

**ANNEX 1 OF INVESTIGATION UNDER S.34 OF THE TRANSPORT ACT 2000:
PROJECT PALAMON – FINAL DECISION**

**Summary of the CAA's Response to
Representations made on the CAA's Draft
Decision and the way forward**

CAP 2100a

A large, abstract graphic composed of overlapping, semi-transparent blue shapes in various shades, ranging from light cyan to deep navy blue, filling the bottom two-thirds of the page.

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Summary of this document

About this document

1. This Annex to our Final Decision (CAP 2100) sets out the CAA's response to the submissions made by interested parties and stakeholders to the CAA's provisional findings in its Draft Decision which we published in September 2020.¹ This Annex forms part of, and should be read alongside, the CAA's Final Decision in relation to its investigation under s.34 of TA00 (Project Palamon) into the compliance of NERL with its obligations under s.8(1) TA00 and Conditions 2 and 5.2 of its Licence.
2. Unless stated otherwise, defined terms in this Annex have the same meaning as those in the Final Decision.
3. The CAA's investigation commenced following complaints by STAL and Ryanair. In the Draft Decision we provisionally found a historical breach by NERL of its statutory obligations and Licence conditions to provide sufficient staffing resilience in Essex airspace.
4. This Annex deals with the following main issues:
 - the CAA's consideration of and reply to the submissions from interested parties to the Draft Decision, including from NERL, STAL, Ryanair and Prospect.² These submissions included observations on the application of the TA00 and Licence conditions, and the need for, and appropriateness of, further enforcement action, as well as more detailed considerations regarding specific factual elements relating to the allegations of breach under investigation in the areas of traffic recovery profiles, the RP2 settlement, staffing resilience, ATC capacity, undue discrimination, coding and provision of sector opening times data, the implementation of the Oberon investigation recommendations, procedural issues, and the need for a staff resilience plan and monitoring;
 - any consequential changes that have been incorporated into the Final Decision.
5. Following analysis of the submissions and further consideration of the wider impact of covid-19 on the aviation industry in general and on NERL in particular,

¹ CAP1943, available at: www.caa.co.uk/cap1943

² Prospect is a trade union representing approximately 3000 air traffic controllers, air traffic management specialists, and air traffic systems engineers in the civic UK air traffic management system.

we developed further our recommendations for NERL. and These are set out in the Final Decision.

6. As set out in the Final Decision, the CAA's findings are summarised as follows:
- in relation to the provision of sufficient staffing resilience in the London Approach Service for users of Stansted and Luton airports, NERL contravened its statutory and Licence duties and obligations in the period January 2019 to March 2020 (the Relevant Period); and
 - in relation to the other parts of the investigation, including on airspace capacity, coding and discrimination, NERL has not contravened its statutory and Licence duties and obligations.

Introduction

7. As explained in the Final Decision, the CAA has investigated complaints brought by Ryanair and STAL regarding the compliance of NERL with its obligations under its Licence and TA00. The complaints related to Air Traffic Flow Management (ATFM) delays experienced by airlines and passengers of Stansted and Luton airports. This Annex summarises and responds to submissions made by interested parties in response to the CAA's Draft Decision³ and explains how we took them into account in making our Final Decision. While this document does not summarise or respond to all points made by stakeholders in their responses, all stakeholder responses were fully considered before the CAA made its Final Decision.⁴ Non-confidential versions of stakeholders' responses and the Final Decision were published alongside this document on the CAA's website.⁵

Overall summary of responses received

8. This section sets out a high-level summary of key aspects of stakeholders' responses to the Draft Decision. We received responses from NERL, Ryanair, STAL and Prospect.

NERL

9. Overall, NERL disagrees with the CAA's Draft Decision, and its response sets out specific concerns. NERL considers that, in reaching the Draft Decision we

³ CAP1943, available at: www.caa.co.uk/cap1943

⁴ CAP 2100, available at: www.caa.co.uk/cap2100

⁵ www.caa.co.uk/Commercial-industry/Airspace/Air-traffic-control/Air-navigation-services/NATS-En-Route-plc-NERL-Licence/

have not considered all relevant factors, and that we have made errors in how we have considered evidence. In particular, NERL considered that:

- the relevant legal tests have not been understood or applied correctly to the facts. The provisional finding of breach is inconsistent with the established understanding of NERL's statutory and Licence obligations and is wrong in law;
- the assessment of NERL's conduct during the Relevant Period entailed a change of the scope of investigation, and the CAA failed to notify NERL of this change in a timely way;
- the CAA has retrospectively imposed a higher and more granular outcomes-based requirement that is not provided for in the TA00 or NERL's Licence;
- the CAA has retrospectively required NERL to meet all 'foreseeable' demand (STATFOR 'high' forecast), irrespective of whether it is reasonable to expect NERL to be able to meet such demand as set out in Condition 2(4)(a) of NERL's Licence;
- NERL was constrained by the RP2 settlement. In advance of the CAA's RP2 decision, NERL warned that reducing staff numbers would have an impact on resilience but the CAA and airlines pushed for cost savings. Staffing resilience in Essex airspace was impacted by RP2 staffing constraints, and by traffic growth being greater than STATFOR's highest growth predictions;
- the higher standard of regulation that NERL considers the CAA's Draft Decision imposes would have an impact on how NERL plans and finances its operations; and
- increased regulatory uncertainty could lead to NERL being less cost-efficient and lead to higher costs for customers.

Ryanair

10. Ryanair also disagrees with the Draft Decision, in particular with our provisional finding that NERL has only historically breached its TA00 obligations and Licence conditions during the Relevant Period. It considers we have not properly discharged our duties with respect to enforcement. Ryanair also sets out its views on next steps and recommendations for NERL. In summary, Ryanair:

- continues to be concerned with NERL's persistent and significant failings in providing staffing resilience for the Stansted approach and emphasises that traffic would not have to rebound to 2019 levels for staffing issues to arise again;

- considers that we are under a legal duty to take enforcement action now as it considers: (i) NERL is very likely⁶ to contravene its Licence and/or s.8 TA00 duties when demand recovers; and (ii) NERL is currently in breach of its duty to plan for future demand;
- contends that robust long-term planning is required to avoid the reoccurrence of delays and that action is needed now because, in its view: demand will recover in a lumpy and unpredictable way; the covid-19 crisis will exacerbate NERL's staffing issues in the long-term; and NERL will fail to meet its obligations even if traffic only recovers to 2016 levels;
- sets out a range of specific steps it considers we should require NERL to undertake, including adopting Eurocontrol's Performance Review Commission (PRC) coding principles, rolling out the rostering tool, and adopting a 5-year staffing resilience plan that is consulted annually with stakeholders;
- makes a number of other detailed points on our conclusions on aspects of the investigation with which it disagrees, including on the implementation of the Oberon recommendations, coding, ATC capacity, discrimination and other aspects relating to procedural fairness; and
- reserves all its rights, including to potentially judicially review our Final Decision if we fail to take enforcement action against NERL.

STAL

11. STAL considers that the Draft Decision is lenient on NERL particularly because:
 - we do not take formal enforcement steps despite the provisional finding of a serious breach of its duties;
 - we make no finding of breach in relation to airspace capacity despite a failure to remedy an issue that has been known for over 14 years; and
 - the investigation of discrimination may not have gone into the depth required.
12. It says that its chief concern is to see the issues remedied in a timely and sustainable manner, and is not seeking to take the matter further if:

⁶ In this regard, Ryanair submits that the requirement for a breach to be "likely" under s.20 TA00 does not mean the breach has to be imminent.

- the CAA requires from NERL a clear, transparent and measurable remedial plan mapped against a reasonably optimistic recovery profile, with regular reporting and close monitoring by the CAA; and
- findings remain “open” and NERL continues to be monitored. That is, if NERL does not take the opportunity to remedy the issues satisfactorily, the CAA would not need to launch another investigation and would be able to move straight to formal enforcement on staffing resilience and/or a finding of breach on airspace capacity management.

Prospect

13. In its response to the CAA’s Draft Decision, Prospect:

- broadly agrees with our provisional findings, including on the contravention finding in relation to staffing resilience but also considers that on other aspects, such as airspace change AD6 should continue to be progressed;
- considers that the CAA’s economic settlements are part of the reason for the low levels of staffing resilience shown by NERL; and
- says that, despite covid-19, now is the time to act on resilience as there are significant lead times to train fully qualified controllers and that lessons from RP2 and the previous recession should be learned.

Summary of CAA’s way forward

14. In Chapter 1 of our Final Decision, we have set out that, having considered the responses in the round, we consider that the general direction set out in the Draft Decision remains the most appropriate way forward. In light of the severe reduction in traffic caused by the pandemic, and the uncertain recovery, we have not prioritised further investigation of the causes of delay. We consider that the most effective way forward is to move onto remedial recommendations and regular monitoring to help to reduce the risk that there is a reoccurrence of the historical difficulties encountered at the Stansted and Luton approaches when traffic starts to recover.
15. Our detailed responses to the submissions received in our Draft Decision consultation are set out in the chapters below. Our final conclusions, having taken into account these responses, are set out in our Final Decision. The key issues are summarised below.

NERL concerns over precedent created by our decision on staffing resilience

16. NERL has raised a significant concern that our finding of breach in relation to staffing resilience sets new and higher service standards for specific sectors of airspace than is otherwise set by applicable regulation. We disagree with this

characterisation, and we agree with NERL that some level of delay is to be expected in normal operations, as is some variation in performance across different parts of the network. It is the particular circumstances of this case, and the evidence relating to Essex airspace, that led to the CAA's provisional finding and which have led to the confirmation of that finding in our Final Decision.

17. It is also relevant that the shortcomings identified in NERL's performance are material and have been sustained over a considerable period of time. They have persisted despite the CAA criticisms and recommendations in the previous Oberon investigation, which has not secured sufficient improvements in performance. In particular, the CAA's finding of breach relates to manifest failings on a section of airspace that has now been investigated for staffing delays twice in five years; and the investigation identified resourcing gaps (but not remedied, by NERL) extending over several years. Therefore, our decisions do not create a sweeping new granular standard for quality of service.
18. We are clear the uncertainty around traffic recovery from covid-19 could bring about some performance risks, and that such uncertainty would potentially be a relevant factor when considering any future complaint that we may receive regarding NERL attributable delay performance. However, the hiatus created by covid-19 should have also created opportunities to address performance issues, and have given NERL time to progress the implementation of airspace changes, progress ATCO training (subject to the constraints created by covid-19), and plan a more flexible approach to manage demand in the London Approach Service (LAS).

Other key concerns raised by respondents

19. We have set out our detailed views on the stakeholder submissions we have received below. In summary, our response to the key views expressed:
- we note the points NERL makes regarding the Relevant Period being covered by the scope of the investigation. However, the scope of the investigation did not set any firm limit on the time frame under consideration and indeed referred to the CAA's assessment of NERL's past, ongoing and future conduct.⁷ We also have broad public law obligations to have regard to the best available evidence during an investigation and to have regard to all relevant considerations. Finally, the publication of our Draft Decision has provided NERL with an opportunity to provide a substantive response to our provisional findings in relation to the Relevant Period, including any evidence that it wished to rely on to counter the provisional finding of a staffing contravention so its procedural rights have been fully respected;
 - NERL raised concerns about the application of the tests and considers that the CAA's interpretation of the statutory framework amounts to an error of law. We did not make our staffing finding under Condition 2(4)(a) of the Licence but under Condition 5.2 of the Licence and s.8 TA00; these legal provisions do not refer to, and apply independently of, the Service and Investment Plan (SIP). We consider that the RP2 settlement provides relevant context but is not determinative. We do not agree with the suggestion that the RP2 settlement was a binding constraint on NERL's staffing arrangements.
 - Ryanair also said that there is evidence of a current/likely future breach by NERL and enforcement is needed. Due to the fall in traffic levels as a result of covid-19, we do not consider that NERL is currently in breach of its Licence conditions or s.8 duties. The reduced traffic levels mean that NERL should now have the opportunity to address the staffing resilience issues that led to this investigation and maintain levels of staffing that are able to manage effectively forward-looking traffic scenarios. The ongoing impact of covid-19 on traffic remains extremely uncertain, and so we are not in a position to determine whether it is likely that NERL will fail to meet its statutory duties and Licence obligations. In these circumstances we consider that users' interests would be better served by focusing on the recommendations in our Final Decision and that careful monitoring of these recommendations and timely action by the CAA in the event of new difficulties would be the most appropriate way forward.

⁷ The scope of the ECTL-PRU report (available at www.caa.co.uk/cap1943a) was focused on the coding of delays in the years leading up to 2018, but the Palamon investigation was not limited to this time period.

Structure of the rest of this document:

20. The rest of this document is structured as follows:
- Chapter 1: contravention finding in relation to staffing resilience
 - staffing resilience
 - issues raised by NERL on the contravention finding
 - Chapter 2: ATC capacity
 - Chapter 3: undue discrimination
 - Chapter 4: enforcement, recommendations and monitoring
 - the need to take enforcement action
 - recommendations and monitoring
 - Chapter 5: other issues raised in the consultation
 - coding
 - Oberon recommendations
 - procedural issues

Chapter 1

Staffing resilience

- 1.1 The obligations imposed on NERL by s.8 of the TA00 and its Licence and the CAA's statutory duty to investigate complaints under s.34 TA00 are set out in Chapter 2 of the Final Decision.
- 1.2 In this chapter, we consider the responses to the Draft Decision finding in relation to staffing resilience and set out our views in response.

Staffing resilience

- 1.3 In our Draft Decision we concluded that, during the Relevant Period, the significant increase in staffing delays together with a persistent lack of staffing resilience on the LAS to Stansted and Luton airports and the failure to anticipate and implement adequate and timely steps to resolve those issues meant that NERL contravened its duties under s.8(1)(c) and s.8(1)(d) TA00 and its obligations under Condition 5.2 of the Licence during the Relevant Period.⁸ This section sets out our views on these issues. We also consider this issue further in the enforcement section of Chapter 4 of this Annex.

Stakeholders' views

- 1.4 NERL considered that, given the ongoing constraints placed on its business plan, together with the unexpected material increases in traffic and their relevance to NERL's obligations, the delay observed does not provide a lawful basis on which the CAA can determine NERL to be in breach of its obligations.⁹ NERL noted the following constraints that affected staffing resilience in Essex airspace:
- The RP2 price control settlement. NERL said that "the RP2 business plan, which was requested by airlines and imposed by the CAA, was predicated upon NERL reducing overall staff numbers, including the number of ATCOs, through voluntary redundancy to meet its cost-saving targets. This has in turn resulted in long-standing staffing resilience issues during RP2".¹⁰

⁸ Paragraph 35 of CAA's Draft Decision. www.caa.co.uk/cap1943

⁹ Paragraph 32 of NERL's response to the Draft Decision.

¹⁰ Paragraph 17 of NERL's response to the Draft Decision.

- The short-term lack of available ATCOs qualified to manage Essex airspace following the redundancy process, and the fact that insufficient time had passed between putting in place actions to address the problem and the events that led to the CAA's provisional finding of breach in the Palamon investigation.¹¹ NERL noted that “increasing ATCO numbers is both a time and resource intensive process due to the long lead times, relatively high attrition rate of trainees and the demands placed on present capacity in terms of diversion of resources to train additional ATCOs in circumstances where a shortfall already exists”.
- The resilience issues “were made more acute in respect of Essex airspace by the significant localised [traffic] growth at Stansted and Luton airports during RP2”, resulting in further staffing delays.

- 1.5 NERL considered that the current difficult circumstances resulting from covid-19 mean that the matters raised in the CAA's Draft Decision are historical only and agreed with the CAA's Draft Decision not to take enforcement action.¹² NERL suggested that future risks to staffing resilience remain once demand recovers from the covid-19 downturn. However, given that reliable traffic forecasting is currently not possible and that customers may, in future, prioritise cost savings over resilience in the reset of RP3, that could create similar conditions to those prevalent in the lead up to RP2.¹³
- 1.6 NERL also suggested that if it was expected to meet “foreseeable traffic”, in the sense of it being able to meet STATFOR high-case traffic forecasts, then it would need to recalibrate its business plan, as the STATFOR base-case is currently being used to prepare its business plans.¹⁴
- 1.7 While NERL accepted that the CAA can investigate instances of localised delay, it considered that the CAA should take into account NERL's network-wide obligations and performance.¹⁵ NERL considered that if the CAA's provisional findings of breach in the Draft Decision were confirmed, it would have less flexibility in how it manages localised spikes in demand across the network which would result in it providing a more costly and less efficient service to customers.¹⁶
- 1.8 Ryanair agreed with our finding that NERL has contravened its duties under s.8(1)(c) and s.8(1)(d) TA00 and its obligations under Condition 5.2 of the Licence during the Relevant Period. However, it considered that NERL is still in

¹¹ Paragraph 21 of NERL's response to the Draft Decision.

¹² Paragraph 32 of NERL's response to the Draft Decision.

¹³ Paragraph 33 of NERL's response to the Draft Decision.

¹⁴ Paragraphs 37 to 39 of NERL's response to the Draft Decision.

¹⁵ Paragraphs 45 to 47 of NERL's response to the Draft Decision.

¹⁶ Paragraph 48 of NERL's response to the Draft Decision.

breach of its 'future-oriented' planning duty under section 8(1)(d). It also considered that NERL is very likely to be in breach of section 8(1)(c) and Condition 5.2 when 'normal' levels of demand resume. In its view, the exact same problems are liable to repeat themselves if no enforcement action is taken by the CAA now.

- 1.9 Ryanair recognised 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. However, it considered that covid-19 also presents NERL with unique opportunities to reduce delays in the future. It considered that NERL should be using the current low levels of traffic to devise and implement a coherent, long-term Staffing Resilience Plan. It also considered that NERL should put in place other measures that require limited investment and would, in Ryanair's view, enable NERL to better manage foreseeable traffic increases, namely:
- fully rolling out the rostering tool cited in the NERL Action plan;
 - 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;
 - increasing the use of overtime where needed and amendments to collective labour agreements where that is possible;
 - using flexible rosters and associated changes to increase the utilisation and efficiency of staff; and
 - making better use of the latest technology and operational developments to increase efficiency of NERL's operation, such as SESAR solutions.
- 1.10 STAL considered, given Project Oberon identified significant staffing resilience issues over three years ago that needed addressing and have still not been addressed, that it is now unavoidable that the CAA must reach the conclusion that NERL has contravened its obligation under sections 8(1)(c) and 8(1)(d) of the TA00 and Condition 5.2 of the Licence.
- 1.11 STAL considers that until staffing issues are remedied "in a sustainable and long-term manner that can handle pre-covid-19 levels of traffic, there inevitably continues to be a 'likely future' breach of Licence and / or TA00". STAL's chief concern is to see that NERL remedies staffing issues expediently and sustainably prior to traffic volumes returning to the extent where it is again causing problems.
- 1.12 Prospect agreed with the CAA's provisional finding that NERL breached its Licence as a result of insufficient staff resources. Prospect noted that several of its members holding validations on Luton and Stansted have expressed their concerns to the Union surrounding staffing issues. It also noted several short-

term initiatives agreed with NERL to provide a more resilient service to Luton and Stansted, such as making greater use of overtime arrangements, and the attempted introduction of a Stansted and Luton Approach Resilience Mode (which would allow Stansted validated controllers to manage Luton airspace and vice versa). In Prospect's view, these initiatives are strong evidence that there were not enough staff to provide the required, resilient level of service for Luton and Stansted airports. Also, Prospect considers that this situation is continuing and the only reason that staffing for Luton and Stansted is now able to meet demand is the current covid-19 crisis.

- 1.13 Prospect noted that it will be "all too easy to make short term choices on staffing levels, including training, through the prism of covid-19". It cautioned that, as seen in past downturns, these short-term choices always lead to staffing shortages once traffic recovers. It also noted that 122 student ATCOs have already been made redundant, which would effectively stop the training supply line.
- 1.14 Prospect's response also considered that the CAA's RP2 determination was part of the reason for the low levels of staffing resilience. Prospect considered the wider economic context is a key factor in understanding NERL's performance. Prospect summarised comments it has made previously, i.e. that the pressure to achieve cost efficiencies under the RP2 determination would ultimately impact future service provision, and in particular a lack of staffing resilience. Prospect considered that the CAA should reflect on the pressure that its price control mechanisms has put on NERL and the impact it has had on NERL's performance.
- 1.15 Prospect also stated that the CAA should consider requiring NERL to produce a fully auditable and traceable 'workforce plan' for the LAS.

CAA's way forward

- 1.16 We note that the parties have not disputed the factual evidential basis that we took into account in reaching our decision. It is not disputed that the relevant sector has been suffering significant staffing pressures for many years and that those could have continued for some time had there not been a major downturn in traffic as a result of covid-19.
- 1.17 While we appreciate that the RP2 regulatory settlement might have created a challenging financial envelope to NERL, we do not accept that this meant that performance issues were unavoidable in the LAS to users of Stansted or Luton or that such issues, once identified, could not have been addressed over a reasonable period of time. While traffic in this section of airspace rebounded more quickly than those in other sectors or faster than base-case traffic scenarios for NERL's business as a whole, this does not provide sufficient mitigating evidence to justify the gap between supply and demand for ATCOs

with the appropriate validations to persist over an extended period of time. In fact, it appears to us that:

- NERL could have made different choices when planning its staffing and safeguarded its operational resources in areas of the business where it could have been anticipated that a lack of staffing would have had a material impact on operational performance and where it could have been anticipated that a lack of staffing would have produced consequences from which it would be difficult to recover.
- It was relatively unsurprising that traffic to non-Heathrow London airports would grow more quickly than average traffic during the period from 2014. Stansted and Luton typically serve LCCs that can quickly switch aircraft between markets and expand rapidly. Furthermore, the two busiest London airports, Heathrow and Gatwick, were also experiencing constraints on runway capacity during 2015 to 2019. Also, we consider NERL could have monitored outturn traffic and changes in the outlook, as well as putting in place remedial plans more quickly.
- It is for NERL to decide how best to comply both with its price control conditions and wider quality of service obligations. Under s.11 TA00, modifications to NERL's Licence can be made only with NERL's consent. This means that if NERL considers the proposed price control does not allow it sufficient funding to comply with its wider obligations, it can reject the proposed modifications. The CAA may then refer the matter to the Competition and Markets Authority. If NERL has under-estimated the costs of compliance and did not challenge the CAA's RP2 determination, then those are risks for its shareholders to bear and it is for NERL or its shareholders to fund the shortfall.

1.18 Similarly, for the reasons set out above, we disagree with Prospect's view that a lack of staffing resilience has been caused by the RP2 determination. The CAA acts in the interest of consumers to put downward pressure on NERL's costs and to incentivise NERL to conduct its business operations in an efficient manner; it is up to NERL to balance its performance, cost efficiency, and its financial obligations. In this regard, we note that, over the RP2 period, NERL has outperformed its overall financial settlement. Furthermore, it is always open to NERL to request that the price control determination is reopened, if there is an intervening material change in circumstance, but it has not done so.

1.19 NERL raised a range of issues with our provisional contravention finding including how the Draft Decision sits in the context of the wider regulatory framework of NERL. Given that price control arrangements are an integral part of the overall effective functioning of the regulatory framework, we have responded

to these issues and NERL's other points around our contravention finding in the section immediately below.¹⁷

- 1.20 We note and agree with Ryanair's point that NERL should be using this period of reduced traffic to plan and put in place the arrangements that will deliver appropriate levels of resilience when traffic demand returns. We consider that NERL should reflect on the findings and recommendations in the Final Decision and should voluntarily take the steps required to reduce the risk of repeated NERL attributable delays being observed in the LAS again. If anything, the challenges of the current circumstances, and the uncertainty about the timing and speed of aviation recovery, make it even more important that NERL addresses these points in the current period.
- 1.21 In response to Ryanair's other suggestions, we agree that NERL should have a long-term resilience plan of which staffing should be a significant part. We set this out in further detail in Recommendation 7 in the Final Decision. We also agree that NERL should improve its staffing resilience available to London Approach airports and in Essex airspace in particular, by making staffing arrangements more efficient and agile, and we set this out further in Recommendation 1 in the Final Decision. We agree with the implementation of the Rostering Tool and set out steps to achieve this in Recommendation 7.
- 1.22 In response to Prospect's recommendation that the CAA should consider requiring NERL to produce a 'workforce plan', in Recommendation 7 in the Final Decision we set out our recommendation that NERL should produce within 6 months of the final decision a detailed update of its staffing resilience plan (included in the overall resilience plan that NERL submits to the CAA under Condition 2 of its Licence).
- 1.23 Therefore, having considered the responses to our Draft Decision, our Final Decision maintains our findings that NERL contravened its duties under s.8(1)(c) and s.8(1)(d) TA00 and its obligations under Condition 5.2 of the Licence over the Relevant Period and that we are not in a position to determine that we are satisfied or that it appears to us that there is a current contravention or that a future contravention is likely.

¹⁷ Paragraph 1.27 onwards.

- 1.24 We also make the following recommendation.

Recommendation 1

NERL should improve the staffing resilience available to London Approach airports and in Essex airspace in particular, including by making staffing arrangements more efficient and agile, to avoid a reoccurrence of the historical difficulties encountered at the Stansted and Luton approaches, before demand substantially recovers to pre-covid-19 levels. NERL should provide a resilient service that is capable of satisfying a range of reasonable scenarios for a rebound in traffic demand for the various areas of its regulated air traffic services. That said, we appreciate that some level of delay is to be expected in normal operations, as is some variation in performance across different parts of the network.

- 1.25 We acknowledge the difficulties that covid-19 presents for planning and the risks that performance issues might reoccur when traffic demand begins recovering. In our view, this means that it is all the more important that NERL maintains critical capability to serve a range of reasonable traffic recovery profiles and to constantly monitor developments in outturn traffic and outlook. However, as we noted in the Draft Decision, this finding does not mean that all future instances of significant delay in a segment of UK airspace would be likely to constitute a contravention of NERL's relevant obligations. Some level of delay is to be expected in normal operations, as well as some variation in performance across different parts of the network. It is the particular circumstances of the evidence relating to the LAS to users of Stansted and Luton that have led to this finding. This includes the fact that the shortcomings identified in NERL's performance have been sustained over a considerable period of time and are material. It also follows a previous formal investigation (Oberon) that concluded it was a "finely balanced decision" that NERL did not breach its Licence obligations with respect to staffing resilience in the same segment of airspace.
- 1.26 In the next section we consider some of the issues raised by NERL on the contravention finding and explain why we do not consider those to be sufficiently compelling reasons to justify us changing our draft contravention finding.

Issues raised by NERL on the contravention finding

- 1.27 As the monopoly provider of en route and certain approach air traffic services, NERL is subject to economic regulation, which is designed to protect the users of its services and prevent NERL from exploiting its monopoly power. Its Licence and the TA00 set out certain statutory and regulatory duties with which it must comply.

- 1.28 In its response, NERL argues that the Draft Decision does not adequately explain how the CAA reached its provisional finding that NERL has breached its statutory and Licence obligations and that the relevant legal tests (as provided for in TA00 and the Licence) have not been understood or applied correctly to the facts.¹⁸ This section addresses NERL's concerns with our contravention finding.

NERL's views

- 1.29 NERL considers we have not correctly applied legal tests in reaching our contravention findings. It argues that the Draft Decision appears to be based on the conclusion that NERL has failed adequately to address issues that (the CAA considers) were foreseeable and that NERL should have addressed.¹⁹ NERL submits that this means that the Draft Decision is wrong in law²⁰ and, if upheld, the CAA's decision would be unlawful.²¹ NERL submits that failure to meet the CAA's desired outcomes cannot, of itself, constitute a breach of NERL's statutory or Licence conditions.²²
- 1.30 NERL also argues that the Draft Decision is inconsistent with the "established understanding" of the legal and regulatory framework, including as it was applied in the Oberon investigation. NERL submits that:
- the CAA recognised in Oberon that the CAA must apply the words of the relevant obligation, including the words that qualify those obligations;
 - the CAA must take account of the constraints on NERL when assessing the reasonableness of NERL's actions; and
 - NERL has complied with the Oberon recommendations.²³
- 1.31 If upheld, NERL believes the Draft Decision represents a marked departure from the way in which NERL has been regulated to date and would impose on NERL a higher and unspecified standard of performance in terms of:
- the level of demand that the CAA expects NERL to meet (STATFOR high-case vs base-case);

¹⁸ Paragraph 5 of NERL's response to the Draft Decision.

¹⁹ Paragraph 26 of NERL's response to the Draft Decision.

²⁰ Paragraph 27 of NERL's response to the Draft Decision.

²¹ Paragraph 5 of NERL's response to the Draft Decision.

²² Paragraph 29 of NERL's response to the Draft Decision.

²³ Paragraph 28 of NERL's response to the Draft Decision.

- the requirement to meet all “foreseeable demand”, irrespective of whether it is reasonable to expect NERL to be able to meet such demand on the basis of capacity to be made available in accordance with NERL’s SIP; and
- the granularity of delay that would be acceptable for NERL to incur when carrying out its operations in a particular sector (in this case, Essex airspace).²⁴

1.32 NERL considers that the Draft Decision, if upheld, would have “considerable practical and cost consequences” for NERL in terms of how it plans and finances its operations.

1.33 NERL claims that the Draft Decision considers that due to covid-19 the CAA’s findings are of historical significance only and considers that the provisional findings, if upheld, would not be of historical significance only. It submits that the Draft Decision creates some uncertainties for NERL that would require NERL to change how it plans and finances its operations to ensure it does not risk being found in breach of its obligations again.²⁵ In particular, NERL claims:

- it is uncertain whether NERL is expected to plan for all foreseeable traffic that might arise as opposed to the level of demand reasonably expected to be met on the basis of capacity available in accordance with the SIP as per Condition 2(4)(a) of the Licence;
- the lack of a defined threshold of good performance sector by sector would mean NERL has to plan for staffing resilience levels across all sectors, shifts and seasons that will allow for any levels of unexpected sickness and staff retirements/sickness that the CAA deems foreseeable;
- the lack of unspecified or unarticulated performance standards means NERL will not be able to make decisions about further cost efficiencies, in case those decisions result in NERL being over or under resourced against CAA’s performance expectations;²⁶
- it is not known what other aspects of NERL’s performance might be subject to the retrospective application of heightened standards creating less certainty for lenders and shareholders.²⁷

1.34 NERL’s response notes that the CAA suggests that whether NERL will be expected to meet actual demand will depend on whether that level of demand

²⁴ Paragraph 30 of NERL’s response to the Draft Decision.

²⁵ Paragraph 36 of NERL’s response to the Draft Decision.

²⁶ Paragraph 34 of NERL’s response to the Draft Decision.

²⁷ Paragraph 35 of NERL’s response to the Draft Decision.

was “foreseeable”.²⁸ NERL submits that this is not consistent with Condition 2.1 and Condition 2.4.²⁹ NERL argues that the Licence provides that determining the level of demand that NERL can reasonably be expected to meet must be by reference to the SIP, whereas the Draft Decision applies a different standard without reference to the SIP.³⁰ NERL submits that requiring it to meet all levels of foreseeable demand without reference to the SIP would mean NERL has to overcommit its resources so it can always meet any level of foreseeable demand at all times, no matter how unlikely that level of demand, resulting in inefficiencies and additional costs for customers.³¹

- 1.35 NERL agrees that the CAA may investigate instances of localised delay, but submits that its obligations are network-wide and that the appropriate standard is to consider what is reasonable from the perspective of the entire system as a whole.³² It argues that the Draft Decision adopts a different approach by measuring performance during the Relevant Period against forecast demand in the Essex airspace, without reference to the wider network. NERL notes that during 2019 it achieved its performance bonus for delay across the network as a whole, which is not factored into the Draft Decision.³³ NERL argues the Draft Decision would require NERL to meet an undefined demand in all sectors of its airspace at all times, rather than allowing it flexibility to deal with localised spikes, resulting in additional costs for customers and a less efficient approach.³⁴
- 1.36 NERL considers the CAA’s duty under s.2(2)(c) TA00 includes the need for regulatory consistency and predictability for effective resource planning by NERL and risk assessment by finance parties.³⁵ NERL accepts that there were instances of delay in the Essex airspace, but argues that it took all reasonable steps to mitigate the lack of service resilience. It considers the Draft Decision fails to specify the “tipping point” of objectionable delay or in what respect NERL’s actions were insufficient to meet its statutory and Licence obligations.³⁶ NERL argues that the Draft Decision would “retrospectively raise the standard of performance” while making it less clear and further removed from the relevant provisions in its Licence,³⁷ thus presenting a material risk to NERL’s ability to plan and finance its operations. NERL suggests that the risks can be mitigated by taking a more cautious approach to planning its ATCO resources, but it would

²⁸ Paragraph 41 of NERL’s response to the Draft Decision.

²⁹ Paragraph 42 of NERL’s response to the Draft Decision.

³⁰ Paragraph 43 of NERL’s response to the Draft Decision.

³¹ Paragraph 44 of NERL’s response to the Draft Decision.

³² Paragraph 46 of NERL’s response to the Draft Decision.

³³ Paragraph 47 of NERL’s response to the Draft Decision.

³⁴ Paragraph 48 of NERL’s response to the Draft Decision.

³⁵ Paragraph 49 of NERL’s response to the Draft Decision.

³⁶ Paragraph 50 of NERL’s response to the Draft Decision.

³⁷ Paragraph 51 of NERL’s response to the Draft Decision.

require confirmation that such additional operating costs would be remunerated via the regulatory settlement, and it would require certainty as to the CAA's expectations for other performance areas, such as implementing airspace changes to address airspace capacity delays.³⁸

CAA's way forward

- 1.37 The CAA disagrees with NERL's assertion that the Draft Decision does not explain adequately how the CAA reached its provisional finding of breach. It also disagrees that the relevant legal tests have been misunderstood or applied incorrectly. The CAA notes that despite the opportunity offered by the consultation period, NERL has not explained why it considers the CAA's interpretation of the TA00 or Licence conditions amounts to an error of law nor does it clarify why it considers the CAA is wrong to rely on the evidence of its performance failures.
- 1.38 The CAA notes NERL's comments in relation to the CAA's duty under s.2(2)(c) TA00, but it disagrees that, if upheld, the provisional finding would retrospectively raise the standard of performance. The CAA also disagrees that the Draft Decision is inconsistent with the "established understanding" of the legal and regulatory framework or with the Oberon decision or represents a departure from them. The CAA considers that there is no legitimate expectation that regulation will continue indefinitely without changing as regulation must evolve over time in light of changing circumstances, but agrees that, where possible, it should ensure continuity and transparency of regulation in accordance with best regulatory practice.
- 1.39 In this regard, the CAA notes that the Palamon investigation has focussed on similar issues to those that have been raised since 2016 in the Oberon investigation. We noted in Oberon that the decision was finely balanced that NERL had not breached its Licence or other statutory duties, but we required NERL to implement a number of recommendations and to comply with its action plan. While the CAA agrees that NERL has complied with the Oberon recommendations, the CAA recognises that the Oberon recommendations did not go far enough. Had NERL engaged constructively in the Oberon investigation, for example, by making proactive suggestions and cooperating in the formulation of commitments and recommendations from an early stage, the Oberon recommendations might have been more targeted and effective. Since the Oberon decision, there has been an increase, rather than decrease, in delays indicating that NERL is still failing to forecast reasonable demand and to develop plans to manage such demand appropriately.

³⁸ Paragraph 52 of NERL's response to the Draft Decision.

- 1.40 The CAA notes NERL's comments regarding Conditions 2.1(a) and 2.4(a) and the reference to the SIP, but the CAA has not made its provisional finding in relation to staffing resilience under that provision. The criteria which it has used to assess NERL's compliance with its obligations under Condition 5.2 of its Licence and s.8 TA00 is based on the ordinary meaning of the legal obligations themselves. The absence of any reference to the SIP in these provisions indicates that the requirements for sufficient staff resources and to take all reasonable steps to secure that demand is met are not conditioned by reference to the SIP. Condition 5.2 provides that NERL must at all times act in a manner calculated to secure that it has available to it sufficient resources including staff resources to ensure that it is able to carry out its Permitted Purpose activities and comply with its obligations under the TA00 and its Licence. NERL has failed to comply with this provision during the Relevant Period, as indicated by the evidence in the Final Decision which demonstrates that ATCO numbers have remained below the levels which NERL itself appears to consider necessary to provide a resilient service. In addition, NERL's own forecasts consistently show the demand for operational staff exceeding supply over a sustained period of time. Furthermore, NERL has also failed to build in effective resource planning solutions to resolve issues that appear relatively long-standing and reasonably foreseeable, such as redundancies, short-term illness, resignations and early retirements.
- 1.41 The CAA disagrees that its provisional finding of breach in the Draft Decision was based on the premise that NERL failed to meet the CAA's desired outcomes. The provisional finding of breach was based on an objective standard which showed persistent and significant failings in NERL's historical performance with respect to staffing resilience for the Stansted and Luton approaches as explained in the Final Decision.
- 1.42 The CAA notes NERL's interpretation that the provisional findings are of historical significance only. The provisional findings relate to historical performance and historical breaches by NERL, but NERL's own forecasts anticipated that shortfalls in the supply of operational staff compared with demand would have continued well into 2023 but for the covid-19 crisis. Due to the material changes in demand caused by covid-19, the CAA considers that for efficiency the recommendations should not address the specific historical circumstances that led to the breach but should rather aim to prevent similar issues occurring once demand returns. The CAA's recommendations are therefore aimed at encouraging NERL to use the current period of decreased demand to address the shortcomings in its approach to resourcing and other matters to make it less likely that similar issues arise in the future. This is particularly important given the uncertainty and the timing and speed of aviation recovery.

- 1.43 The CAA disagrees with NERL's submission that its performance should only be assessed from the perspective of the entire air traffic system as a whole. Such an approach leaves the interests of certain categories of passengers or geographic regions at risk of being ignored or unnoticed and such delays would be masked by the overall performance. As noted in the Draft Decision, some level of delay is to be expected in normal operations, but the provisional findings in the Draft Decision relate to shortcomings in NERL's performance that are material, have been sustained over a considerable period of time, and have persisted despite the concerns raised in the previous Oberon investigation. The CAA's recommendations and action plan imposed to reinforce staffing resilience in the very same segment of airspace did not secure NERL's performance improvements. Our findings do not create a new granular standard for quality of service. In fact, by definition, a decision on Licence compliance cannot create new standards but can only clarify the standards that are already contained in Licence conditions or the TA00.

Chapter 2

ATC capacity

- 2.1 In this chapter, we consider the responses to the findings in our Draft Decision in relation to ATC capacity.
- 2.2 In our Draft Decision we considered that while the AD6 proposed change could have been initiated in a timelier manner, we noted that a single lapse by NERL did not necessarily indicate a contravention of its statutory or Licence duties. In particular, we took into account the significant progress that has been made in recent years in relation to airspace modernisation, with respect to the development of airspace capacity. However, we noted the multilateral nature of airspace change, which requires input from several parties and stakeholders (not just NERL) particularly with regard to the fundamental redesign of airspace and the significant time it takes to develop and implement complex airspace change proposals. This section considers stakeholder views on these issues, and our response.

Stakeholders' views

- 2.3 NERL agreed with the CAA's provisional findings that NERL was not in breach of its Licence obligations to ensure sufficient capacity was provided within the Essex airspace for the provision of the LAS. However, NERL did not agree that AD6 "could have been initiated in a timelier manner", nor with the implication that this was a "lapse" on the part of NERL. In its view, there was no undue delay on the part of NERL, as the reason for delay was due to a "culmination of factors outside NERL's control". Such factors led to a level of uncertainty that, until recently, made airspace changes difficult to propose and progress, particularly given that they are time and resource intensive and often at risk of failure and wasting costs.
- 2.4 Ryanair welcomed the CAA's conclusion that "the AD6 project could have been initiated in a timelier manner" and that the delay represents a "lapse" on the part of NERL.³⁹ Ryanair further endorsed "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."⁴⁰
- 2.5 Ryanair acknowledged the multilateral and complex nature of airspace change. However, it considered that:

³⁹ Paragraph 79 of Ryanair's response to the Draft Decision.

⁴⁰ Paragraph 80 of Ryanair's response to the Draft Decision

- NERL failed to engage with airlines in discussions about airspace change until 2018;
- NERL failed to foresee and plan for what was a highly predictable rebound of traffic to 'normal' levels after the recession;
- the CAA should order NERL to take action on airspace capacity now, before traffic recovers to pre-covid-19 levels;
- the CAA should make clear that NERL is required to engage constructively with stakeholders and to deliver on the promised airspace capacity reforms in the near to medium-term.

- 2.6 STAL disagreed with the CAA conclusion that there had not been a breach of NERL's Licence and / or TA00. In its view, it was clear that NERL has not made available the core services (as defined in the Licence) so as to be able to meet a reasonable level of overall demand, has not taken all reasonable steps to secure that demand is met and has not had proper regard to the demands likely to be placed on the airspace in the future. That said, STAL acknowledged that steps were being taken to address ATC capacity issues. STAL was therefore not seeking to take the issue further but considered that additional monitoring was required to ensure that issues were addressed by the time traffic recovers to pre-covid-19 levels. Also, should the issues not be satisfactorily resolved, the CAA should be able to pick up Palamon findings at that point and carry them through to breach and enforcement stages.
- 2.7 STAL considered that AD6 should have been brought forward sooner. It also considered that NERL's failure to bring about airspace change sooner should not be described as a 'single lapse', but as a long-standing, continuous failure and oversight on the part of NERL.
- 2.8 STAL rejected suggestions that STAL is not supportive of AD6, and asked us to review and amend paragraph 8.28 of the Draft Decision where we referred to its alleged lack of support for airspace changes, which it rejects. It explained that the AD6 solution relied on moving the hold position for aircraft inbound to Luton, while the holding position for aircraft inbound to Stansted remains unchanged. STAL said it has always supported AD6, continues to do so and is pursuing changes to lower level routes that are consistent with it. STAL is making changes to all lower level arrival and departure routes and wants to consult stakeholders on these as one package.
- 2.9 STAL expressed concerns with the recommendation set out in paragraph 52 of the Draft Decision that airports and ACL, as the UK's slot coordinator, should seek timely input from NERL to feed into their capacity declaration and scheduling processes. STAL considered that airport and airline operations

should not be curtailed to accommodate any failures of NERL to adhere to its Licence and statutory obligations.⁴¹

- 2.10 Prospect concurred with the CAA's provisional findings in relation to ATC capacity. On this issue, it considered that NERL has historically been constrained by government policy (or lack of it), and numerous stakeholders with competing objectives. Prospect hopes that the recently formed Airspace Change Organising Group (ACOG) can aid both the UK and NERL in forging ahead with a strategy that is fit for purpose: improving levels of safety, reducing delays and contributing to reduced carbon emissions. In its view, the AD6 airspace modernisation project needs to continue to be progressed, as airspace redesign will be part of the wider solution to ease delays in the area.

CAA's way forward

- 2.11 We continue to be of the view that airspace change proposals relevant for Essex airspace, such as AD6, could and should have been initiated in a timelier manner. However, we do not consider that the evidence indicates that NERL has contravened its statutory or Licence duties in relation to ATC capacity. This is because:
- airspace change is a multilateral and complex process;
 - there has only been one year where there have been significant delays resulting from the absence of airspace design changes;
 - we understand that NERL and other stakeholders are making good progress on AD6.
- 2.12 We referred to a single lapse in the sense that if AD6 had been brought forward earlier then it is likely the capacity delays would have been lower. We also note that it was only in 2018 that this sector has experienced significant traffic delays relating to capacity. Nonetheless, we agree that NERL could have taken the opportunity to initiate and progress airspace change projects in the LAS earlier.
- 2.13 In relation to STAL's other comments, paragraph 8.28 of the Draft Decision said: "We note that STAL has chosen not to fully cooperate with certain airspace change initiative brought forward by NERL." The CAA accepts that STAL disputes NERL's description of events surrounding any delays in implementing AD6 and we have amended this sentence to read: "We note that there are differing views amongst stakeholders as to the cause of any delays to the implementation of AD6."
- 2.14 We note that all stakeholders have a role to play in working together in a collaborative way to help make sure available airspace capacity is developed

⁴¹ Paragraph 55 of STAL's response to the Draft Decision.

and used efficiently. The multi-lateral nature of airspace change is reflected in the comments of stakeholders, and we welcome the recognition from stakeholders of the importance of sensible collaborative working on these matters. These considerations also reinforce the importance of the recommendations made in our Draft Decision on stakeholder engagement and a collaborative approach to airspace change, capacity declarations, and scheduling processes. Recommendation 3 encourages airports and airlines to work together, and to have regard to existing airspace bottlenecks in their processes.

- 2.15 As such, we consider that it is appropriate to make Recommendation 2 as well as Recommendation 3 (below) in our Final Decision.

Recommendation 2

NERL should continue to take steps to increase the capacity available in Essex airspace, including for example by making appropriate and timely progress with the AD6 change.

Recommendation 3

NERL should engage more pro-actively and transparently with its customers and key stakeholders including Ryanair and STAL. Ryanair and STAL should also do more to communicate with NERL in a constructive and cooperative manner. NERL and the other parties should take steps to improve the quality of their dialogue and, if necessary, consider the use of a range of dispute resolution mechanisms in the future.

We recommend that airports should seek timely input from NERL to feed into their capacity declaration and scheduling processes. NERL should work with all parties in this investigation and seek to improve collaboration. For example, all parties should take advantage of the work of the Industry Resilience Group (IRG) – where airports, airlines and ACL (the UK's slot coordinator) sit – and other fora in order to improve communication on strategic operational issues. NERL should also consider setting out formally what information it would be useful for them to receive from airports and airspace users, and by when, in order for them to plan their operations.

Chapter 3

Undue discrimination

3.1 The CAA considered the issue of undue discrimination following the complainants' allegations that NERL had discriminated against them and/or shown undue preference between London airports or operators, to the detriment of Ryanair and Stansted Airport. In the Draft Decision, we provisionally found that regarding its Licence Condition 2.7 NERL has not failed, is not failing, nor is likely to fail, to meet its obligation to not unduly prefer or discriminate against any person or class of person in respect of the operation of its systems. This section considers stakeholder responses, and our way forward.

Stakeholders' views

3.2 NERL welcomed and agreed with the CAA's provisional findings that did it not unduly discriminate between any person or class of persons in providing the LAS.⁴²

3.3 Ryanair considered that, since Oberon, the problems at Stansted have gotten worse. It submitted that this suggests that the lack of resilience at Stansted identified by the CAA in Oberon persists, while the absence of equivalent delays at Heathrow indicates continued discrimination by NERL in favour of Heathrow.⁴³

3.4 In particular, Ryanair considered that the following events were evidence of discrimination by NERL in favour of Heathrow over Stansted:

- an increase in weather-related delay at Stansted compared to a drop in weather-related delay at Heathrow;
- a fall in delay at Heathrow in 2016 following the implementation of LAMP1 when delay at other London airports increased;
- a delay in implementing airspace changes via LAMP2.

3.5 Ryanair was also submitted that the CAA should not give too much weight to "special event" delays at Heathrow for a planned NERL system upgrade.

3.6 Ryanair disagreed with the conclusions of the ECTL-PRU⁴⁴ report, as it considered that the ECTL-PRU should have focussed on the actual underlying reasons for delays rather than looking at all ANS-related delay.

⁴² Paragraph 2 of NERL's response to the CAA's Draft decision CAP1943, 19 October 2020

⁴³ Paragraph 9 of Ryanair's response to the CAA's Draft decision CAP1943, 19 October 2020

⁴⁴ ECTL-PRU refers to the Performance Review Unit of Eurocontrol. It has produced a report for the CAA in support of our investigation, available at www.caa.co.uk/cap1943a.

- 3.7 Ryanair noted it was disappointed because it considered that the Draft Decision failed to provide proper justification for an implicit rejection of Ryanair's arguments on discriminatory treatment.
- 3.8 STAL considered that had Stansted received an equivalent level of focus and resource to that afforded to Heathrow and Gatwick, the issues covered by the investigation would not have arisen or if they had, they would have been remedied much sooner.
- 3.9 STAL referred to Figures 6.7 to 6.10 in the Draft Decision, noting that NERL was predicting a vast oversupply of ATCOs at Heathrow going forward, while other London airports were anticipated to have a long-running significant under-supply until March 2025. In STAL's view this may be because NERL was preoccupied and predominantly focussed on Heathrow and a sign of a long-term, deep-rooted, persistent, systemic preoccupation with and focus on Heathrow at the expense of STAL and other airports. STAL considered this conduct could place STAL and its customer base at a competitive disadvantage.
- 3.10 STAL encouraged us to further consider this limb of the investigation as it is a long-running concern of STAL's. It noted that, in the relative short/medium term however, the main concern of STAL is to see the staffing resilience and airspace capacity issues remedied.

CAA's way forward

- 3.11 We note the parties' comments on our findings in the Draft Decision in relation to discriminatory treatment.
- 3.12 We disagree with Ryanair's submission that an absence of an increase in equivalent delays at Heathrow indicates continued discrimination by NERL in favour of Heathrow. We consider that this fails to take into account the differences in air traffic management at Stansted and Heathrow, as set out in Chapter 8 of the Draft Decision and re-iterated in the Chapter 8 of the Final Decision.
- 3.13 We asked ECTL-PRU to review ATM delay on arrival at London airports during 2018. As Heathrow, and to a lesser extent Gatwick use holding stacks to manage incoming traffic (categorised as ASMA delays), which is different to the Air Traffic Flow management methods used at Stansted and Luton airports, the type of ATM delays seen at the airports are of a different type. When all ATM causes were included, Heathrow had the largest amount of ATM delay per flight. We note Ryanair's use of the word equivalent and consider that as set out in 8.19-8.24 of the Draft Decision that ASMA and ATFM delays are both types of ATM delays and therefore equivalent. Therefore, we do not propose to amend the findings of Chapter 8 of the Draft Decision following the submissions made on this point.

- 3.14 We note STAL's observations on the differences between Heathrow airport and Stansted airport. As set out in Chapter 8 of the Final Decision, these are two very different airports operating in different circumstances, therefore differences in the treatment of these airports by NERL do not necessarily indicate a contravention by NERL of its Licence obligations on no undue discrimination.
- 3.15 We agree with STAL that the focus following this investigation should be to improve staffing resilience planning and ATC capacity provision in the LAS. This is the best way to ensure that any significant differences in treatment are reduced and minimise the risk that new allegations of undue discrimination arise again in the future. However, on the basis of the evidence presented, we do not consider that we need to change our Draft Decision findings in this regard.

Overall conclusion on contravention findings

- 3.16 As set out in the Final Decision, following careful consideration of the responses of stakeholders and noting the diverse spectrum of views from a range of positions, the CAA considers that on balance its Draft Decision was proportionate and correct in its findings. It appears to us that if NERL plans for an adequate level of staffing resilience in the London Approach Service and continues to make progress on airspace capacity projects that are in motion, it will mitigate the risk that staffing, capacity and discrimination issues, like the ones raised by the complainants, will occur in the future.

Chapter 4

Enforcement, recommendations and monitoring

- 4.1 In this chapter, we consider the responses we received to our Draft Decision not to take enforcement action. We also consider the recommendations that should be made in the context of this investigation as well as the additional monitoring that is warranted.
- 4.2 The statutory thresholds for regulatory intervention by the CAA are set out in Chapter 2 of the Final Decision.

The need to take enforcement action

- 4.3 As set out in the Draft Decision, we provisionally found that NERL was in breach of its duties under ss.8(1)(c) and 8(1)(d) TA00 and Licence Condition 5.2 in respect of the provision of sufficient staffing resilience in the LAS to users of Stansted and Luton during the Relevant Period. The TA00 gives the CAA powers to issue final or provisional orders in respect of current and likely future contraventions. Given the current pandemic and the resulting dramatic drop in demand for air traffic services, we concluded that there is no current contravention and, in the light of the reduced traffic levels as a result of the Covid-19 pandemic and the uncertainty as to when travel restrictions will be lifted and consumer confidence will restore traffic to pre-pandemic levels, we cannot say that a future contravention is likely in the near future. As such, we indicated that we did not expect to be in a position to take formal enforcement action against NERL.

Stakeholders' views

- 4.4 STAL considered the Draft Decision was lenient on NERL for a number of reasons, including because of the proposal not to take formal enforcement action under the TA00.⁴⁵ STAL disagreed with our proposed action on the basis that NERL has had over three years since the Oberon Report was published to remedy the staffing resilience issue. STAL considers that Stansted and Luton services continued to be under-resourced and there would continue to be a “likely future” breach of NERL’s Licence and/or TA00 until the issue is remedied in a sustainable, long-term manner sufficient to deal with pre-covid-19 levels of traffic.⁴⁶
- 4.5 Ryanair’s response said:

⁴⁵ Paragraph 4(i) of STAL’s response to the Draft Decision.

⁴⁶ Paragraph 18 of STAL’s response to the Draft Decision.

- that the Draft Decision demonstrated that the concerns identified in the Oberon Report had worsened;
- the Oberon recommendations were insufficient;
- NERL had failed to provide sufficient staffing resilience;
- NERL’s failings are “persistent and significant”;
- NERL had no credible plans to address the failings until 2023; and
- traffic would not need to regain 2019 levels for several areas to experience congestion.⁴⁷

Ryanair agreed that there was no current breach under s.8(1)(c) TA or Condition 5.2 of the Licence,⁴⁸ but considered that NERL was “very likely” to contravene s.8(1)(c) TA00 and Condition 5.2 when demand recovered.⁴⁹ Ryanair said that there is no requirement for a “likely” contravention under s.20 TA00 to be imminent.

4.6 It agreed with the Draft Decision that NERL was in breach of s.8(1)(d) during the Relevant Period⁵⁰, but submitted that, despite the impact and uncertainty of covid-19, the lack of any credible plan⁵¹ to address its staffing shortfalls when normal demand returns meant that NERL continued to be in breach of its duty to anticipate future demand.⁵² Ryanair considered that rather than a reason not to take enforcement action, the reduction in demand by covid-19 is all the more reason to require NERL to take action now.⁵³

4.7 Ryanair said that for the reasons set out in its response and summarised above, the CAA has a duty to take enforcement under s.20(1) or alternatively under s.20(2)⁵⁴, and that the CAA is not “*relieved from its statutory obligation to take enforcement action*” because it cannot say with exact certainty when demand will recover.⁵⁵ Ryanair suggested that if the CAA failed to take any formal enforcement action, given the points noted above, this would be unlawful, irrational and would ignore relevant factors regarding the likely recovery of demand, the impact of covid-19 on staffing issues in the long-term and the

⁴⁷ Paragraphs 1b, 1c and 1f of Ryanair’s response to Draft Decision.

⁴⁸ Paragraph 24 of Ryanair’s response to Draft Decision.

⁴⁹ Paragraphs 1d, 25 and 29a of Ryanair’s response to Draft Decision.

⁵⁰ Paragraph 27 of Ryanair’s response to Draft Decision.

⁵¹ Paragraph 1i of Ryanair’s response to Draft Decision.

⁵² Paragraphs 1j, 27, 29b of Ryanair’s response to Draft Decision.

⁵³ Paragraph 1f of Ryanair’s response to Draft Decision.

⁵⁴ Paragraphs 1d, 28 and 30 of Ryanair’s response to Draft Decision.

⁵⁵ Paragraphs 1e and 26 of Ryanair’s response to Draft Decision.

likelihood of NERL failing to meet its obligations if traffic recovers to 2016 levels only.⁵⁶

- 4.8 By contrast, both NERL and Prospect agreed with our Draft Decision not to take enforcement action. Prospect also suggested we should stipulate recommendations as we did in the Oberon decision.

CAA's way forward

- 4.9 We disagree with STAL's suggestion that the Draft Decision was lenient on NERL because of the provisional decision not to take formal enforcement action. While we agree that the Oberon recommendations and the actions NERL took were not sufficient to prevent further material issues arising regarding NERL's performance and staff resourcing,⁵⁷ our Draft Decision concluded that NERL implemented all 23 items on its action plan and followed all of the Oberon recommendations. This suggests that our focus should be on developing an effective set of recommendations helping to drive appropriate change in the future, rather than attempting to take formal enforcement action in respect of historical failings. These recommendations should require that NERL engages and provides meaningful comfort to stakeholders on how it is addressing performance issues and delivering change. We are therefore grateful for the comments we have received on the proposed recommendations in the Draft Decision and we consider these in the section below.
- 4.10 As noted above, we agree with Ryanair that the Oberon recommendations and the actions NERL took were not sufficient to prevent further material issues arising. We also agree with Ryanair's view that while the evidence available to us pointed to "persistent and significant" failings in NERL's historical performance with respect to staffing resilience for the Stansted and Luton approaches, there is no current breach under s.8(1)(c) TA00 or Condition 5.2 of the Licence.
- 4.11 However, we disagree with STAL and Ryanair on there being a "likely" future breach. We do not concur with:
- STAL's suggestion that there continues to be a "likely future" breach;
 - Ryanair's interpretation of the word "likely" in s.20 TA00;
 - Ryanair's suggestion that a breach of s.8(1)(c) is "very likely"; and
 - Ryanair's claim that there is a current breach of s.8(1)(d) TA00.
- 4.12 As explained in the Final Decision⁵⁸, there is no definition of the word "likely" in relation to either s.20(1) or s.20(2) of the TA00, which should be construed

⁵⁶ Paragraphs 1e, 1f, 1g and 30 of Ryanair's response to Draft Decision.

⁵⁷ Paragraph 11 of Draft Decision. www.caa.co.uk/cap1943

⁵⁸ Paragraph 44 of the Final Decision

according to its ordinary meaning with regard to its purpose and context. The grammatical meaning of “likely” indicates that there should be a good chance of an event happening; that it should be “probable” or “expected”. In legal terms, “likely” is often referred to something being more probable than not on the balance of probabilities (i.e. more than 50%). It also suggests that the event should be proximate within a reasonable timescale. Since the end of the Relevant Period, demand for air travel and NERL’s air traffic services has fallen very significantly because of the impact of the covid-19 pandemic and the timing, extent or shape of the recovery remains uncertain. For example, in January 2021, the number of flight arrivals and departures at UK airports remain over 70% lower than in same period in 2020. The recovery will depend on a number of unknown factors, including the success and timing of the vaccine program, possible future mutations of the virus and the transmission rate, as well as economic recovery and consumer confidence.

- 4.13 In the Final Decision, the CAA has confirmed its finding of a past contravention by NERL in relation to staffing resilience. As s.20(1) and s.20(2) TA00 set out the CAA’s power to take enforcement action in relation to present and future breaches only (the TA00 does not refer to past breaches), the CAA disagrees with Ryanair’s contention that it is under a duty to take formal enforcement action in these circumstances. Even if it has an implied discretion as to whether to commence enforcement, that discretion involves policy choices regarding the best allocation of its limited resources and the need for and likely outcome of any such action compared to other competing administrative priorities. There is currently no clear shortfall between staffing resources and demand, and we do not have firm evidence on the likely timing, extent or shape of the recovery of air traffic levels in order to properly assess whether a future breach is likely. While it is clear NERL needs to address the difficulties it has experienced with capacity and operational staffing and to prevent such problems reoccurring in the near future, it remains unclear as to the precise steps NERL should take in respect of these matters. As a result of these uncertainties, the CAA is also not in a position to set out specific achievable obligations on NERL. Instead, in the Final Decision, we have proposed recommendations which are designed to encourage NERL to improve its future performance and enable the CAA to monitor and adjust those requirements as the situation evolves. We emphasise our view that this should be a focus for NERL.

Recommendations and monitoring

- 4.14 In the Draft Decision, we said we were minded to require NERL to report to the CAA and interested parties in this investigation, by the middle of 2021 and then on a six monthly basis on the progress that it is making with respect to all of the findings in an open and transparent way. We also said we were minded to continue requiring that NERL publishes data on its performance as required by

the data provision in NERL's Service Standards Statement produced under Condition 11 of its Licence (which includes the data provided in the Oberon Indicators report) over the RP3 period to assist in the continued monitoring of its performance. Finally, we noted that NERL should also consider how best to provide any further contextual background information and data to ensure that its operations and plans are properly and reasonably transparent to all stakeholders.⁵⁹

Stakeholders' views

- 4.15 NERL noted the CAA's recommendations but it disagreed with the findings that underpinned them.
- 4.16 Ryanair submitted that the CAA, in its final decision, should require NERL to, among other things, do the following:
- immediately adopt PRC best coding practices;
 - immediately roll out the rostering tool;
 - begin attributing staffing-related delays to shortages against actual demand;
 - begin sharing dynamic Sector Opening Times with Eurocontrol;
 - 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; and
 - 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.
- 4.17 Ryanair considered the above 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.
- 4.18 STAL said it was in principle willing to provide NERL with a further opportunity to remedy issues identified in the Draft Decision if such remedial action is achieved in advance of traffic recovering to the extent where it becomes a resilience issue. In that context, STAL considered that holding NERL accountable through timely and transparent progress reporting against an appropriate measurable timescale is of vital importance.

⁵⁹ Paragraph 54 of the Draft Decision. www.caa.co.uk/cap1943

- 4.19 Noting that in the Draft Decision we indicated that we were *minded* to require NERL to report “*by the middle of 2021 and then on a six-monthly basis*” on progress, STAL considered this reporting to be essential and encouraged the CAA to look at more frequent reporting such as quarterly – with a detailed plan required within three months of the Final Decision setting out how the issues will be remediated, the timescale for such remedies and how this would be mapped to meet any recovery profile (with NERL initially adopting an optimistic view of recovery to ensure it is not caught out by quicker than anticipated recovery).
- 4.20 Furthermore, as the traffic recovery becomes clearer and it is possible to predict the timescale of recovery with more accuracy, STAL said it would wish for NERL to continually update the remedial progress timescales to ensure it remains on course to resolve issues by the time traffic recovers.
- 4.21 STAL said that it would be important for Project Palamon not to be considered closed by covid-19 and the temporary traffic reduction acting as a ‘get-out-of-jail-free’ card for NERL. In its view, should NERL fail to remedy these long-standing issues leading to significant delays again re-occurring, STAL does not wish to be in the position where it must raise another formal, further complaint in the same way the parties have done with Project Palamon following Oberon. Rather, STAL considered that the CAA should adopt a position which now allows NERL time to remedy the issues as outlined above but should they fail to do so:
- move straight to formal enforcement measures on staffing resilience; and / or
 - a finding of Licence or TA00 breach on airspace capacity management – without the need to conduct a further full investigation.
- 4.22 Prospect suggested that the CAA should ask NERL to produce a ‘workforce plan’ with a granular level of detail on how it intends to staff its way out of the current problem. It has also suggested linking the recommendations around increasing NERL’s transparency to interested stakeholders with the production of such plan.⁶⁰

CAA’s way forward

- 4.23 The CAA is disappointed that NERL has not proposed any positive input to improve the recommendations in the Palamon Draft Decision nor has it attempted to give undertakings on the issues identified by the CAA’s provisional findings. That is reminiscent of its approach in the Oberon investigation, where the recommendations and action plan turned out to be sub-optimal. Bearing those issues in mind and the comments of other respondents we have strengthened our recommendations in the Final Decision so that NERL is going

⁶⁰ Prospect’s response to the Draft Decision, page 7.

to be required to produce a resilience plan for consultation with stakeholders that is capable of addressing the issues identified in our Final Decision. NERL will then be required to report on implementation against that plan.

4.24 Therefore, having considered the responses to the consultation, and agreeing with the sentiment of the responses that further monitoring of NERL's performance in this regard is reasonable and warranted, in addition to Recommendation 1, (in Chapter 1), Recommendations 2 and 3 (in Chapter 2) and Recommendation 4 and 5 (in Chapter 5), we have further decided to make Recommendations 6 and 7 (below) in the Final Decision to:

- aid the continued monitoring of NERL's performance in the LAS; and
- to secure the implementation and monitoring of the actions needed to improve the resilience of its services.

Recommendation 6

NERL should continue making data available to the CAA, airports and airspace users, on its performance as required by NERL's Service Standards Statement under Condition 11 of its Licence (which includes the data provided in the Oberon Indicators report) at least until the end of 2025 to assist in the continued monitoring of its performance.

Recommendation 7

NERL should report to the CAA and interested parties in this investigation, within 6 months of this decision and then on a six-monthly basis until the end of 2025 on the progress that it is making, in an open and transparent way, with respect to:

- addressing any staffing resilience difficulties identified in the London Approach Service, including by making staffing arrangements more efficient and agile, as per Recommendation 1;
- the delivery and implementation of AD6 or other projects that increase ATC capacity in Essex airspace;
- the provision of dynamic sector opening times to the satisfaction of Eurocontrol; and
- its implementation of PRC principles when coding of ATFM delays; and
- the roll out of its new rostering tool, if that has not yet been achieved.

NERL should provide within 6 months of this decision a detailed update of its staffing resilience plan (included in the overall resilience plan that NERL submits to the CAA under Condition 2 of its Licence), setting out:

- how the staffing issues in the London Approach Service will be addressed,
- the timescale for such; and
- how this will be mapped to be able to meet a range of demand scenarios, including a reasonably optimistic recovery profile from covid-19.

NERL should also set out how it will avoid similar difficult issues with staffing levels in other sectors. NERL should consult interested parties on this plan and respond to any concerns raised. This detailed staffing resilience plan should then be refreshed annually up to and including 2025 and thereafter in line with the regular reviews of the overall resilience plan.

This plan and the reporting above should include a transparent and granular account of any staffing resilience risks in the provision of the LAS and how they are being addressed, as well as the timescale for doing so. It should also include information similar to that provided in Figures 6.9 and 6.10 of the Final Decision on how rosterable ATCO supply compares to demand on a forward-looking basis to each of the 5 main London approach services, and the main drivers/assumptions underpinning those forecasts. NERL should keep the key aspects of this plan under review to ensure that the plan will remain fully effective as circumstances change.

Chapter 5

Other issues raised in the consultation

5.1 This chapter deals with respondents' views and our response on three broad issues:

- coding and sector opening times;
- NERL's implementation of the recommendations made as part of the Oberon investigation; and
- certain procedural matters.

Coding and Sector Opening Times

5.2 In Chapter 5 of our Draft Decision we considered the coding of delay in the LAS, particularly whether a) coding had been wrong or misleading or b) improvements in accuracy and transparency of the coding process were warranted.

5.3 On the accuracy issue we engaged ECTL-PRU to produce a report for us due to its expertise in this area. Its report underpinned our findings and recommendations for improvements on coding and sector opening times.

5.4 We have found that NERL's coding of delay was consistent with current Eurocontrol guidelines and the approach adopted by other ANSPs in Europe, but that current coding guidelines are not very prescriptive. We considered that NERL should adopt best practice coding principles recommended by the PRC unless NERL could demonstrate to the CAA an important operational reason not to adopt them.

5.5 In relation to this issue, we focussed on delays that were NERL-attributable.

Stakeholders' views

5.6 NERL noted it would be happy to adopt any new principles or guidelines given to it by Eurocontrol for delay coding. However, it is likely that this would only be beneficial if applied to all ANSPs, so as to facilitate data and performance comparison across Flight Information Regions (FIRs).

5.7 NERL said that it has always engaged with Eurocontrol, including in relation to coding of any regulations and that it follows the Eurocontrol process and will continue to do so. NERL said that it provides dynamic sector opening times to the Eurocontrol Network Manager since October 2018. However, it noted that "this does not include sector opening times for Terminal approach sectors (such as Essex) as the Eurocontrol system does not accept them".

- 5.8 In its response to the Draft Decision, Ryanair considered that NERL's coding practices misled stakeholders and that this should concern the CAA. It was of the view that NERL should follow coding best practice, which would be to adopt PRC coding principles. Ryanair considered that NERL should use the time of current low traffic caused by covid-19 to review internal procedures, start applying best practices and begin sharing dynamic sector opening times with Eurocontrol.
- 5.9 Ryanair raised concerns about NERL's internal guidance on coding and how NERL planned sector configuration is determined by NERL, meaning it may itself be inadequate to meet airspace demand. Ryanair considered that the Draft ECTL-PRU report had not linked the publication of NERL's internal guidance with a) a marked decrease in delays attributed to staffing and b) a marked increase in delays attributed to capacity. Specifically, many delays that would have previously been attributed to staffing, were being attributed to capacity from April 2017.
- 5.10 Ryanair said it was unclear why the Draft Decision did not conclude that capacity coding had been used to conceal staffing issues. Ryanair was of the view that the CAA's further investigation set out in Appendix E of the Draft Decision was limited in scope as it covered only four months in 2018 and that the same analysis should be applied to the whole of 2018.
- 5.11 Ryanair also considered that NERL measuring delay against planned sector configurations rather than traffic demand was misleading and had potentially misleading consequences:
- persistent staffing shortfalls could be factored into the plan, and staffing would not be the coded cause of delay;
 - ATC staffing delays have an asymmetric cost. Staffing costs when adequate are passed on to airspace users by the ANSP. When staffing is inadequate, airspace users bear the costs, and the ANSP has the benefit of lower salary costs. The PRC coding principles would address this;
 - NERL's revised internal guidance obscured independent analysis and oversight.
- 5.12 Ryanair considered that the CAA has disregarded Ryanair's request and ECTL-PRU's recommendations that:
- the PRC's principles for ATFM delay attribution should be incorporated into NERL's internal guidance;
 - the amended delay attribution processes should be made mandatory with breaches subject to sanction; and
 - the CAA should introduce a robust and independent verification process for ATFM delay attribution without delay.

- 5.13 Ryanair noted that it had previously asked the CAA in July 2019 to investigate some areas of misleading delay attribution identified in the ECTL-PRU report. Ryanair considered that the CAA should strengthen its draft recommendation on NERL providing sector opening times to the Network Manager. Ryanair considered that NERL should fully disclose its use of short term ATFM measures (STAMs) to the ECTL-PRU.
- 5.14 Ryanair was concerned that ECTL-PRU and the CAA did not take further steps to interrogate the reasons given for the allocation of regulations by NERL. Ryanair considered that there is a disconnect between the figures given in the ECTL-PRU report for the UK's growth in traffic in 2018 (0.9% increase in average daily flights in the UK, and 0.7% in London) and the increase in delay in the same period (70% and 158% respectively).
- 5.15 Ryanair stated that conjoint airspace was a new term for its Operations Team who are extremely familiar with air traffic control concepts. Ryanair considered that the practice of NERL to report "conjoint airspace" as "collapsed sectors" was a concerning illustration of NERL's lack of transparency, rather than, as NERL claims, a technical problem with the reporting system. Ryanair noted that this miscoding was unknown to the CAA, which, in its view, demonstrates a lack of adequate regulatory oversight. Ryanair further considered that the CAA should investigate the significant increase in delays in "conjoint airspace" and "collapsed sectors".
- 5.16 Ryanair considered that the CAA should:
- make a provisional or final order to enforce compliance by NERL with the PRC's coding principles;
 - make reporting Sector Opening Times mandatory; and
 - consider and explain in the Final Decision whether it is necessary to report NERL's shortcomings in this area to the Network Manager.
- 5.17 STAL agreed with the recommendations on coding principles, sector opening times and engagement with Eurocontrol set out in paragraph 51 of the Draft Decision.

CAA's way forward

- 5.18 We note Ryanair's comments in its response to the Draft Decision. We do not consider, however, that we should prioritise further investigation of the causes of delay in 2018. Instead, it is our view that Recommendation 4 and Recommendation 5 on the coding of delays and sector opening times in the Final Decision will improve transparency on the underlying causes of delays in the future. We consider that these Recommendations will appropriately address the

relevant concerns in relation to the coding of delays and sector opening times raised by Ryanair during the investigation and in response to the Draft Decision.

Recommendation 4

We recommend that NERL adopts the PRC coding principles* unless NERL can demonstrate to the CAA a material operational reason not to adopt the PRC best practice principles.

* PRC coding principles are defined in paragraph 5.14 of the Final Decision.

Recommendation 5

NERL should provide dynamic Sector Opening Times to Eurocontrol's Network Manager (NM) as soon as practically possible. In the meantime, NERL should provide Sector Opening Times information to the NM manually, while a system to provide dynamic sector opening times is being developed.

NERL should also update the CAA and stakeholders on progress and on when it expects a system to provide dynamic sector opening times to be operational. NERL should continue engaging with Eurocontrol, as NM, to ensure there is greater clarity on how NERL operates and that the data it submits to the NM is clear and accessible.

- 5.19 We concur with Ryanair that NERL's internal coding guidance can be inconsistent with the PRC principles and that it should change to more closely align with them. The introduction of PRC principles and sector opening times data (as recommended above) would better allow for external independent assessment of the coding of delays.
- 5.20 We consider that the use of STAMs and practices leading to the operation of conjoint airspace are capable of improving the efficiency of the service that NERL's customers receive. For example, the use of STAMs can avoid the introduction of more restrictive ATFM regulations. NERL publishes STAM information on NERL's quarterly Operational Performance Report, produced under Condition 11 of NERL's Licence, which is available to airspace users. On conjoint airspace, it is important that NERL is transparent on such arrangements so they can be factored in the analysis of ATFM delays. Eurocontrol is aware of these operational matters. That said, the most important aspect is that delays in this airspace – regardless of whether they are capacity or staffing delays – are addressed before the time traffic substantially recovers by a combination of airspace redesign (such as AD6, which may impact on the operation of conjoint airspace) and/or better staffing deployment.

- 5.21 NERL suggested that it would only be beneficial to adopt PRC coding principles if they are mandated by Eurocontrol across all other European countries to ensure comparability. It appears to us that the PRC and Eurocontrol more generally are already encouraging all ANSPs to use these principles and that it is important that PRC coding principles are used without delay by NERL, even if not all other ANSPs do the same.
- 5.22 In this regard, we note that a recent technical note by ECTL-PRU⁶¹ on the “ten most constraining ACCs” in Europe (which did not include NERL) has looked at retrospectively reallocating delay causes using available data and best practice coding principles.⁶² In many instances it found that coding delays to ATC Staffing instead of ATC Capacity and other causes, such as weather, would have been more appropriate.
- 5.23 As such we consider that the benefits of our recommendations to transparency and for the better understanding of the constraints faced by ANSPs outweigh any possible loss of comparability arising from delays in other ANSPs adopting best practice coding principles. Also, data analysis (particularly where there is transparency on sector opening times) may still allow for meaningful comparisons to be made with other ANSPs.
- 5.24 The comment that NERL makes on Eurocontrol not taking certain dynamic sector opening time data is one we do not recognise. From our discussions with Eurocontrol and the ECTL-PRU report, it was clear to us that Eurocontrol was not satisfied with the level of sector opening time data it received from NERL. NERL has not yet provided us with sufficient evidence that this issue has been addressed to Eurocontrol’s satisfaction.
- 5.25 We note STAL’s comments on the coding of delays.

Oberon recommendations

- 5.26 In Chapter 4 of our Draft Decision we set out the Oberon recommendations from the Oberon report⁶³ and made some provisional conclusions on NERL’s implementation of the Oberon recommendations.

Stakeholders’ views

- 5.27 NERL welcomed and agreed with the CAA's provisional findings that, contrary to the complaints by Ryanair and STAL, NERL implemented all of the CAA's

⁶¹ ECTL-PRU, Technical note on en route capacity, available at: <https://www.eurocontrol.int/publication/technical-note-en-route-capacity>

⁶² see Figure 4 and, for example, Figure 8 of the technical note, available at: <https://www.eurocontrol.int/publication/technical-note-en-route-capacity>

⁶³ CAP1578: Investigation under section 34 of the Transport Act 2002: Project Oberon Final Report - Non-Confidential August 2017, paragraph 1.14 www.caa.co.uk/CAP1578

recommendations in the Oberon final report and fully implemented the Oberon action plan.

- 5.28 NERL considered that it had also put considerable effort into developing the resilience plan, increasing ATCO recruitment and training materially to maximum capacity until the start of the pandemic.
- 5.29 NERL noted that the Draft Decision found that these steps had not been sufficient to overcome the long-standing (and purportedly foreseeable) issues with staffing resilience in Essex airspace. NERL considered that its ability to address these issues was as constrained during the Relevant Period, as it was at the time of the Oberon decision.
- 5.30 NERL said that there had been insufficient time between the actions it took to address the problems investigated in the Oberon investigation and the events that led to the provisional finding of breach in Palamon for the actions it took to be fully effective.
- 5.31 Ryanair considered that the Oberon recommendations had been insufficient to ensure an adequate service in Essex airspace.
- 5.32 STAL considered that the Oberon recommendations have failed to remedy the staffing resilience issues, despite being largely implemented. Therefore, the Palamon recommendations need to include more frequent and more measurable monitoring.
- 5.33 STAL considered that, given the actions taken by NERL following Project Oberon had failed to improve resilience, and due to the ATCO levels for the Stansted and Luton remaining below optimum levels, it agreed with the CAA's provisional finding that "the evidence points to persistent and significant failings in NERL's historical performance with respect to staffing resilience for the Stansted and Luton approaches".⁶⁴
- 5.34 Prospect said that the actions taken by NERL following Oberon demonstrates that NERL was aware of its ongoing resourcing difficulties and that the CAA should make further recommendations to ensure that NERL rectifies these matters.

CAA's way forward

- 5.35 We note the points raised by the parties and consider that the recommendations that we have set out in the Final Decision build upon the Oberon recommendations. Our intention is that NERL will take appropriate steps to rectify the difficulties that led to the Palamon investigation. These recommendations will work best if NERL, Ryanair and STAL engage and work

⁶⁴ Para 6.50 of the Draft Decision. www.caa.co.uk/cap1943

together constructively on issues that may emerge in the future. We also consider that the continued monitoring of performance in the LAS and that the Palamon recommendations aimed at improving resilience in the LAS are warranted.

Procedural issues

5.36 Stakeholders have made a number of representations on procedural matters relating to the investigation. This section summarises these issues, and our views.

Stakeholders' views

5.37 Ryanair's response contained various claims against the CAA that it has suffered procedural unfairness during the course of this investigation. These are not new issues and have been the focus of extensive correspondence between the CAA and Ryanair.

5.38 NERL raised concerns regarding the period in scope of the investigation. In its response to the Draft Decision, NERL stated that it had not been formally notified of the extension of scope of the Palamon investigation to include the period in which NERL was provisionally found to be in breach of its duties under ss. 8(1)(c) and 8(1)(d) TA00 and Licence Condition 5.2 in respect of the provision of sufficient staffing resilience in the LAS to users of Stansted and Luton by the CAA.

5.39 Ryanair also raised concerns about reimbursement of delay costs. It noted in its response that it has incurred considerable costs as a result of NERL's persistent failings, particularly under EC Regulation No. 261/2004, that trigger airline compensation to passengers for flight delay in some circumstances. It considers that NERL must be held accountable for those costs and urged the CAA to order NERL to calculate the losses borne by users of Stansted and devise a mechanism for reimbursement. Ryanair suggested that NERL should begin to deduct that sum from airline user charges in 2021 and make a donation to a relevant consumer association. Ryanair also considered that a significant reduction in its charges for airlines going forward was warranted.⁶⁵

CAA's way forward

5.40 The CAA maintains that Ryanair's rights to procedural fairness as a complainant have been fully respected in this investigation. This is not an adversarial process but an investigative one, where the CAA is doing its best to accommodate the interests of all parties. The CAA repeats its position that:

⁶⁵ Paragraphs 32, 37 and 116(f) of Ryanair's response to the Draft Decision.

- Ryanair's interests and procedural rights are not as extensive as those of NERL, which is the entity accused of contraventions and the subject of the investigation; and
- Ryanair has been treated no differently to the other complainant, STAL.

- 5.41 With regard to NERL's concerns regarding the period in scope of the investigation⁶⁶ was set out at an early stage of the investigation by the CAA and sent to the parties for consultation in December 2018. The CAA considered whether the scope needed to be amended following receipt of STAL's formal complaint but considered that the issues raised by STAL could be covered by the original scope.
- 5.42 The investigation was not limited to a set time period. During the investigation the CAA sought evidence from NERL in relation to delays in 2019 and NERL provided the requested information to the CAA without raising any concerns that 2019 was out of scope or as to the scope of the investigation generally.
- 5.43 Bearing the above in mind, we do not agree that NERL was not aware that the CAA was considering as part of its investigation delays that occurred in 2019. Our Draft Decision has also provided NERL with an opportunity to comment on all aspects of the investigation and if appropriate provide additional evidence, including in relation to its conduct and performance in 2019.
- 5.44 With regard to Ryanair's concerns on reimbursement of delay costs, we note that under s.34 TA00, the CAA is obliged to investigate if a person who appears to have an interest makes a representation in relation to an alleged or apprehended contravention of a s.8 duty or Licence condition. As set out in Chapter 3 of the Final Decision we have taken account of the costs to airlines and consumers of the disruption caused by NERL's performance.
- 5.45 If Ryanair wants to make wider representations about the functioning of the regulatory regime for NERL, including the price controls and incentives for quality of service then it can do so as part of the process for review NERL's RP3 price control (which we will consult on during 2021).

⁶⁶ Can be seen in full at para 1.20 of the Draft Decision. www.caa.co.uk/cap1943

APPENDIX A

Abbreviations

Abbreviations	
ACCs	Area Control Centres
ACOG	Airspace Change Organising Group
ANSP	Air Navigation Service Provider
ASMA	Arrival and Sequencing Metering Area
ATC	Air Traffic Control
ATCO	Air Traffic Control Officer
ATFM	Air Traffic Flow Management
CAA	Civil Aviation Authority
ETCL	EUROCONTROL
FIR	Flight Information Region
IRG	Industry Resilience Group
LAMP	London Airspace Management Programme
LAS	London Approach Service
NERL	NATS En-Route PLC
NM	Network Manager
PRC	Eurocontrol's Performance Review Commission
ECTL-PRU	EUROCONTROL's Performance Review Unit
Prospect	Prospect is a trade union representing approximately 3000 air traffic controllers, management specialists, and systems engineers in the UK.
RP2	second reference period
RP3	third reference period
Ryanair	Ryanair plc
STAL	Stansted Airport Ltd
STAM	short term traffic ATFM measures
STATFOR	The Statistics and Forecast Service, part of EUROCONTROL
TA00	Transport Act 2000