Ryanair's external legal representatives, Stephenson Harwood LLP, is attached at **Appendix 1** to these Submissions, and is confidential. That Appendix illustrates that Ryanair has been forced to spend a significant amount of time engaging with the CAA as to procedural issues; which is time Ryanair would rather have spent engaging on the substance of the Palamon investigation. This Chapter includes prominent examples of procedural unfairness towards Ryanair arising from the CAA's conduct of the Palamon investigation to date.

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<sup>88</sup> By way of example, [REDACTED]

(a) The Unredacted Oberon Report

100. The CAA has not been forthcoming in providing Ryanair with a copy of the unredacted Oberon Report, despite its obvious significance to the investigation, prejudicing Ryanair's rights from the outset of the investigation. At the time of identifying the scope of the investigation, the CAA requested information from Ryanair, and specifically asked whether Ryanair had '*any evidence to indicate that NERL has not met the Oberon recommendations.*' Given that the majority of the Oberon recommendations, including namely NERL's list of 23 action points, were not published with the Oberon Report, Ryanair was naturally unable to answer the CAA's question fully.<sup>89</sup> Ryanair requested a copy of NERL's Oberon actions list on this basis, but this was not provided, prejudicing Ryanair's ability to properly reply to the question.



102. Ryanair first raised its position regarding the redactions to the Oberon Report with the CAA on 30 May 2017 and has since reiterated this in substantial detail in further correspondence (see the confidential Appendix 1). Ryanair explained that its Operations Team requires sight of the unredacted Oberon Report to properly analyse the technical findings in the Decision, but the CAA has chosen to protect NERL's interests above those of Ryanair (a recurring theme in this investigation). The CAA's blanket position that the redacted sections are justified by '*commercial sensitivity*' in the light of the '*prevailing market circumstances*'<sup>90</sup> is devoid of merit. Ryanair requested that the CAA provide its specific justification for each redacted passage, as provided by NERL and considered by the CAA.<sup>91</sup> The CAA has to date failed to do so.<sup>92</sup>

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<sup>89</sup> Letter from Ryanair to the CAA dated 25 January 2019.



(b) The PRU Report

103. Ryanair's ability to participate meaningfully in the PRU's investigation into NERL's coding practices was consistently undermined by the CAA's handling of this aspect of Project Palamon. In particular, the CAA appears to have ignored Ryanair's feedback on the Draft PRU Report and the Decision appears to take little account of Ryanair's comments to date.
104. The CAA invited Ryanair to submit comments on any factual inaccuracies in the PRU's provisional findings.<sup>93</sup> This invitation naturally gave rise to an expectation that Ryanair's substantive comments would be considered before the finalisation of the Revised PRU Report, and this was reinforced at a meeting between Ryanair and the CAA on 24 May 2019, in which it was agreed that Ryanair would provide the CAA with its comments by 28 June 2019. Following a request for an extension to that deadline, Ryanair submitted its detailed substantive comments on the Draft PRU Report to the CAA on 5 July 2019.
105. On 12 July 2019 the CAA provided Ryanair with the Revised PRU Report. At this point it became clear that the CAA had failed to take account of any of the substantive comments raised by Ryanair in respect of the Draft PRU Report. In fact, it transpired that the CAA had been working to a different deadline of 13 June 2019 for the parties to submit their substantive comments. The CAA failed to communicate this change in deadline to Ryanair.
106. At that point it also became clear that the CAA had unilaterally accepted changes suggested by NERL and incorporated these into the Revised PRU Report without any further reference to Ryanair. These changes followed a trilateral meeting between the CAA, the PRU and NERL on 13 June 2020, of which Ryanair again had no prior knowledge.
107. Since then the CAA has failed to offer any credible explanation as to how this critical omission transpired. Ryanair has repeatedly asked the CAA to explain why it had failed to notify Ryanair of the change in date, but the answers offered by the CAA in response have been unsatisfactory. The CAA's continued silence on this point speaks for itself.

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<sup>93</sup> The CAA's letters to Ryanair dated 6 March, 8 April and 26 April 2019.

108. It appears from the correspondence that the CAA’s position is that it was not necessary to inform Ryanair of the change of the deadline because the comments requested by the CAA were limited to “manifest factual inaccuracies” (“MFIs”). Ryanair's 5 July Submissions did, however, contain a number of MFIs and were disregarded nonetheless. The procedural unfairness in this regard was exacerbated by the fact that the comments submitted by NERL did more than just seek to correct MFIs in the Draft PRU Report and resulted in the insertion of entirely new sections into the Revised PRU Report, most notably the previously unexplored issue of “conjoint” airspace. Furthermore, it is now clear from the Decision that the CAA has neither properly nor fully considered/addressed Ryanair's 5 July Submissions and the further comments submitted by Ryanair in Stephenson Harwood’s letter of 26 July 2019 when drawing up the Decision.<sup>94</sup>

109. The CAA has thus deprived Ryanair of the opportunity to participate meaningfully in the PRU investigation and to suggest amendments to the Draft PRU Report prior to the publication of the final Revised PRU Report. Instead of seeking to rectify this in the relevant passages of the Decision, the CAA has continued to disregard the 5 July Submissions, which are unaddressed in Chapter 5 of the Decision.

(c) Disclosure requests

110. Requests for further documents and evidence to be shared with Ryanair have been made throughout the course of the Palamon investigation. These requests related to progress reports, staffing delay-related information; delay-coding documents; NERL's internal guidelines and staffing resilience plan, as well as Oberon related documents, for instance the unredacted Oberon Report and NERL's action plan (which are discussed above). Given the scope of the Palamon investigation these documents go to the root of the investigation and therefore such disclosure requests are reasonable [REDACTED]

111. [REDACTED]  
[REDACTED]  
[REDACTED] Prior to the publication of

[REDACTED]

the Decision, the CAA continually rejected Ryanair's disclosure requests on the basis that they were not "warranted" at that stage of the investigation and would be disclosed at the time of the Decision. The CAA consistently indicated that it was of the position that relevant evidence that was material to the CAA's findings would be disclosed to Ryanair (if necessary, subject to appropriate redactions).

[REDACTED]

However, given the difficulties Ryanair experienced in making disclosure representations without assistance from its Operations Team, the CAA proposed amending the timetable for the investigation to allow a 10-day window following publication of the Decision, for all stakeholders to make further disclosure requests once they had the opportunity to review the non-confidential Decision.

112. The CAA's proposal to grant a 10-day disclosure window was unilaterally withdrawn without further consultation following the CAA's decision to open the membership of the confidentiality ring to two members of each party's operations team provided that they signed an enhanced undertaking.<sup>95</sup> Whilst Ryanair has always taken the position that members of its Operations Team must be allowed into the confidentiality ring<sup>96</sup> it could not agree to the terms of the enhanced undertaking for the reasons set out in full in its letter to the CAA [REDACTED]. Notwithstanding Ryanair's legitimate concerns with the scope and duration of the enhanced undertaking, and despite knowing that Ryanair had identified key supporting documents important to its analysis of the Decision, the CAA refused to provide Ryanair with the 10-day window, or to even consider Ryanair's disclosure requests. This left Ryanair's Operations Team disadvantaged as they were unable to review the Decision with the supporting evidence.

*(d) Discrimination between stakeholders*

113. Ryanair is gravely concerned about the CAA's preferential treatment of NERL, which is adverse to Ryanair's interests. This has prejudiced Ryanair's ability to participate in

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[REDACTED]

the Palamon investigation and is procedurally unfair. Particular examples are as follows:

- a. Maintaining the redacted passages in the Oberon Report, which was published on 3 August 2017,<sup>97</sup> and which are not commercially sensitive and are historic in nature.
- b. Taking account only of NERL's comments, and not Ryanair's 5 July Submissions, in the preparation of the Revised PRU Report. Significant substantive revisions were made to the Draft PRU Report as a result of NERL's intervention and representations to the CAA and went far beyond the scope of correcting MFIs. The CAA involved NERL far more closely in the investigation and allowed NERL an exclusive opportunity to influence the PRU's findings throughout.
- c. Rejecting Ryanair's disclosure requests, making it the only party in the investigation unable to discuss the redacted passages in the Decision and the supporting documentation with its Operations Team. The findings in the Decision are of a highly technical nature and Ryanair's legal representatives are reliant on guidance from its Operations Team. The CAA's decision to not allow Ryanair's Operations Team sight of any of the supporting documents (even redacted) to assist with representations on the Decision, prejudices Ryanair's basic rights to procedural fairness.

114. Allowing NERL to claim confidentiality over all supporting documents attached to the Decision is contrary to the CAA's confidentiality criteria and standards. The CAA has made it very clear that parties should not be making blanket claims to redact or assert confidentiality over entire documents, yet it has allowed NERL to assert confidentiality over all the supporting documents attached to the Decision without specific reasons for doing so in each case.

## **CONCLUSION**

115. For the avoidance of doubt, Ryanair considers that the CAA's handling of the Palamon investigation has been unfair and places Ryanair on an unequal footing compared to

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<sup>97</sup>CAA online publication of CAP 1578: Project Oberon, Final Report,  
<https://publicapps.caa.co.uk/modalapplication.aspx?appid=11&mode=detail&id=8004>

other parties, notably NERL. Ryanair is concerned that undue protection has been afforded to NATS as licence-holder and that this will inevitably prevent Ryanair from engaging meaningfully with the investigation and the Decision. The CAA has failed to appreciate that Ryanair suffers serious and ongoing reputational damage as a result of the matters giving rise to the Palamon investigation, and this protracted and severe reputational damage may well be larger than the damage that NERL may (or may not) incur as a result of the Palamon investigation.

116. The CAA is urged to make a *final* Order against NERL in the following terms:

- a. Immediately adopt PRC best coding practices.
- b. Immediately roll out the rostering tool.<sup>98</sup>
- c. Begin attributing staffing-related delays to shortages against actual demand.<sup>99</sup>
- d. Begin sharing dynamic Sector Opening Times with Eurocontrol.
- e. Within the next 6 months, adopt a binding 5-year Staffing Resilience Plan to be consulted upon on (at least) an annual basis with airlines and other stakeholders.
- f. Ascertain the costs incurred by airlines and consumers as a result of the “*persistent and significant*” NERL-attributable delays at Stansted since 2016 and devise a mechanism for reimbursing those costs: Ryanair suggests that NERL should begin to deduct that sum from airline user charges in 2021, and make a donation to a relevant consumer association.

117. Ryanair reserves all rights, including as to a potential judicial review, in the event that the CAA fails to take account of these detailed Submissions and, in particular, if the CAA fails to take *any* enforcement action against NERL despite that provisional conclusion being vitiated by errors of law and/or being unsustainable given the CAA’s own findings: see Chapter 2 of these Submissions above.

**19 OCTOBER 2020**

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<sup>98</sup> Decision, § 4.13

<sup>99</sup> Decision, § 5.49