

Web site: [www.dft.gov.uk](http://www.dft.gov.uk)

1 September 2011

Dear

**Call for Evidence: Extension of the licence period and changes to the terms of NATS (en route) Ltd (NERL)'s air traffic services licence**

I would like to invite you to comment on the Government's proposal to amend terms 6 and 7 of the licence under which NATS (en route) Ltd (NERL), the regulated business of NATS, operates to:

- increase the notice period after which the licence can be terminated from 10 to 25 years; and
- remove the restriction which specifies that notice may not be served until the 20th anniversary of the grant of the licence.

Taken together, these changes would have the effect of ensuring that the Secretary of State could not, under terms 6 and 7 of the licence, terminate the licence for at least 25 years following the decision to terminate and serving of notice. However, this would not impact the current powers held by the Secretary of State and the CAA to terminate the licence in the event that the licence holder breaches key licence duties.

We are proposing these amendments in response to concerns raised by NATS which we consider are likely to be justified. The company is concerned that if the current notice period is retained, NATS will have increasing difficulty in accessing the long term financing it needs to finance the business effectively. The Secretary of State has a statutory duty to secure that licence holders "will not find it unduly difficult to finance activities authorised by their licences" (Transport Act 2000 1(2)(c)).

For these reasons the Government has decided that it would be appropriate to consider extending the notice period of the licence. We are carrying out this targeted 28 day call for evidence aimed at those parties in the UK aviation sector who have a direct interest in, and understanding of, the supply of air traffic services to inform this consideration.

In section 1 below we have laid out in more detail the amendment that we are proposing to make. Three particular questions are set out at paragraph 1.23 of this letter (page 9), however we would also welcome any wider feedback that you consider relevant. Section 2 lays out details of how to respond to this call for evidence.

Please note that the scope of this call for evidence is limited to the specific change proposed to terms 6 and 7 of the licence. The proposed change is a technical one that we believe would not in itself impact on any other provision of the licence, or the principles under which the CAA acts as the independent regulatory body responsible for managing the NERL licence. I would like to emphasise that, subject to the results of this call for evidence, we propose to continue with this licence amendment irrespective of whether or not a decision is made to sell Government shares in NATS.

I would draw your attention to the fact that we are publishing separately as Annex A to this call for evidence, NATS' Position Paper on Amendment to NATS (En Route) Plc ("NERL") Licence Term" (Published as "Annex A - NATS position paper") and as Annex B a formal opinion from our financial advisers, Bank of America Merrill Lynch (BofAML) (Published as "Annex B - BofAML Considerations on licence maturity"). These documents form part of the call for evidence, but have been published as separate downloadable documents on our website.

Please note that this call for evidence closes on **29 September**. Thank you for taking the time to respond; I look forward to reading your responses.

**Andy Kirby**

Aviation Regulatory and Consumer Policy Division  
Aviation Directorate, Department for Transport

# PART 1: CALL FOR EVIDENCE

## Background

- 1.1** NATS (formerly National Air Traffic Services) provides air traffic control en route services in the UK and Eastern North Atlantic Airspace and control tower services in the UK and abroad. It is split into two businesses which provide distinct services:
- NATS (en route) Ltd (NERL) – the regulated part of the business which provides en route air traffic management services to aircraft within the UK and Eastern North Atlantic airspace. These services make up approximately 80% of the business; and
  - NATS Services Ltd (NSL) – the unregulated part of the business which provides air traffic control services at 15 of the UK's major airports and Gibraltar, as well as consulting services. These services make up the remaining 20% of the business.
- 1.2** NATS operates its regulated business (NERL) under a licence granted by the Secretary of State in accordance with the Transport Act 2000<sup>1</sup>("the licence"). The licence was granted on 28 March 2001.
- 1.3** The Secretary of State currently has the power under Terms 6 and 7 of the licence to serve notice of termination of the licence no earlier than 20 years after the date on which the licence was granted (i.e. 2021), and with a notice period no shorter than 10 years. This means that the earliest date on which notice can currently be served via this route is 2031, but from 2021 NERL will effectively be operating under a licence with a rolling 10 year notice period.
- 1.4** Under section 1.2(c) of the Transport Act 2000, the Secretary of State for Transport has a duty to secure that NATS does not "find it unduly difficult to finance activities authorised by their licence".
- 1.5** NATS has brought the attention of the Government to the difficulties it is likely to face in raising long-term financing which is appropriate and efficient if NERL is operating under a licence with a 10 year rolling notice period. This is due to the asset life of the investments in long term infrastructure that it is required to undertake in support of its licence

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<sup>1</sup> The licence is at <http://www.caa.co.uk/default.aspx?catid=5&pagetype=90&pageid=585>

obligations. The 10 year rolling term may prevent NATS from accessing long term bond financing that matches the asset life of its longer term assets such as radars and distance measuring equipment. It also limits the ability of the company to access the competitive financing available to other regulated utilities, which typically have 25 year notice periods on their licences.

- 1.6** We therefore propose to extend the notice period of the licence to 25 years and remove the earliest date at which notice can be served. It should be emphasised that this amendment would have no impact on the other powers available to the Secretary of State and the CAA through the Transport Act 2000<sup>2</sup> and the licence<sup>3</sup> to revoke the licence in the event that the licence holder contravenes its duties e.g. with regard to providing a safe, efficient system that meets present and future demand.

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<sup>2</sup> In particular see section 8 of the Transport Act 2000: Duties of licence holders and section 20 of the Transport Act: Orders for securing compliance.

<sup>3</sup> In particular see Schedule 3 of the licence: REVOCATION OF LICENCE (EN ROUTE (UK) AREA) AND (EN ROUTE (OCEANIC) AREA)

## Proposed Amendments

### 1.7 Terms 6 and 7 of the licence currently state:

- 6. "In so far as it authorises the provision of air traffic services in respect of the En route (UK) Area, unless revoked in accordance with the terms of Schedule 3 this Licence shall continue to have effect until determined by not less than ten years' notice in writing given by the Secretary of State to the Licensee following consultation with the CAA, such notice not to be served earlier than the twentieth anniversary of the grant of this Licence."
- 7. "In so far as it authorises the provision of air traffic services in respect of the En route (Oceanic) Area, unless revoked in accordance with the terms of Schedule 3 this Licence shall continue to have effect until determined by not less than ten years' notice in writing given by the Secretary of State to the Licensee following consultation with the CAA, such notice not to be served earlier than the twentieth anniversary of the grant of this Licence."

### 1.8 We propose to alter these terms to reflect a notice period of 25 years and the removal of the restriction on the earliest date that the licence can be terminated. The proposed revised terms would likely read as follows:

- 6. "In so far as it authorises the provision of air traffic services in respect of the En route (UK) Area, unless revoked in accordance with the terms of Schedule 3 this Licence shall continue to have effect until determined by not less than twenty-five years' notice in writing given by the Secretary of State to the Licensee following consultation with the CAA."
- 7. "In so far as it authorises the provision of air traffic services in respect of the En route (Oceanic) Area, unless revoked in accordance with the terms of Schedule 3 this Licence shall continue to have effect until determined by not less than twenty five years' notice in writing given by the Secretary of State to the Licensee following consultation with the CAA."

### 1.9 Please note that the Secretary of State has no current intention to make any further amendments to the licence provisions.

## Reason for proposed amendments

### 1.10 The Government has considered carefully the information provided to it by NATS in relation to the expected consequences of retaining the current notice period. We are publishing separately as Annex A to this call for evidence, NATS' "Position Paper on Amendment to NATS (En

Route) Plc ("NERL") Licence Term" (Published as "Annex A - NATS position paper") in which this case is set out.

- 1.11** We have also taken a formal opinion from our financial advisers in relation to NATS, Bank of America Merrill Lynch (BofAML), who concluded that NATS will not be able to fund itself efficiently beyond 2031. BofAML agree that a 25 year rolling term would be appropriate to allow NATS to secure financing to match its longer asset life and give NATS access to the same financing opportunities as other regulated utilities, thereby reducing refinancing costs and execution risk. We are publishing their advice separately as "Annex B - BofAML Considerations on licence maturity".
- 1.12** The Government is therefore proposing this change on the basis of the arguments put forward by NATS and supported by Bank of America Merrill Lynch. The arguments suggest that the Government needs to increase the notice period in order to enable the Secretary of State to satisfy his duty to secure that NATS will not find it unduly difficult to finance activities authorised by its licence.
- 1.13** We are suggesting that extending the notice period to 25 years would be appropriate to allow NATS to finance itself efficiently. However, we welcome any evidence that a period other than 25 years would more be appropriate, and invite those responding to address this point.

## Legal basis for amendments

- 1.14** Section 7(1) of the Transport Act 2000 provides that a "licence may include such provisions as the licence authority thinks are necessary or expedient". This confers on the licence authority (the Secretary of State for Transport) a power to insert new provisions into the licence from time to time. Such a power may be implied by virtue of section 12(1) of the Interpretation Act 1978 which reads, "where an Act confers power or imposes a duty it is implied, unless the contrary intention appears, that the power may be exercised, or the duty is to be performed, from time to time as occasion requires".
- 1.15** Underpinning any decision by the Secretary of State to amend terms of the licence must be consideration of his duties under section 1(2) of the Transport Act 2000:
- 1(2): The Secretary of State must exercise his functions under this Chapter [i.e. Chapter 1 of the Transport Act 2000] in the manner he thinks best calculated -
- (a) to further the interests of operators and owners of aircraft, owners and managers of aerodromes, persons travelling in aircraft and persons with rights in property carried in them;
  - (b) to promote efficiency and economy on the part of licence holders;

- (c) to secure that licence holders will not find it unduly difficult to finance activities authorised by their licences.
- 1.16** The reference in point (a) above to furthering interests implies a reference to furthering them (where the Secretary of State thinks it appropriate) by promoting competition in the provision of air traffic services.
- 1.17** Whilst we consider that amending the licence so as to extend the notice period engages all of the Secretary of State's duties positively, we are particularly mindful of section 1(2) (c) of the Transport Act 2000, which requires the Secretary of State to exercise his functions in the manner he thinks best calculated to secure that the licence holder will not find it unduly difficult to finance activities authorised by its licence.
- 1.18** As set out above, evidence has been presented to suggest that the current notice period does not permit NATS to finance itself effectively. Ministers are therefore minded to extend the notice period of the licence from 10 years to 25 years and remove the date on which notice can first be served. This will put the earliest date on which the licence can be terminated, following the provision of notice under Terms 6 & 7 of the licence, at 2036. At present the earliest date of termination via this route is 2031. The timeframe for revoking the licence in the event of the licence holder contravening key licence terms will remain unchanged.

## Expected costs and benefits

- 1.19** The proposed amendments are expected to ensure that NATS will not find it unduly difficult to finance activities authorised by the licence in the most appropriate and efficient manner. We do not anticipate any adverse consequences in terms of the nature, cost and provision of NATS' services to the aviation industry arising from this change. It neither increases nor decreases the airspace management function of NATS and the associated burdens and costs to industry.
- 1.20** For the duration of the licence, NERL has a natural monopoly in respect of the provision of en route services. The possibility of competition only arises after a licence has terminated. By extending the notice period from 10 years to 25 years, the opportunity for competition is put back by up to 15 years. However, we do not anticipate that the proposed amendments to the licence will have an adverse impact on the interests of operators and owners of aircraft, owners and managers of aerodromes, persons travelling in aircraft and persons with rights in property carried in them (as set out in section 1(2)(a) of the Transport Act 2000). This is because of the important role of regulation in ensuring these interests are protected and promoted.

- 1.21** The Government welcomes evidence on the impact that respondents feel the 25 year notice period proposal might have on the promotion of the interests of operators, passengers and others, or on the remaining factors the Secretary of State has a duty to promote under section 1(2) of the Transport Act 2000 (set out at paragraph 1.12).
- 1.22** The changes would bring the NATS licence notice period in line with other regulated utilities, including electricity, gas and water, which have rolling licence notice periods of 25 years, thereby putting NATS on a more competitive footing for accessing long term financing.



## Call for Evidence Questions

**1.23** The call for evidence questions are:

**Q1: Do you think it is appropriate for the Secretary of State to set the notice period for termination of the licence at 25 years or do you have evidence that some other notice period would be more appropriate?**

**Q2: Do you agree that the Government should remove the provisions at the end of terms 6 and 7 of the licence which state that “such notice not to be served earlier than the twentieth anniversary of the grant of this licence” or do you have evidence suggesting why the removal of these provisions would not be appropriate?**

**Q3. What evidence do you have as to the balance of costs and benefits of these proposed changes, particularly in respect of the Secretary of State's duty to exercise his functions in the manner he thinks best calculated to-**

- (a) further the interests of operators and owners of aircraft, owners and managers of aerodromes, persons travelling in aircraft and persons with rights in property carried in them (including furthering those interests by the promotion of competition);**
- (b) promote efficiency and economy on the part of licence holders;**
- (c) ensure that the licence holder will not find it unduly difficult to finance activity authorised by the licence?**

**1.24** If you have any other evidence that you believe to be of relevance to amending the licence on this basis, please feel free to provide it.

## What will happen next?

**1.25** Ministers will consider the responses to the call for evidence and a summary will be published on the website after the call for evidence closes.

**1.26** The results will inform ministers' decisions on whether to proceed with the proposed amendments. If the decision is positive, the change will be announced.

## Interaction with other Calls for Evidence

- 1.27** The Government is embarking on this call for evidence in response to NATS' concerns about financing itself efficiently.
- 1.28** This process is independent of any decisions regarding the potential sale of all or part of the Government's 49% stake in NATS that might take place, and any matters raised in responses about a sale process will not be considered through this call for evidence.
- 1.29** We have completed a separate call for evidence to seek evidence on whether the Government should retain a shareholding, which can be found at <http://www.dft.gov.uk/consultations/dft-2011-15>. Please note that the deadline for responding to that call for evidence has now passed and a summary of results will be published shortly.

## PART 2: How to respond

- 2.1** The remainder of this letter sets out how you can respond to this call for evidence.
- 2.2** This call for evidence will run for 28 days and close on **29 September 2011**.
- 2.3** When responding please state whether you are responding as an individual or representing the views of an organisation. If responding on behalf of an organisation, please make it clear who the organisation represents and, where applicable, how the views of members were assembled.
- 2.4** Your responses to the questions asked in paragraph 1.23 (page 9) should be sent to me at the e-mail or postal address below by close of business on 29 September 2011.
- 2.5** Email: [andy.kirby@dft.gsi.gov.uk](mailto:andy.kirby@dft.gsi.gov.uk)  
Postal:  
Andy Kirby  
Department for Transport  
Zone 1/25  
76 Marsham Street  
London  
SW1P 4DR
- 2.6** Please note that we will make every effort to ensure that late responses, and responses that fall outside the scope of the call for evidence are read, but these responses may not be taken into account in the publication of results.

### Help with queries

- 2.7** Questions about the issues raised in the document can also be addressed to the Call for Evidence lead, Andy Kirby, at the above email or postal addresses.

## Consultees

- 2.8** A list of organisations/stakeholders that we have sent this call for evidence to is included at Annex C. If you have any suggestions of others who may be in a position to offer informed comments, please contact Andy Kirby at the email or postal address above.
- 2.9** This call for evidence has also been posted on the Department for Transport's website at <http://www.dft.gov.uk/consultations>.

## Issues relating to the call for evidence process

- 2.10** If you have comments or complaints about the way this call for evidence has been conducted, these should be sent to:

Consultation Co-ordinator  
Department for Transport  
Zone 2/25, Great Minster House  
76 Marsham Street  
London  
SW1P 4DR  
Email: [Consultation@dft.gsi.gov.uk](mailto:Consultation@dft.gsi.gov.uk)

## Data Protection and Freedom of Information

- 2.11** Information provided in response to this call for evidence, including personal information, may be subject to publication or disclosure in accordance with the Freedom of Information Act 2000 (FOIA) or the Environmental Information Regulations 2004.
- 2.12** If you want information that you provide to be treated as confidential, please be aware that, under the FOIA, there is a statutory Code of Practice with which public authorities must comply and which deals, amongst other things, with obligations of confidence.
- 2.13** In view of this it would be helpful if you could explain why you regard the information you have provided as confidential. If we receive a request for disclosure of the information we will take full account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstances. An automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded as binding on the Department.
- 2.14** The Department will process your personal data in accordance with the Data Protection Act and in the majority of circumstances this will mean that your personal data will not be disclosed to third parties.

# Annex C: List of Consultees

Table 1: List of Consultees	
Aer Lingus	Eurocontrol
Air Canada	The EU Commission
Air France	Flybe
The Airline Group	IATA
Aircraft Owners and Pilots Association	Government partnership directors
Airport Operators Association	Joint Trade Unions
American Airlines	KLM
BAA	Monarch
BATA	NATS
BMI - Lufthansa	Popular Flying Association
British Airways	Ryanair
British Business and General Aviation Association	Thomas Cook
CAA	Thomson Airways
Delta Airlines	United Airlines
Easyjet	Virgin Atlantic