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19 October 2020

Dear Beryl,

Project Palamon: Investigation under s.34 of the Transport Act 2000

1. We write to provide our substantive feedback on the CAA's preliminary conclusions and recommendations set out in '*CAP1943 Project Palamon – Draft Decision*' ("**Draft Decision**").
2. Capitalised and *italicised* terms used in this letter are as established in the Draft Decision unless specified otherwise.

Summary:

3. We are grateful for the time the CAA has spent in investigating and addressing this matter, particularly given the significant challenges brought about by Covid-19.
4. We respectfully consider the Draft Decision lenient on NERL for a number of key reasons:
 - (i) **Staffing resilience:** The proposed lack of formal enforcement steps despite a serious finding of breach of Licence and statutory obligations.
 - (ii) **Airspace capacity:** The characterisation of the failure to remedy a known issue for over 14 years as a '*single lapse*' and at this stage not constituting a breach.
 - (iii) **Discrimination / Undue Preference:** The willingness to accept the operational differences between airports in conjunction with the NERL self-serving narrative on airspace change and resilience as justification for the long-term, persistent issues

faced by STAL in comparison to Heathrow and Gatwick. We consider the investigation may not have gone into the depth required on this point to truly interrogate whether long-term systemic discrimination / undue preference is a key factor in the issues arising and persisting.

5. However, despite the above, STAL's chief concern at the present time is to see the issues remediated in a timely and sustainable manner. Therefore, subject to the points below which are of crucial importance to STAL, we would not seek to take the matter any further at this time:

- 5.1 Firstly, it is crucial that NERL now takes the opportunity to remedy both the resilience and airspace capacity issues by the time air traffic returns to levels where they again begin to cause issue (whatever the traffic recovery profile may look like). Vital and central to this should be: (i) a clear, transparent and measurable remedial plan mapped against an optimistic traffic recovery profile (with the traffic recovery continually monitored against the plan to check whether it remains on course); and (ii) frequent, transparent and timely reporting to both the CAA and the complainant parties and close monitoring by the CAA.

- 5.2 Secondly, serious findings have been made against NERL – a breach of Licence / statutory obligations in respect of staffing resilience and serious shortcomings in their management of airspace capacity. These will remain 'live' issues until adequately remedied in a sustainable manner. Therefore we consider that the Palamon findings should remain open until they are resolved – by which we mean that if NERL fail to now take the opportunity to remedy those issues satisfactorily, it is not required that STAL launch another further costly and time-consuming complaint, but rather that the CAA continue to scrutinise NERL's performance and if appropriate: (i) move straight to formal enforcement on staffing resilience; and/or (ii) a finding of breach on airspace capacity management.

6. We are happy to discuss the content of this response with the CAA or provide any further information should such be useful.

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¹ CAP1943 "Summary of the CAA's Provisional Conclusions" – [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Staffing Resilience (Chapter 6):

Provisional Conclusions:

12. We note that on staffing resilience issues, the CAA recognises that the actions taken by NERL following Project Oberon “*have failed to improve resilience on a consistent and sustained basis*”⁴ and that ATCO levels for the Stansted and Luton approaches remain below the optimum levels and indeed below even 2016 levels which “*were already inadequate to meet the lower levels of demand at that time*”⁵.
13. We further note the CAA identifies that the underlying reasons and evidence provided by NERL for the staffing resilience issues “*appear relatively long-standing and reasonably foreseeable issues that should be built into effective resource planning*”⁶ and that NERL has failed to present a recovery plan that can credibly demonstrate closing the resilience issues demand gap for non-Heathrow airports in the near future - indeed, the CAA notes that absent Covid-19, the issues would have continued until “*at least 2023*”⁷.
14. In light of the above, we agree with the CAA where it states 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*”⁸. These failings being the basis of our complaints to the CAA in 2016 (Oberon) and more recently in 2019 (Palamon).
15. Given that Project Oberon identified over three years ago there were significant staffing resilience issues that needed addressing (with at that time it being a “*finely balanced decision*” as to whether NERL were in breach of Licence / TA00), we consider it now unavoidable that the CAA must reach the conclusions set out at para 57 of the Draft

⁴ para 6.49

⁵ para 6.49

⁶ para 6.50

⁷ para 6.52

⁸ para 6.52

Decision, being that NERL has contravened its obligations under sections 8(1)(c) and 8(1)(d) of the TA00 and 5.2 of the Licence.

Remedy and enforcement

16. Despite the above findings, we note that the CAA does not intend to take any enforcement action at this time on the basis that taking such steps is limited to where there is a “*current and / or likely future*” breach and here it considers the contraventions to be historic, being between the period of January 2019 and March 2020 (referred to in the Draft Decision as the ‘Relevant Period’).
17. The CAA considers that the reduction in air traffic caused by Covid-19 means that there is no ‘current’ contravention and that the term ‘likely future’ indicates there must be a more probable than not (i.e. more than 50%) chance of contravention within a “*reasonable timescale*”⁹ - this is not defined or expanded on as a timescale, rather the CAA simply noting that it “*cannot now say that a future contravention is likely due to the dramatic drop in demand as a result of Covid-19. We do not have firm evidence on the likely timing or shape of the recovery in air traffic. As such, the CAA does not consider it is appropriate to adopt formal enforcement measures when there is currently no clear shortfall between staffing resources and demand*”¹⁰.
18. We disagree with this reasoning for a lack of enforcement. As highlighted in the Draft Decision, NERL has had over three years to remedy this staffing resilience issue since Project Oberon and has failed to do so - such being, in the words of the CAA, a ‘persistent and significant failing’. Project Palamon clearly evidences that the Stansted and Luton services continue to be under-resourced and we therefore consider that until this issue is remedied in a sustainable, long-term manner that can handle pre-Covid levels of traffic, there inevitably continues to be a ‘likely future’ breach of Licence and / or TA00.
19. However, at present the chief concern of STAL is to see that NERL do now remedy this longstanding issue expediently and sustainably prior to traffic volumes returning to the

⁹ para 45 (page 19)

¹⁰ para 45 (page 19)

extent where it is again causing problems. Therefore, provided this is achieved, STAL would not seek to push for formal enforcement action on this point at this time.

20. In light of the breach finding, the CAA needs to assure itself that it has taken all reasonable steps to ensure that the issues do not re-emerge as traffic levels recover, as such may trigger the need for STAL and impacted airlines to take up a third complaint against NERL, which we do not consider would be in the interests of any party given the time, cost and resource associated with making and investigating such complaints. It must therefore be the case that the CAA requires NERL to transparently map, progress report and implement remedial actions in a formalised manner, not just to the CAA but to the complainants also. Close monitoring and measurable progress reporting is of particular importance given the remedial actions identified by Project Oberon appear to have failed to remedy the staffing resilience issues (as we understand from the Draft Decision that the Oberon actions were actually largely implemented). We therefore consider closer, more frequent and more measurable monitoring is required on this occasion to ensure a sustainable solution is identified and implemented.
21. In taking the above steps, it must also be continually monitored as to whether it appears NERL are on course to resolve the staffing resilience issue by the time that traffic recovers to pre-Covid levels - a timescale which should become clearer in time, but NERL should start with an optimistic outlook on traffic recovery to ensure it does not get caught out by quicker than anticipated recovery. Should it then become apparent that NERL have fallen behind on that measurement, it would be difficult to then avoid the conclusion that there is a '*likely future*' breach - and enforcement measures should be brought back into consideration.
22. In this way, the Project Palamon finding on contravention of Licence and TA00 would not be confined simply to the Relevant Period but rather would, in principle, operate in a similar manner to a deferred prosecution agreement – i.e. the CAA has made a formal finding of a breach but will not take enforcement steps in respect of that breach provided that NERL remedy the issue within the period afforded by the traffic reduction resulting from Covid-19.

ATC Capacity Issues (Chapter 7):

History of airspace change initiatives relevant to Essex airspace (paras 7.13 – 7.22):

23. STAL rejects the narrative NERL seeks to portray through these paragraphs. MAG / STAL have worked in a committed way with NERL over many years to deliver airspace change, not only for STN but also for the wider benefit of other airports/users in the South East. For example, STAL worked closely with NERL to deliver airspace changes as part of LAMP 1A that had no direct benefit to STAL or its users but was delivered (at a cost to STAL) to enable wider changes in the London system to be taken forward. This demonstrates a positive and constructive approach from STAL to working with NERL and other stakeholders, including the CAA.
24. At paras 7.14 and 7.15, NERL attempts to suggest that the reason it did not continue with the TC North design was due to STAL and the airlines allegedly failing to support it. STAL strongly disagrees with this. STAL did not support the specific solution that NERL identified because it did not provide an efficient airspace design for the airport and our users; we remained supportive of the need to improve airspace capacity. STAL's understanding is that NERL shutdown the TC North project because of a short-term downturn in traffic and the fact NERL were focusing on airspace improvements at Heathrow and Gatwick. If TC North had continued, it is considered likely a reasonable solution to reduce the impact on STAL would have been found.
25. At paras 7.16 and 7.17, NERL attempts to suggest that STAL is not supportive of AD6 and that such lack of support reduces the benefits and capacity that can be delivered. Again, STAL considers this to be misleading. The AD6 solution relies on moving the hold position for aircraft, inbound to Luton. Crucially the holding position for aircraft inbound to STAL remains unchanged and therefore, regardless of STAL's progress with implementing RNP routes at lower level, the LTN traffic is removed from the current arrival route thereby freeing up the airspace to be fully utilised by Stansted, realising the benefits. STAL has always supported AD6, continues to do so and is pursuing changes to lower level routes that are consistent with it. As STAL is making changes to all lower level arrival and departure routes, it is important that the package of change is considered as one consultation and engagement exercise, to allow stakeholders the opportunity for

meaningful engagement. This is the sole reason for STAL making its contribution to the broader airspace solution independently of AD6.

Provisional Conclusions:

26. As acknowledged in the Draft Decision, the need to modernise the Essex airspace to handle increasing demand was identified by 2006 at the latest, if not earlier¹¹.
27. Yet despite this being a known issue, following the failure of the TC North project in 2010 (for the reasons outlined above in this response), as the CAA notes, NERL did not take steps to remedy the issue until 2018 in the form of LAMP Phase 2 and AD6. This despite traffic in the meantime growing in line with the STRATFOR high case thereby making clear that action on airspace change would be needed sooner.
28. In light of the above, we agree with the CAA where it states, *“On balance, the evidence suggests that NERL did not reasonably anticipate demand growth or put in place timely capacity enhancing plans early enough¹²”*.
29. However, the CAA goes on to conclude that *“Whilst we consider the AD6 proposed change could have been initiated in a timelier manner, we note that a single lapse by NERL does not necessarily indicate a contravention of its statutory or licence duties¹³”*.
30. We make two points here.
31. Firstly, the CAA states that the AD6 change designed to remedy the capacity issue *“could”* have been brought forward sooner.
32. Under its obligations, NERL is required to (with *our emphasis*):

¹¹ para 7.14

¹² para 7.35

¹³ para 7.39

- (a) Under Licence Condition 2.1(a), make available the Core Services so as to be *capable of meeting on a continuing basis any reasonable level of overall demand* for such services;
- (b) Under TA00, 8.1(c), take *all reasonable steps to secure that the demand for authorised air traffic services in respect of a licensed area is met*;
- (c) Under TA00, 8.1(d), *have regard*, in providing, developing and maintaining the system, to the *demands which are likely to be placed on it in the future*.

33. Given the chronology of this issue – i.e. that it was known since 2006 if not earlier that once traffic volumes reached a certain level the airspace could not meet demand and yet despite this and despite traffic growing in line with projections (albeit the high case of such projections) the issue not being remedied in adequate time to meet that demand – we find it difficult to reconcile how NERL could be said to have met the above Licence and statutory duties in such circumstances and rather would consider not that AD6 “*could*” have been brought forward sooner, but that it quite clearly “*should*” have been brought forward sooner.

34. The second, linked, point on this preliminary conclusion is that the CAA characterises this as a “*single lapse*”. As already highlighted, this has been a known issue for 14+ years and hasn’t been addressed despite it having become quite clearly more and more pressing as years have passed and growth continued. In this context, we consider it extremely generous for the CAA to describe such as a ‘single lapse’. Rather it is a long-standing, continuous failure and oversight on the part of NERL.

35. We find it particularly troubling that the CAA on the one hand appears to rely, at least in part, on the NERL narrative of the chronology of failed airspace change (paras 7.13 to 7.22, addressed above) in concluding that there is no breach at this time¹⁴, yet on the other hand acknowledges that it has not properly investigated the veracity of that NERL narrative, noting at para 7.19 that it “*has not sought nor formed detailed views on the full historic facts on each airspace change project relevant to Essex airspace*”. Given the

¹⁴ e.g. CAA comments at para 7.35 noting that airspace change has not always been supported by all stakeholders and it therefore not being reasonable to hold NERL solely responsible.

nature of the complaint and the CAA's obligations, it is necessary for the CAA to reach firm views on these issues based on an effective review of the evidence.

36. In light of the above, we disagree with the CAA conclusion that there is no breach of Licence and / or TA00 in the circumstances as quite clearly NERL have not made available the Core Services so as to be able to meet a reasonable level of overall demand, have not taken all reasonable steps to secure that demand is met and have not had proper regard to the demands likely to be placed on the airspace in the future.
37. Again however, STAL's chief concern is to see the issue now remedied in an expedient manner and we acknowledge that steps are now being belatedly taken to do so. As such, STAL is not seeking to take this issue further at this stage on the basis that NERL is now required to ensure the issue is resolved through clear, transparent reporting and monitoring and in time to ensure it is no longer an issue by the time traffic recovers to pre-Covid levels.
38. Again, what STAL is particularly concerned about here is that this issue is not now considered investigated and closed - as even though it has stopped short of a contravention finding, the CAA has quite clearly identified serious shortcomings in NERL's compliance with its Licence and statutory obligations. Therefore, STAL is keen to avoid a situation whereby in e.g. two years' time it is necessary to make a further complaint should the issue still not be remedied (in the same way it has had to make the Palamon complaint following Oberon). Rather, NERL should be required to set out a clear plan and timescale to remedy the issue and, should it fail to adhere to that plan, it would become clear at that stage that NERL is in breach of Licence or statutory duty and formal enforcement action may thus be required.
39. As with staffing resilience, STAL would therefore wish to see the CAA adopt a position which doesn't treat Palamon as a closed investigation but rather sees the findings remain open with NERL given opportunity in the circumstances to remedy them, but should they fail to do so in an appropriate timescale planned against traffic recovery, then the CAA effectively picks the Palamon findings back up at that point and carries them through to breach / enforcement stages.

Undue Discrimination (Chapter 8):

Provisional Conclusion:

40. We are disappointed by the CAA preliminary conclusions in this area and respectfully consider that, whilst we acknowledge it is a challenging allegation to investigate and evidence, the investigation may not have gone far enough in considering this point.
41. We accept that there are inevitably objective operational differences between Stansted Airport and Heathrow / Gatwick which may lead to differing delay causes etc. However, we disagree with the CAA's characterisation of the different reasons for delays at each of the London airports. These issues were discussed at the 'State of Play' meeting, where we explained that the delays at Heathrow are largely a direct result of the airport's conscious decision to maximise the throughput of its runways (and accept higher delays as a trade-off). At Stansted, the delays are attributable to NERL's management and operation of the airspace around the airport, rather than a strategic choice by the airport. This difference in the reasons for the delay is key to understanding our view that NERL has unduly discriminated against STAL, or unduly preferred other airports.
42. However, our over-arching point is that there have now been long-standing issues identified with both staffing resilience and airspace capacity management when it comes to Stansted Airport. Our view is that had Stansted received an equivalent level of focus and resource to that afforded to Heathrow and Gatwick (*pari-passu*) these issues would not have arisen or had they, they would have been remedied much sooner. To put this another way, we consider these issues would not have been allowed to arise in the first place at Heathrow or Gatwick.
43. We note the CAA's view that the failure to remedy airspace capacity in a more timely manner does not in itself evidence discriminatory behaviour but rather that "*STAL has chosen not to fully cooperate with certain airspace change initiatives brought forward by NERL*"¹⁵. We have explained above why we do not agree with the narrative put forward by NERL on this point and have also noted that the CAA accepts at para 7.19 that it has not

¹⁵ para 8.28

scrutinised this NERL narrative nor formed detailed views on historic airspace change projects and the reasons for their failure. We therefore find it surprising and disappointing that the CAA refer to this NERL narrative in dismissing potential discriminatory behaviour as being part of the reasoning and would encourage this particular paragraph 8.28 to be reviewed and amended in the final Palamon report.

44. Similarly on staffing, we note the CAA dismisses discrimination as a potential factor on the basis that due to its greater size Heathrow airport requires a larger pool of ATCOs and thus the issues causing delay at Stansted do not as readily manifest themselves at Heathrow¹⁶. Again, we are disappointed at how readily the CAA appear to dismiss any role long-term systemic discrimination may play here, our view being that the size of operation doesn't explain the long-term lack of resilience in the Stansted operation.
45. Solely by way of example, in considering Figs 6.7 – 6.10 (inclusive) we agree with the CAA where it notes *“the relatively low level of staffing for the non-Heathrow approach functions is a consistent feature of the historical data, including NERL forecasts for its future operations over the next 3 years...”*¹⁷. The figures at 6.7 and 6.8 in particular help to emphasise STAL's point here – Fig 6.7 shows that in its Jan 2019 forecasts, NERL was predicting an oversupply to begin for HAL by around July 2020 leading to a vast oversupply by March 2025. By contrast, at Fig 6.8, other approach functions were anticipated to have a long-running significant under-supply until March 2025 (and by the look of the demand gap, significantly beyond that). We note the CAA comments here that this significant differential *“may”* be due to planning for the new Heathrow runway expansion and that it was reasonable for NERL to take account of capacity expansion in its plans – but STAL's points here would be: (i) from the use of the word 'may' it appears the CAA have not interrogated this significant imbalance in sufficient depth to draw a definitive conclusion as to whether discrimination / undue preference may have been at play; and (ii) even if the reasoning is Heathrow expansion planning, whilst we don't criticise NERL planning in such a manner, this does just re-emphasise the point that it clearly is possible for NERL to implement these remedial resource measures for HAL yet resolving issues or planning to resolve issues for STAL and others appear to continually lag behind. We would suggest

¹⁶ para 8.31

¹⁷ para 6.36

part of the reasoning for Fig 6.7 and Fig 6.8 looking so different may be because NERL was pre-occupied by and predominantly focused on Heathrow – which goes back to our over-arching point that there is a long-term, deep-rooted, persistent, systemic pre-occupation and focus on HAL at the expense of STAL and other airports which could act to place STAL at a competitive disadvantage if the service quality to its customer base is not on a par with HAL. We also note that all users effectively pay the same unit rate for NERL's services, rather than paying different rates for different levels of service.

46. In light of the above, we respectfully consider that the Palamon investigation may have perhaps failed to test this area in the depth required to truly identify whether discriminatory behaviour in terms of resource allocation and focus has occurred between the London airports.

47. We therefore would encourage the CAA to further consider this area as it is a long-running concern of STAL that we consider Project Oberon failed to adequately address and that Project Palamon may now be doing likewise.

48. In the relative short / medium term however the main concern of STAL is to see the staffing resilience and airspace capacity issues remedied.

Summary of provisional recommendations (paras 47 – 54 inclusive):

49. Above we have focused on the three main areas of the Palamon investigation being staffing resilience, airspace capacity management and discrimination.

50. We now specifically consider the provisional recommendations set out at paras 47 – 54 inclusive.

Staffing (para 47):

51. We have provided our views on how we consider the staffing resilience issue should be treated at paragraphs 12 to 22 of this response above. We do not reiterate those points here save to note that we consider the CAA should bolster its recommendation / next steps in the manner outlined in those paragraphs to enable it to assure itself that its remedies will address the identified problems.

Capacity (para 48):

52. Likewise, we have provided our views on how we consider the airspace capacity issue should be handled at paragraphs 23 to 39 of this response above. Again, we do not seek to reiterate those points here save to note we believe the CAA should bolster its recommendation to hold NERL to account and ensure this issue is remedied in a timely manner.

Stakeholder engagement (paras 49 – 50):

53. We would welcome more transparent and strategic dialogue with NERL. In particular, we would proposed that NERL are asked to formalise what information / additional transparency it would be useful for them to receive and in what cycle in order for them to operate the en-route service as efficiently as possible in respect of demand forecast and resource allocation.

Coding of delays (para 51 – 53):

54. We agree with the recommendations set out at para 51.

55. We have significant concerns with the recommendation at para 52. The Licence and statutory obligations of NERL which have been considered as part of the Palamon investigation place clear obligations on NERL to manage resources and airspace in a manner to meet the reasonable demands placed on it and in doing so take account of the likely future demands. To require airports and airlines to effectively curtail their operations to accommodate any failures of NERL to adhere to those obligations in our view acts to undermine the chief purpose of the obligations and would potentially provide the artificial view that NERL is managing the resource and airspace adequately to meet the reasonable demands, whereas the reality may in fact be that airports and airlines are constraining their operations to account for NERL shortcomings.

Overall reporting arrangements (para 54):

56. As highlighted in our feedback, we believe that the Draft Decision is lenient to NERL and does not go far enough in certain areas – with regards staffing resilience in the proposed

lack of enforcement action and with regards airspace management in characterising the long-term shortcomings as a 'single lapse' as opposed to constituting a clear breach.

57. However, STAL is in principle willing to provide NERL with a further opportunity to remedy these issues on the basis that such is achieved in advance of traffic recovering to the extent where they again pose an issue (regardless as to what the recovery profile looks like). As such, holding NERL accountable through timely and transparent progress reporting against an appropriate measurable timescale is of vital importance to STAL as emphasised at various points throughout this response.

58. On this point, the CAA states that it is "*minded*" to require NERL to report "*by the middle of 2021 and then on a six-monthly basis*" on progress. We would say this reporting is essential and would encourage the CAA to look at more frequent reporting such as quarterly – with a detailed plan required within three months of the Decision setting out how the issues will be remediated, the timescale for such and how this will 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).

59. In particular, as the traffic recovery becomes clearer and it is possible to predict the timescale of recovery with more accuracy, we 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.

60. Vitally important to STAL is that in this respect, Project Palamon is not considered closed with Covid-19 and the temporary traffic reduction acting as a 'get-out-of-jail-free' card for NERL. As 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 considers 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: (i) move straight to formal enforcement measures on staffing resilience; and / or (ii) a finding of Licence / TA00 breach on airspace capacity management – without the need to conduct a further full investigation.

61. We would therefore welcome more robust and detailed recommendations from the CAA on the issue of reporting along with a clearer remedial process for NERL to follow, both along the lines outlined above.

Next Steps:

62. We hope the above is of use to the CAA, please let us know if there are any particular areas on which we could expand. If it would assist, we would welcome the opportunity to talk to any of the issues set out in this response.

63. We look forward to understanding the next steps and timescales on this matter.

Yours sincerely,

David McBride

Senior Legal Counsel

For and on behalf of Stansted Airport Limited