ANNEX 2 - Consultation responses

Respondent	Do you agree with the proposal to update the licence modification process?
The CAA	We welcome the Department for Transport's (the Department) proposals to update the licence modification regime in the Transport Act 2000 in respect of existing conditions and where we consider new conditions are required. We consider this is a key change needed to ensure the Air Traffic Services (ATS) licence and regulatory framework remain fit for purpose and continue to improve outcomes for users and consumers in line with our statutory duties and best regulatory practice. The current regime requires us to obtain the licence holder's agreement to any licence change we consider necessary. If agreement cannot be reached, we either have to abandon the proposal, reach a compromise position with the licence holder so as to secure their agreement or make a reference to the Competition and Markets Authority (CMA) that the changes are in the public interest and can be imposed. This process can make it difficult to introduce changes we consider are necessary to the licence in a timely manner. This not only affects the efficiency of the licensing framework, it also increases the risk of 'regulatory stalemate' by holding up key decisions that need to be made swiftly in the interests of users and consumers. Also, the lengthy six month time frame for the CMA to determine a reference, which can be extended by another six months, is not practical for key changes to the licence that need to be made swiftly. This also has the effect of increasing regulatory uncertainty for the licence holder, other stakeholders and the CAA. We are firmly of the view that the licence modification regime needs to be modernised to strike a more appropriate balance. This balance should aim to provide a more agile and flexible regime, allowing the regulator to make timely changes it considers are necessary to further the interests of users and consumers, and at the same time providing appropriate safeguards against potential regulatory overreach. We consider the Department's proposals to introduce targeted rights of appeal that are more closely aligned with the regime in the Civil Aviation Act 2012 (CAA12) generally achieves this balance. In particular, the CAA12 timeframe for licence modification appeals (a twenty-four weeks period for the CMA to make a decision which can be extended by eight weeks if there are good reasons for doing so) is more appropriate whilst still ensuring stakeholders' concerns are dealt with properly in the appeals process. We consider this is an appropriate model to adapt and tailor to the ATS licence framework. The proposals also carry the additional benefit of providing greater consistency with our economic functions for airports, thereby creating greater regulatory certainty for stakeholders. We consider appropriate safeguards against potential regulatory overreach should include mechanisms to ensure due process is followed for procedural

	fairness, proper consultation and explanation of proposed modifications, coupled with the checks and balances that are attached to targeted rights of appeal. We agree with the Department that the licence modification regime in the CAA12 is an appropriate model to consider for the ATS licence framework. The CAA12 regime requires us to consult and consider representations before making a decision to modify an airport licence, but without requiring the consent of the licence holder. We are required to send a notice to the licence holder and other stakeholders setting out: that we propose to modify the licence, the proposed modification, our reasons for doing so, the effect of proposed modification and a reasonable period for making representations. We consider these safeguards reflect best regulatory practice and take account of the better regulatory agenda, and are therefore sufficient in giving stakeholders an opportunity to give detailed consideration to the proposed licence modification in an open and thorough consultation process. It also makes it more likely that key issues will be addressed during the consultation avoiding, the need for further action. We consider a consultation on proposed modifications is needed in all cases but the CAA12 model provides some discretion to tailor the period for receiving representations in urgent cases if legitimate grounds exist and these are in the interests of users and consumers pursuant to our statutory duties under the Transport Act 2000. Overall, we agree with the Department's assessment that such changes will include benefits such as a more transparent, cost-effective streamlined process so the CAA can develop the licence in a way that furthers its statutory duties to users and consumers as they change over time. We also agree that the proposed changes should come into force as soon as practicable rather than delaying implementation until the next regulatory control period so that users' and consumers' interests can be best served without delay. <u>Grounds to appeal</u> We agree with the Department's proposed grounds to appeal a decision made by the CAA on its merits to modify the ATS licence, aligning it with the process in CAA12. These grounds are: - The decision was based on an error of fact; - The decision was wrong in law; - An error was made in the exercise of discretion We consider these targeted grounds are comprehensive and offer a reasonable balance between the need to avoid a complete rehearsing of the whole regulatory decision under the current process (which will have already been subject to an open and thorough consultation process under the Department's proposals), while allowing appropriate rights of appeal. <u>Appeal rights</u>

	We agree with the Department's proposal to give symmetric appeal rights to 'both the licence holder and other relevant adversely affected parties.' We consider specifying in legislation which other parties have this right and the threshold for allowing such appeals will provide greater clarity and regulatory certainty. We consider these other parties need to demonstrate that their interests have been materially affected by the decision to modify the licence. We also consider other suitable safeguards available in other regulated sectors, such as airports, should be introduced to ensure only appeals which merit consideration are taken forward. We consider the airlines, as the licence-holder's primary customer, should be given rights of appeal. We also consider there might be a case for extending this to airport operators and Terminal Air Navigation Service Providers as they have the potential to be materially affected by a decision to modify the licence in specific circumstances. <u>Appeal bodies</u> We agree with the Department's proposal that appeals against decisions to modify the licence should be heard at the CMA. We are firmly of the view that the CMA has the necessary economic, legal and financial expertise and experience in licence modification appeals as well as the flexibility to tailor the appeals process to the ATS licence framework. For example, the CMA can consult on and make 'Appeal Rules'1 and accompanying guidance2 regulating the conduct and disposal of appeals. We consider the Department's proposal will provide greater regulatory certainty for stakeholders and the CAA and also avoids adding unnecessary complexity, costs and the additional burden of introducing another body into the appeals process. It would also provide greater consistency between different appeal routes in different sectors while recognising that specific characteristics of each sector may require tailored approaches. Given that one of objectives of the proposals in modernising the tools under the Transport Act 2000 is to align it more closely with CAA12 and best regulatory practice, we consider there would need to be good reasons for introducing a different approach. We also note these considerations chime with the Government's views in the 2013 consultation on Streamlining Regulatory and Competition Appeals on how best to streamline the appeals process across different sectors. In that consultation, one of the Government's objectives was that appeal bodies' expertise is applied in the most appropriate way and appeal routes are more consistent across sectors to provide greater certainty and better use of resources. We support this objective. We also note that in that consultation, the Government's view was that the CMA should continue to hear all appeals on licence modification decisions.

	We also note that the Competition Appeal Tribunal has relevant competence in regulatory matters. However it is our strong view that the CMA is the most appropriate body for the reasons noted above.
NERL	NERL is aware that some regulators have the ability to make changes independently to the licences of the companies they regulate, and that the DfT proposes to provide the CAA with this ability too. However, it is important to note that the CAA already has a right to make changes independently to the NERL licence in some areas. In particular, the CAA can make changes to NERL's licence through Condition 3, with NERL only having limited grounds for withholding its consent. Condition 3 allows the CAA to "fast track" its proposed changes relating to operational aspects of NERL's licence and NERL can only object if it believes it either cannot implement the changes or they would cause significant harm to its finances. As noted in the consultation document, more wide ranging changes to the NERL licence require NERL's consent. This arrangement was deliberately established at the time of PPP because NERL's natural monopoly for air traffic services requires a higher level of control of the nature of the service than might be seen in other regulated industries due to the priority on safety. The primary role of NERL (under the Transport Act 2000 and the licence) is to ensure that the tightly specified services are provided safely. The remaining commercial freedom for NERL is to determine the balance of risk in its resources, processes and manpower to deliver that safe service efficiently. That balance of risk is intrinsic to and embodied in each regulatory settlement, with the commercial terms reflected through licence change on the basis of consent and with the ability to refer the wider economic aspects of any disagreement to the CMA. Therefore, introducing the concept of a broader scope for the CAA to impose licence terms introduces the new risk that the commercial terms are no longer struck through extensive consultation and discussion for each reference period. Alternatively, given that the new basis of appeal is not yet clear, there is a risk that any settlement having been struck on this basis can still be overturned without meaningful recourse. To date NERL and its lenders have considered these risks adequately mitigated on the basis that consent is required in advance and that there is an economic appeal process available through the CMA. Given that these arrangements for NERL were deliberately put in place after careful consideration by the DfT, the CAA and NERL, with the CAA already having some ability to impose licence changes on NERL, NERL requests that the DfT maintains the current procedure in place for changes to NERL's Licence. However, if the DfT still feels it is necessary to bring NERL more in line with other UK regulated industries in this area, NERL has the following requests:

	• There should be no weakening of the existing duty of the CAA and the DfT to ensure that NERL does not find it unduly difficult to finance activities authorised by its licence. • The existing process of notification by the CAA to NERL of proposed licence changes ahead of consultation should be maintained: this enables NERL to highlight to the CAA any particular concerns associated with proposed licence changes. NERL and its lenders have found that this process facilitates orderly changes to the NERL licence and a useful exchange of information. NERL believes that this is proportionate given the potential direct impact of modifications on NERLs financial position in terms of risk and affordability. Therefore, NERL would welcome this pre-notification staying in place and the DfT considering how it can support its maintenance through its proposals. • Introduction of the new licence change procedure in RP3: this is necessary in order to be equitable to NERL and its shareholders as the current RP2 regulatory settlement does not compensate NERL for the additional risks that these proposed licence changes represent even if the protections above are incorporated. If these proposed changes are made at the beginning of RP3 then this will enable the CAA to consider representations from NERL for such compensation (e.g. through cost of capital and/or allowances for risk and contingency). The risk associated with these changes is also materially affected by the terms of any appeal mechanism. NERL is unable to express a view on whether these are appropriate because important details have yet to be finalised. However, the high-level grounds of appeal indicated in the consultation document imply that the CAA's imposed modification would be a fundamental change to the scope of an appeal. At present, the CMA assesses for itself whether a proposed modification is in the public interest. The implication of the proposal would appear to be that the appeal would instead be restricted to a limited form of merits review. This compounds the risks potentially faced by NERL as a result of the proposed new licence change procedure. Therefore, NERL is keen to understand more fully the basis on which any appeals would be conducted and trusts that, should the DfT be minded to proceed with changes in this area, there will be further consultation on the terms of the mechanism and who can use it. NERL also welcomes the ongoing efforts by the DfT to work with the Commission and other Member States to construct an effective appeal mechanism for price control decisions that affect NERL and other relevant adversely affected parties through the SES regime.
Ministry of Defence	In the course of exploring the potential implications of selling the government shares in NATS, the MOD identified a requirement to have the data supplied to ASACS included as part of the License. Currently it is wholly reliant on the FMARS contract between MOD and NATS - enshrining in the License will protect this national security requirement in law.

MAG AIRPORTS	The current framework is out of line with other regulatory frameworks in the UK and does not represent best practice. The modification will enable CAA to respond 'in the moment' to issues that arise.
Dept for Infrastructur, NI	We note in the consultation document that in 2014, there were two serious system failures which resulted in an independent enquiry being undertaken; following which a number of recommendations to update and modernise the licensing framework were made. Any modernisation of the existing licensing framework which encourages a high standard of safety and service continuity, supports economic growth and promotes efficiency in the provision of air traffic services is welcomed. We recognise that since the establishment of the economic regulatory regime for NATS (En-Route) plc, (NERL) back in 2001, there have been many improvements to licensing regimes in other industries. It would therefore seem sensible to have these reflected in a more updated economic regulatory regime for the provision of en-route air traffic control service The current regime (referred to at 3.2 and 3.3) highlights the delays involved with the existing process and we agree that the Government's proposed changes (detailed in 3.4) would allow the Civil Aviation Authority (CAA) to modify the license in a more efficient manner, whilst still allowing the licence holder and any affected party, the right of appeal. We would have no objection to the proposed timing for implementing the proposed changes.
BAR UK	The proposals presented by the Department seem reasonable in relation to the rationale behind the licence modification to bring into line with other regulated sectors and better regulatory practice. As a trade body, we have not received any unified view on timing as to whether the changes should take place sooner or in-line with RP3. However, the fundamental concept of the process as presented is supported. Grounds for appeal must be managed by the CAA to ensure 'relevant affected parties' are defined as those who are materially affected and that only valid appeals are taken forward.
British Airways	BA agrees with the proposal. The proposed licence modification process - with CAA consulting relevant stakeholders, directing the change to the licence-holder, and allowing relevant affected parties including the licence-holder to appeal to the CMA after a decision has been made – is in line with the process already used for airport regulation of Heathrow and Gatwick. As such it is known and understood by BA and we do not see any issues applying this approach to NERL. Within this process the CAA will need to ensure that the grounds for appeal open to 'relevant affected parties' is managed robustly to ensure only valid appeals are taken forward. Further work may also be required to define what qualifies parties as being "relatively affected".

	BA believes that the licence modification process change should be made in tandem with the other changes proposed in this consultation as a single package. This approach would reduce regulatory complexity and ensure that NERL and other stakeholders fully understand the timing of these proposed changes. This overall package of changes should be implemented as soon as possible to improve the NERL licence framework and deliver consumer benefits at the earliest opportunity, as well as to further progress on the delayed LAMP Phase 2 programme. BA does not believe the changes need to wait for the start of RP3.
Airlines UK (formerly BATA)	We agree with the proposal to update the **licence modification process** as outlined in the consultation document. The proposed process reflects that already used for airport regulation and licensing at Heathrow and Gatwick, which airlines understand and are used to. We believe airlines should have a right of appeal,along with other affected parties that can clearly demonstrate an impact. To assist this process and to allow only valid appeals to be taken forward, attention will need to be paid by the CAA to the grounds on which an appeal can be made. Further work may also be required on the definition of 'affected parties'. Changes to both the licence modification and enforcement regime should be introduced at same time, as a single package. This approach would reduce regulatory complexity and help ensure the changes are clearly understood by stakeholders.
Virgin Atlantic Airways	VAA agrees with the proposal to update the licence modification process as outlined. As initially indicated during the workshop held on the 11th October 2016, the proposed process mirrors that of the airport licence modification process which we currently support. Regarding appeal rights, VAA notes the current text in Section 24 of CAA 2012 for appealing airport licence modifications and the reference to those whose interests are ‘materially affected’ by the decision. VAA is of the view that airlines should have a clear right of appeal, along with other parties that can clearly demonstrate the impact of the decision taken. Whether this means passing any relevant ‘tests’, or some form of clearly validating the impact made, we would be open to reviewing how this process is taken forwards. On the proposals for when such changes come into force, we note that there is merit in ensuring any changes to the licence modification process along with changes to the enforcement regime should come in concurrently. Whether this is as soon as practicable, or at the start of the next regulatory period (RP3), there is a need to ensure that both are introduced at the same time.
Ryanair	We agree that the current licence amendment process needs to be changed. We have the following points in relation to the proposed licence amendment process:

	1. Airlines are uniquely placed to provide insight on the operation of the licence. Therefore, the CAA must consider any licence amendments suggested to it by airlines. 2. The views of airlines are critical to any licence amendment process. The CAA must notify airlines of any proposed licence amendment and invite representations from airlines in relation to the amendment. 3. The CAA must consider any representations made by airlines in relation to a licence amendment. 4. The CAA must conduct the licence amendment process in accordance with fair procedures. 5. The CAA must publish its decision in relation to any proposed licence amendment, giving the reasons for the decision. 6. We agree that any relevant affected party should have the right to appeal the CAA's decision to the CMA. 7. We note that the consultation document states that parties would have a right to appeal "on the grounds that the decision to modify the licence was wrong". For the avoidance of doubt, the right to appeal the CAA's decision must apply whether the decision was to grant the licence modification or to refuse the licence modification. 8. The grounds of appeal should include circumstances where there was a breach of fair procedures and circumstances of real or perceived bias. 9. We agree that the changes should come into force as soon as practicable.

Respondent	**Do you agree with the proposal to amend the enforcement regime?**
The CAA	General We welcome the Department's proposals to update the enforcement regime in the Transport Act 2000. We consider this is a key change needed to ensure the Air Traffic Services (ATS) licence and regulatory framework remain fit for purpose and continue to improve outcomes for users and consumers in line with our statutory duties and best regulatory practice. Following an internal review of the CAA's enforcement tools under the Transport Act 2000 after the December 2013 NERL Voice Communications System (VCS) failure, we recommended to the Department that these tools were unfit for purpose and should therefore be modernised via primary legislation and more closely aligned with the regime under CAA12 and best practice in other regulated sectors. This was reinforced by the CAA's commitment to the Transport Committee on the December 2014 failure and the recommendation from the Independent Enquiry that "*the CAA should pursue the inclusion in any forthcoming Aviation Bill of powers to enforce*

	appropriate levels of service by NATS, through, the grant of a power to levy fines for serious or repeated breaches of its licence…" We agree with the key deficiencies that have been identified in the current enforcement regime which include: - No power to impose enforcement orders for past breaches (breaches which have come to an end). We can only impose provisional and final orders for ongoing and likely breaches. - Inflexible statutory enforcement procedures for imposing orders create overly procedural and disproportionate hurdles which make it difficult to make an enforcement order in the first place. - No financial penalty regime for any breach of the licence or Transport Act 2000, which reduces the incentive to avoid failures and to change behaviours when breaches occur. We also agree with the Department's assessment of why these deficiencies make the regime unfit for purpose and its proposals to provide the CAA with the full suite of regulatory enforcement tools available to it under Part 1 in the CAA12. We consider these additional powers will provide us with a set of proportionate and flexible tools allowing a more stepped and tailored approach to enforcement according to the nature and seriousness of the breach. We also welcome the Department's acknowledgment of its intention to give us maximum flexibility to enforce as we consider appropriate in accordance with our statutory duties under the Transport Act 2000. In particular, we agree with the Department's assessment that inflexible enforcement procedures limit the flexibility of the regime. We support the introduction of a simpler, more intuitive procedure coupled with appropriate procedural checks for stakeholders akin to the process in CAA12. We also agree with the Department's assessment that these proposed changes will bring the ATS licence framework in line with best practice in other regulated sectors, many of whose licensing regimes have been modernised in recent years to ensure regulators have the necessary tools to further consumers' interests. The enforcement regime for ATS is an anomaly is several respects, particularly as it is the only regime where the regulator is not able to enforce past breaches and does not have access to a penalty regime. This limits our ability to take effective enforcement action where warranted and incentivise behaviour from the licence holder that furthers the interests of users and consumers. We therefore agree that it is the opportune moment to address this gap in the CAA's enforcement toolkit. Criminal sanctions for failure to provide information required for enforcement action We agree with the Department's proposal to replace criminal sanctions for a failure to provide information required for the purpose of taking enforcement action with civil sanctions. We consider civil sanctions allow a more flexible and proportionate approach to regulatory enforcement, as advocated in the Hampton and Macrory reviews, and are more likely to generate the right incentives to return to compliance leading to better outcome for users and

	consumers. This is also consistent with the CAA12 regime and best practice in other regulated sectors. In particular, we support the use of civil sanctions as they can allow for greater flexibility in tailoring the sanction to the nature and seriousness of the breach. For example, by accounting for aggravating factors that suggest greater culpability as well as mitigating factors that reduce the impact or seriousness of the breach. Furthermore, a civil sanctions regime would be accompanied by penalty policy that would be subject to consultation. This provides a more transparent means in which our enforcement tools are applied. In this context, we also note the Government's recent consultation on its proposals to give the CAA access to a wider range of civil sanctions under the Regulatory Enforcement Sanctions Act 2008 to sit alongside our existing safety powers as an alternative to criminal enforcement action. Financial Penalties and redress We agree with the Department's assessment that the lack of a penalty regime is contrary to the principles on better regulatory enforcement, as recommended in the Hampton Review of the regulatory system and Macrory Review of regulatory penalties. These principles have been used to inform our own CAA12 enforcement and penalties policy as is the case in other regulated sectors. As currently drafted, we consider the Transport Act 2000 enforcement regime is not underpinned by some of these principles. Also, in recent years economic enforcement regimes in sectors such as rail, electricity and gas, and water have undergone significant modernisation providing regulators with appropriate tools to regulate effectively. There is evidence from these sectors that effective enforcement tools can produce better outcomes for consumers and that without a 'backstop' penalty regime, regulators are extremely limited in their ability to hold regulated companies to account and deter future non-compliance. In particular, penalties can result in visible and meaningful consequences for regulated companies, particularly the threat of a penalty (by simply having the power) which can focus the mind of the licence holder and incentivise better outcomes. We also agree with the Department that the associated reputational impact of a financial penalty is a key tool that incentives compliance and deters future non-compliance with the licence. We also recognise that financial penalties do not directly benefit affected consumers. Therefore, we also support the Department's proposal to include a measure for the CAA to require the licence holder to remedy the consequence of breach. There are risks around using powers of redress due to the structure of the industry (where there is no direct relationship between the licence holder and passengers); the difficulties of identifying affected passengers and attributing fault to the licence holder (as failures might be exacerbated by external factors); and potential conflict with EU261 as ATC failures are considered to be Extraordinary Circumstances and Article 13 (right of redress) is difficult to enforce. However we consider that it is in the

	interests of consumers to explore if this is feasible and how it might work in practice. The licence holder is also protected from liability to its customers and third parties for the impact of licence/statutory breaches related, for example, to service interruptions under section 10 of the Transport Act 2000. Thus, there are limited means to seek redress for loss, damage or inconvenience resulting from a breach, unless the licence holder breaches a duty to comply with an enforcement order. While the section 10 immunity is still in force, as it is considered important to maintain a high standard of safety, we consider the power to 'require the licence holder to remedy the consequences of a breach' provides a potential means for us to direct the licence holder to 'make good' consumer detriment and delay resulting from its service continuity failures. It is also worth noting that we have the same powers of redress in requiring economically licensed airports to 'remedy the consequences of a breach' under the CAA12 which does not specify what form this should take: we have discretion in accordance with our statutory duties, enforcement guidance and penalties policy. The CAA12 also states that we must take into account any redress when considering a financial penalty, to avoid double jeopardy. This could potentially allow us to impose a financial penalty as a deterrent and also require the licence holder to 'make good' the damage done to consumers using powers of redress. Interaction with safety Our primary statutory duty is to exercise our licensing functions so as to maintain a high standard of safety in the provision of ATS. We do not consider the introduction of effective enforcement and penalty powers will pose a risk to how we, or the licence holder, undertake our respective statutory duties relating to safety. We also consider the Department's proposals do not introduce an additional burden on the safe operations of the licence holder as it is already fully aware of its statutory duties on safety. Operational staff and management also undertake their safety obligations within a framework that already includes criminal penalties under the EU Single European Sky (SES) framework and the Air Navigation Order (ANO) which have already been factored into operational and safety processes. These sanctions have not generated adverse operational behaviour or unintended consequences as the licence holder has a strong safety record. We consider the same to be true for the Department's proposals. As long as the licence holder adopts robust mitigations and assurances, as well as transparent processes based on clear statutory enforcement procedures, and the CAA consults on its economic enforcement guidance and penalties policy setting out how the regime applies and interacts with the licence holder's safety obligations, we consider there will be no impact to safety.

	We also note that our enforcement guidance and penalties policy will set out the criteria we will consider in taking enforcement action and imposing a financial penalty, the size of a penalty and how this is calculated, as well as the circumstances in which they are likely to be levied. The requirement to have enforcement guidance and a penalties policy is required in other regulated sectors and is considered to be standard practice. Furthermore, financial penalties are intended as a measure of last resort for the most serious breaches. This approach is supported by the Independent Enquiry into the NATS Systems Failure on 12th December 2014. We also note that we would have regard to our duty to ensure the licence holder can continue to finance its licensed activities and our other statutory duties when considering enforcement action and the imposition of a penalty. We also note that other regimes allow for dual economic and safety regulatory functions. These include the CAA's economic functions under CAA12 and safety functions under the ANO/European Aviation Safety Agency (EASA) certificates which we undertake in a joined up and integrated manner, as well as the Office of Rail and Road's economic functions under the Railways Act 1993 and safety functions under the Health and Safety at Work etc Act 1972. Both the CAA and ORR, and those they regulate, already manage to balance their respective dual duties – it is well understood that safety has priority but both regulators and those they regulate manage the two without conflict and give due consideration to consumer outcomes. Indeed, the ORR has access to an economic regulation enforcement regime (which includes the ability to impose penalties for serious breaches) in parallel with its safety regulation functions. The fact that ORR is able to do this, is evidence that it is possible to have effective economic and safety regimes working in parallel. Timings We disagree with the Department's proposal of delayed implementation of the enforcement proposals to 'provide greater regulatory certainty for NERL, particularly in context of financial penalties.' We consider this proposal is unjustified and would in fact create greater uncertainty for the licence holder, other stakeholders and the CAA. This is because stakeholders would be exposed to additional uncertainty around the penalty regime which would need to be factor into the settlement for the next regulatory control period. On the contrary, we consider introducing penalty powers as soon as is practicable, accompanied by a clear penalty policy, would in fact create greater regulatory certainty for all parties as they would understand how the penalty regime would work on the ground. We also consider delayed implementation is inappropriate because financial penalties will operate entirely separately to the SES Performance Scheme incentive regime and there is no risk of double jeopardy, as acknowledged by the Department in the consultation. Furthermore, financial penalties would only be considered for the most serious breaches, in accordance with Recommendation 28 in the Independent Enquiry and approach adopted in the report by Sir Robert Walmsley.

	For these reasons we support the option that both licence modification and enforcement proposals should come into force as soon as practicable rather than delaying implementation until the next regulatory control period so that users and consumers interests can be best served without delay. We would also stress the importance of introducing both powers together because they are complementary and both required to make the licence framework operate effectively. This supports the Department's objective for the consultation in making the whole licensing regime fit for purpose. We also consider delaying implementation of the enforcement powers could lead to unintended consequences. There are a number of licence conditions that the licence holder could breach at any time and currently we have limited tools to enforce such breaches and incentivise compliance. Also, as noted above the licence holder is already subject to criminal sanctions under SES and the ANO. The CAA can also vary, suspend and revoke SES certificates. Moreover, the licence holder's financial arrangements can currently be impacted if it breaches an enforcement order. In effect, this means that the licence holder is already exposed to 'regulatory uncertainty' through these other enforcement mechanisms. We consider the Department's proposals do not create additional regulatory uncertainty for the licence holder that cannot be planned for. The licence holder is already required to comply with the licence under the current regime. We consider the Department's proposals do not require the licence holder to do anything above what it is already required to do. Enforcement Appeals We agree with the Department's proposals to introduce an appeal regime that allows the licence holder to appeal enforcement decisions made by the CAA. We also agree with the grounds for appeal suggested by the Department, which we consider are appropriate and provide the licence holder with targeted rights to challenge enforcement decisions made by the CAA. This also carries the additional benefit of aligning the regime more closely with and creating greater consistency between our economic regulatory functions, which is a key objective of the Department's consultation. This also supports the Government's position in the 2013 consultation on Streamlining Regulatory and Competition Appeals. We consider the best placed body to hear such appeals is the Competition Appeal Tribunal, which already has relevant experience and expertise in considering such matters in other regulated sectors, and is also the default appeal body for CAA12 enforcement decisions.
NERL	NERL accepts that other regulated industries face fines as part of their enforcement regime while NERL does not. NERL also recognises the CAA and the DfT's wish to bring NERL's enforcement regime in line with other industries. NERL notes that the current consultation does not set out details of the proposed penalty regime and the mechanisms, the detail of which will be crucial to its successful introduction and operation. NERL is keen to engage

	with the DfT and the CAA regarding the detailed proposals for a revised enforcement regime. The most significant issues in considering the possibility of a new penalty regime for NERL will be to ensure that the new regime reflects the principles of proportionality, equity, transparency and predictability. In terms of proportionality, the size of any maximum penalty needs to take account of the likely impact on economic return of investors. Ofgem and Ofwat both have the power to issue fines of up to 10% of a company's turnover. However, as these regulators oversee capital, rather than labour intensive industries, turnover for companies in those sectors would be expected to represent a lower proportion of the regulatory asset bases (a proxy for company value) than would be the case for NERL. For example, the ratio of turnover to regulatory asset base is around 20% for Thames Water, as compared to 60% for NERL. This means that the impact on investors' return of the same percentage fine on NERL could be three times more. This points to NERL having a lower maximum penalty and we would be happy to work with you on what this revised maximum might look like. Even if the 10% maximum threshold is implemented then it should specify that any penalty should be proportionate to the nature of any breach of licence, the extent of NERL's culpability with respect to that breach, the damage suffered and NERL's residual ability to finance its activities without this being unduly difficult. In terms of equity, it will also be important to ensure that NERL is not being penalised for a technical failure which could give rise to penalties both under the SES Performance Scheme (e.g. for failing to meet capacity targets) as well as for breach of licence as a result of failure to achieve minimum resilience standards. NERL believes that this risk of "double-jeopardy" is real and would welcome clarification from the DfT on what protections it intends to put in place to prevent it. NERL also believes that in the spirit of modernising the CAA's range of powers in relation to licence breach, it will be appropriate to grant the CAA the discretion to waive or grant concessions in relation to minor breaches of the licence. For example, at present if a certificate is delivered one day late, but is otherwise fully compliant with licence conditions, the CAA is obliged to expend resource in assessing and documenting the severity of the breach and any decision not to take enforcement action. This applies even where NERL has given due notice of the likely delay and the CAA acknowledges no harm arises to customers. The additional discretion could save administrative costs to the CAA and NERL, which would benefit industry. Some other examples of important elements which NERL would expect to be included in the fining regime would be: • Explicit discretion to the CAA as to whether to commence an investigation/enforcement process (enabling a proportionate approach to minor breaches) in line with the 2012 Act approach

	• The imposition of any penalty to be determined promptly and, in order to provide certainty for potential future providers of finance, in any event within a specified period of months after the relevant breach • The returning of any fines directly to customers through a discount to the UK unit rate • Account being taken of the increased financial risks associated with the possibility and likely scale of fines in determining NERL's price cap revenues. Given the potential impact on financing, NERL supports the DfT's proposal not to implement a change to NERL's enforcement regime until RP3.
Ministy of Defence	Given the MOD's desire to have the data supplied to ASACS a condition of the License, the MOD agrees with the scales of enforcement to ensure this national security requirement is met.
MAG AIRPORTS	The current framework only enables the CAA to intervene in a limited set of circumstances. The changes will enable the CAA to investigate and take action for historic breaches where necessary.
Dept for Infrastructure NI	3.11 of your consultation document states that under the current enforcement regime, CAA is limited to two enforcement tools under section 20-25 of the Transport Act 2000 and we note the deficiencies this current regime has at para 3.13. We note that the proposed regime (referred to at 3.17) would give the CAA access to the full suite of regulatory enforcement tools available to it under Part 1 of the Civil Aviation Act 2012 in relation to Airport Regulation. As this is consistent with the Government's Principle for Economic Regulation, we would agree that this is the right approach. We agree that the licence holder should have appeal rights and that the CAA should be accountable for any decision made. We have no objection to the suggested timing of the proposed changes.
BAR UK	In the highly unlikely event that such enforcement tools should be called upon, the overall package of measures and appeal process seems reasonable. We believe the right to appeal should be restricted to those who would be materially affected.
British Airways	BA agrees with the proposal. BA sees particular benefit in the CAA being able to review and issue contravention notices for past breaches, and to be able to make urgent enforcement orders where there are serious licence breaches or serious economic or operational problems. Furthermore allowing the CAA to require NERL to take specific, appropriate steps to remedy the consequences of a breach is also welcome. There may need to be a further provision to allow the CAA to consult other stakeholders, such as airlines, to inform a decision on what such appropriate steps might need to be.

	Appeal rights are referred to as being the same for the licence modification process, but as proposed they do not allow other relevant affected parties to appeal a CAA enforcement decision. BA believes that a right of appeal of CAA enforcement decisions is merited where those decisions materially impact relevant affected parties. The benefits of allowing other stakeholders to appeal these enforcement decisions will be to ensure the CAA retains the appropriate consumer focus and that airline and other stakeholder knowledge of NERL can be used in helping correcting breaches, e.g. airline views and data could be used to help inform decisions on the appropriate steps CAA requires NERL to undertake to correct a breach. Additionally there is likely to be a case for the CAA to publish when a decision has been taken not to proceed with enforcement action, in case relevant affected parties disagreed with that assessment and wished to appeal a lack of enforcement action. This again would ensure there is full accountability for enforcement decisions and a consumer focus is retained. BA believes that the enforcement regime change should be made in tandem with the other changes proposed in this consultation as a single package. This approach would reduce regulatory complexity and ensure that NERL and other stakeholders fully understand the timing of these proposed changes. This overall package of changes should be implemented as soon as possible to improve the NERL licence framework and deliver consumer benefits and the ability to take appropriate enforcement action at the earliest opportunity. BA does not believe the changes need to wait for the start of RP3, and we note that whilst NERL could face a greater level of enforcement they would also benefit from the change of criminal to civil sanctions.
Airlines UK (formerly BATA)	We agree with the proposal to amend the **enforcement regime.** This will introduce a greater degree of flexibility in the system and again reflects the existing arrangements for airport regulation. We welcome the introduction of a more robust framework for holding NERL to account on license breaches. As with the license modification process, airlines should have the ability to appeal CAA enforcement decisions, along with any other relevant materially affected party, if this can be adequately tested and justified. We believe that changes to the enforcement regime should also be brought in, as a single package, at the same time as any changes to the license modification process. We would not support either set of changes coming in separately at different times.
Virgin Atlantic Airways	VAA supports the proposed changes being suggested by DfT on the current enforcement regime. The suggested regime should introduce a new level of flexibility in the system and again replicates that available under the airports licensing mechanism. It will also provide a more robust framework for holding NERL to account on licence breaches. As with the proposed licence modification appeal rights, VAA is again of the view that airlines should hold the ability to appeal CAA enforcement decisions along with any other relevant materially affected party, as long as this can be

	tested and robustly justified as to how they are impacted. Again as noted above, VAA is of the view that the changes to the enforcement powers should also be brought in at the same time as any changes to the licence modification process. We would not be able to support either coming in during different time periods.
Ryanair	We agree that the CAA's current enforcement powers need to be improved. We agree that the powers provided in Part 1 of the Civil Aviation Act 2012 would be a good model for the CAA's proposed enforcement powers. We agree that the licence-holder should be able to appeal on the grounds set out in paragraphs 3.6 to 3.8 of the consultation document. We agree that the changes should come into force as soon as practicable.

Respondent	**Do you agree with our proposal to lengthen the licence notice period?**
The CAA	Preferred length is 15 years. In Autumn 2015, we provided advice to the Secretary of State for Transport on issues relating to the extension of the ATS licence notice period. This followed a formal request from the Department on 22 June 2015 under section 16(1) of the Civil Aviation Act 1982 that the CAA provides further evidence and analysis to support a decision on potential changes to the duration and/or structure of the ATS licence. Our advice, together with additional financial analysis undertaken by Europe Economics, is published on the CAA website. Our advice stated that there may be a good case to extend the notice period to 15 years to reflect the average asset lifecycle and regulatory depreciation period. We concluded that the case for extending the notice period beyond 15 years seemed weak. This was based on an analysis of the following themes: Forward look - There is considerable scope for technological and regulatory change particularly at the European level. - The obligations on States and ANSPs may evolve in a number of alternative directions which are not easy to anticipate in advance. - The Government may therefore need to be mindful that is does not unwittingly constrain or make more costly actions that it may need to take in the future. Comparison with other industries After comparing the ATS licence with those in other regulated industries we concluded that:

	- There is an evidence based justification for the licence holder's licence to be shorter than those for industries with much longer investment cycles. - The licence holder is not disadvantaged by its licence terms compared to other ANSPs in Europe. - Re-introducing exclusivity for the licence holder is likely to have no practical effect but would give the wrong signals generally by appearing to add an artificial barrier to competition. - There may be some benefit in removing the current text in the terms of the ATS licence as it refers to a period which has now ended. Impact of a licence extension Regarding the impact the minimum period before which a licence can be terminated has upon the volumes and costs of debt -raising by regulated companies, our consultants found: - Regulated companies do raise significant volumes (30 per cent and sometimes more) of debt that matures after the minimum termination notice period. The minimum termination notice period does not act as a hard "cap" on the ability of firms to raise debts. - When the minimum termination notice period is longer, firms tend to raise debt with a longer maturity profile — each additional month of extension in the minimum termination notice period means average debt maturity profiles of almost one month greater. - Debt that is raised beyond the minimum termination notice period is materially more expensive — the cost of debt maturing beyond the minimum termination notice period is around half a percentage point greater than of debt maturing inside (other things being equal). - When asset lives are longer, this tends to offset the impact of bonds maturing beyond the minimum termination notice period. If assets have a life of more than six years greater than the minimum termination notice period, that entirely offsets the yield elevation of maturation lying beyond the period. We concluded that: - Despite the difference in yields, the financing benefits to the licence holder of a 25 year notice period are likely to be relatively modest compared to the overall level of determined costs. - There may be a good case to extend the notice period to 15 years to reflect the average asset lifecycle and regulatory depreciation period (although there does not seem to be a good reason why the earliest date for termination should currently be extended beyond the current time in 2031). - There does not seem to be a strong case for extending the notice period beyond 15 years.
NERL	Preferred length is 20 years

	It is in the interest of NERL's customers, and ultimately of passengers, that NERL is able to finance its activities and long term investment in a way which delivers orderly and smooth pricing which reflects efficiency - both operational and financial. The Licence notice period is at the heart of this. In this context, NERL agrees with the DfT that it is efficient for firms to finance its investments over a period that matches the economic life of the asset. NERL considers that in order to deliver a stable and efficiently financed investment programme, the licence notice period should match or exceed the foreseeable investment time horizon. Otherwise there could be distorting effects on investment, which may negatively impact customers. This is a well-recognised principle. For example, the OECD Competition Committee has stated that “long concessions create appropriate incentives for the concessionaire to make long-term investments including to invest in maintenance near the beginning of the concession. Short concessions exacerbate the problem of insufficient incentives to make investments near the end of a concession, as well as the problem of incumbents gaining advantages over other bidders in successive concessions”. [Ref: OECD (2006), ‘Global Forum on Competition: Concessions’ Policy Roundtables’, p. 48]. One specific concern in NERL's case is that a licence notice term shorter than the investment horizon would be likely to encourage NERL to pursue short-term "make do" solutions rather than providing incentives to innovate. Given the pace of technical change and need for innovation in the sector alongside the size and timescales of investment, this risks embedding solutions which could restrict the company’s ability to handle increased levels of traffic and would not deliver acceptable delay outcomes. The earliest termination date of March 2031 has, to date, provided these incentives to look to the long term. As a result this has facilitated the provision of safer and more efficient services for customers, as described in the DfT’s consultation document. The DfT correctly highlights that the technological and economic landscape of air traffic services has been rapidly changing in recent years. Since the PPP in 2001, NERL has embraced these changes. NERL’s safety and service quality performance along with its operating efficiency demonstrates how successful the CAA has been in applying the existing regulatory framework to improve the provision of en route service by NERL to its customers. NERL agrees with the DfT that it is important that the company continues to invest in its infrastructure, ensuring that it is operating with modern capability. In this regard, it is important that there remain appropriate incentives for investment in the company, on a basis that such investment offers a reasonable business case for providers of equity and of debt.

	NERL considers that retaining an effective licence notice period of 20 years would maintain that appropriately long term view and thereby deliver good customer outcomes. Further, and independent of the notice term, NERL considers that notice should not be capable of being served earlier than 1 January 2020 (the start of the next reference period). This would represent a practical compromise between our desired position of maintaining the status quo (notice not capable of being served earlier than March 2021) and the proposal to remove this restriction during the middle of RP2. The removal of this restriction adds a new risk to the company that is not compensated for in the RP2 performance plan.
Ministry of Defence	Whilst the MOD has no real preference on the notice period, a longer period would allow the MOD to explore all the implications of the License holder changing. Currently, the MOD conducts a number of derogated services on behalf of the License holder. A greater notice period would allow the MOD more time to determine whether it would continue to provide these derogated services for a different License holder.
Dept for Infrastructure NI	We believe that the proposed amendments to extend the notice period to 15 years (detailed at para 4.7) strikes the right balance between providing NATS (En-Route) plc (NERL) with additional flexibility to ensure efficient financing of its investment programme and at the same time, allow future governments to change the licence holder without unnecessary delay, should a more competitive entity emerge.
BAR UK	The linking of the licence period with the average asset life would seem logical to ensure investment or ownership is not compromised, although this should not be the sole determining factor. In terms of achieving a balance, we believe that 15 years would be proportionate.
British Airways	BA does not believe that the evidence presented in the consultation is sufficient, on its own, to justify lengthening the licence notice period. However BA does agree with the general principle, articulated in the consultation document, that extending the licence from the current rolling 10-year notice period (from 2021) to 15-years should allow NERL to secure debt financing on better terms. This represents an acceptable compromise position, minimising the potential for a longer NERL licence notice period to reduce incentives to control costs and avoid poor service levels. We concur with the CAA's analysis that there is "little evidence of regulated companies being unable to secure debt financing extending beyond the notice period". BA acknowledges that there may be a risk premium of circa £1m per annum associated with debt secured under a 10-year licence period and, whilst not a significant sum in the context of the wider NERL regulatory settlement, would accept the licence notice period extension to offset this.

	An argument is also made that 15 years is a suitable notice period as it would bring this in line with the NERL average 15-year depreciation policy for assets. However BA believes that depreciation policy should not be driving the length of the NERL licence notice period. This may be a point that needs to be considered within the next NERL regulatory review.
Humberside Airport	My personal view is that 10 years is the optimum period as any greater period acts as a disincentive for a business to plan to bid for the licence. Given the pace of change in the industry, any longer period would effectively block innovative bids from other potential providers.
BATA	In relation to the proposal to lengthen the license notice period, we would not object to an extension of 15 years, but struggle to see any justification for a longer period.
Virgin Atlantic Airways	On proposals to extend the licence notice period, whilst we note the incentive for NERL to be able to finance longer term investments at a cheaper rate, we note that any extension of the notice period may have an impact on cost efficiency. VAA would not object to an extension to 15 years, but we would not see any merit in extending to a period longer than this.

Respondent	**Do you have any comments on the impact assessment at Annex A?**
The CAA	We consider the Impact Assessment at Annex A to be well evidenced and a comprehensive assessment of the impacts of extending the licence. In our analysis and published report, we concluded that there does not seem to be a strong case for extending the notice period beyond 15 years. We found that the financing benefits to NERL of a 25 year notice period are likely to be relatively modest compared to the overall level of determined costs. While we accept that matching the notice period to the life cycle of assets (as described in the section above) would be one way to further reduce uncertainty about the remuneration of investment and facilitate financing, our analysis on asset life suggests that such an extension would not need to be as long as 25 years. Indeed, we understand that the average life cycle of new assets is some 15 years. This is the period over which regulation allows all those assets to be remunerated. We consider that any increase in the notice period beyond 15 years would not be necessary to align the term of debt with the life of the associated assets. In our advice, we also noted that the effects on the incentives on operating costs are difficult to quantify but given operating expenditure is six times the cost represented by the return on capital, the Government should be mindful of the effects on these incentives from extending the licence. We also analysed whether the licence holder was at a disadvantage to other regulated utilities given that water companies have had their notice periods extended from 10 years to 25 years. We found that it was not unusual for the

	notice period to be shorter than the average asset lives. For example, many assets in the energy and water sectors are much longer than the notice period of 25 years. Our overall advice, as detailed above, is that there may be a good case for extending the notice period to 15 years to reflect the average asset lifecycle and regulatory depreciation period.
NERL	In the consultation document the DfT states that it is currently neutral between extending the notice period to 15 years and extending it to 20 years. This is because it is less clear whether the marginal benefits of extending the notice period beyond 15 years outweigh the marginal costs of doing so. For the reasons given below, NERL considers that the marginal benefits of a 20 year notice period are stronger than suggested in the consultation document and that the likelihood of the risks associated with a 20 year notice period are lower than suggested in the consultation document. If these arguments are accepted, this would point to extending the notice period towards 20 years rather than 15. Benefits of a 20 year notice period The DfT states that in certain circumstances a 20 year notice period would make it cheaper for NERL to finance its investments. NERL considers that the evidence for this is stronger than the CAA advised the DfT. The first aspect of this lies in the assumptions that have been made in the calculation of the impact on the cost of finance of a 15 year licence notice period, relative to the status quo. We understand that the annual savings of £1m p.a. referenced in paragraph A.16 assumes that: a) only 30% of NERL's debt would attract the premium of 0.5% p.a.; and b) there is no impact on NERL's cost of equity. NERL disagrees with both of these assumptions. The assumption that only 30% of NERL's debt would attract a premium implies that 70% of NERL's debt has a maturity (on issuance) of 10 years or less. This is at odds with the evidence in paragraph A.17 that efficient finance results from matching the maturity of funding with the average economic lives of the assets being funded. In other words efficient funding could be achieved through a portfolio of bonds that have an average maturity (on issuance) of 15 years. Therefore, it would be more appropriate to assume that under the status quo nearer 100%, rather than just 30% of NERL's bonds would attract this premium of 0.5% p.a. This being the case, the saving from a longer notice period for the cost of debt alone is around three times higher than indicated in the consultation document. Also, the impact on the cost of equity should not be ignored in this analysis. As shareholders' interests are subordinate to those of debtholders it is likely that the impact on the cost of equity would be greater than on the cost of debt. However, if it is assumed that the impact on the cost of equity is the same as the impact on the cost of debt (i.e. 0.5% p.a.), then the annual cost saving of

	moving to 15 years, relative to the status quo is closer to £2m p.a. for the cost of equity alone. This being the case, the saving from a longer notice period in relation to the cost of equity alone is around two times higher than indicated in the consultation document. Taking the understatement of the cost of debt and the omission of the cost of equity, the saving of a 15 year licence notice period is around five times higher than indicated in the consultation document. This calculation of c£5m p.a. is based on a RAB of £1.1bn that is funded by debt and equity, attracting the 0.5% p.a. premium, from 2021 onwards, under the status quo. This understatement of the impact on the cost of finance also has an impact on the relative difference between a 20 year and a 15 year licence notice period. By seeking to achieve a portfolio of bonds with an average maturity (on issuance) of 15 years, NERL is likely to have some bonds with maturities in excess of 15 years. If the licence notice period is 15 years, then these bonds may suffer a debt premium that might have been avoided if the licence notice period were 20 years. In addition, there are occasions when supply and demand imbalances in the Sterling bond market mean that long dated bonds are cheaper than shorter dated bonds. A 20 year notice period would increase the likelihood of NERL being able to take advantage of this, and as a consequence lower its future finance costs. Similarly, the consultation document recognises that in practice packages of investments are likely to be financed by a single bond and that in these circumstances it may be more prudent to issue a bond with maturity greater than 15 years. This further highlights the higher probability that the costs of finance would be lower under a 20 year notice period than under a 15 year notice period, as in the latter case any bond with a maturity greater than 15 years may suffer a debt premium. These financing related points, along with the greater incentives to invest associated with a 20 year notice period as noted above, are not adequately recognised in the consultation document (Annex A). If they were to be recognised, then this would strengthen the argument for a 20 year notice period. Risks associated with a 20 year notice period The consultation document comments that there is a possibility that future technological and economic developments would necessitate the termination of the NERL licence. NERL considers that the risk of this necessity is remote. The consultation document states that the technological and economic landscape of air traffic services has been rapidly changing in recent years. These changes have been captured within NERL's technology plans and in its performance plan for RP2. NERL considers that it is highly likely that future technological and economic developments can be successfully captured in future plans without the need to terminate NERL's licence. As a consequence this makes the risk of the need to terminate NERL's licence as a result of such developments to be very low.

	In relation to incentives for cost efficiency, NERL agrees with the DfT that this risk is largely mitigated by the price-cap mechanism. If there were indeed reduced incentives for cost efficiency as a result of a long notice period, then one would expect more regulated companies to have short notice periods. However, typical notice periods in the water, gas and electricity sectors are 25 years. NERL considers that the reference in paragraph A.21 of a delayed introduction of a new provider is largely a repeat of the point, in paragraph A.18, about future technological and economic developments. As such, when considering the balance of benefits and risks, this over-lap should be taken into account. Taken together, these points indicate that the risks of a 20 year notice period are over-estimated in the consultation document. In summary, we believe that the benefits of a 20 year licence notice period have been understated and that the risks of a 20 year licence period have been overstated. Given that the DfT previously thought these risks were balanced at 15 years, then this points now towards a longer licence notice period e.g. 20 years.
British Airways	BA agrees with the principle articulated in Annex A that a longer notice period will decrease the regulatory incentives on NERL leading to a lesser propensity to control costs and avoid poor service levels. As such options to increase the licence notice period beyond the proposed 15 years to 20 years or more have not been justified based on the assessment presented in Annex A.
Ryanair	We absolutely reject the proposal that the duration of the licence should be extended. NATS currently have a monopoly on air traffic services that will last until at least 2031. There is no commercial or other justification for extending by 5 years the time interval at which competition for the market place can take place. Extending the licence duration will result in decreased efficiency, reduced levels of service and increased costs for users.