



Non-confidential version

NATS/CAA regulatory appeal  
Competition and Markets Authority  
The Cabot  
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London  
E14 4QZ  
United Kingdom

15 April 2020

Sent by email only to [nats.caa@cma.gov.uk](mailto:nats.caa@cma.gov.uk)

Dear Sir or Madam,

**Referral from the Civil Aviation Authority ("CAA") to the Competition and Markets Authority ("CMA"): NATS En-route Limited ("NERL") Price Determination – Further Representations**

**I. Introduction**

1. The International Air Transport Association ("IATA") is the trade association for the world's airlines. It currently represents more than 290 separate airlines, the collective flights of which constitute around 82% of all air traffic. IATA's global mission and aims are enshrined within in its Articles of Association. Chief amongst IATA's stated aims is "[the promotion of] safe, reliable and secure air services for the benefits of the peoples of the world."
2. On 17 January 2020, IATA provided written submissions to the CMA ("**IATA's January Response**") in relation to the CAA's reference to the CMA of matters relating to proposed modifications to NERL's licence. IATA's written submissions were supplemented with oral representations at a hearing on 27 January 2020. IATA's written and oral submissions emphasised that both it, and its members, were appreciative of the work carried out by the CAA throughout the RP3 review process generally, but that it had a number of concerns relating to the deployment by NERL of Space-Based Automatic Dependent Surveillance-Broadcast ("**SB ADS-B**") services.
3. IATA's position remains that, for the reasons set out in its previous submissions to the CMA, services based on SB ADS-B are not yet needed. The current and near-future traffic demand does not necessitate a reduction in separation that would require the use of an enhanced surveillance system such as SB ADS-B, and the associated data charges for oceanic flights are therefore disproportionate and unduly onerous to airspace users. Consequently, and for the reasons previously explained, the proposed SB ADS-B charges for transatlantic crossings operate contrary to the public interest.
4. Additionally, it remains of concern to IATA that alternatives to Aireon's SB ADS-B data services exist<sup>1</sup> but have not been given the benefit of a fair assessment by NERL in devising its business plan for RP3. This concern is heightened by the significant inter-relationships between several key stakeholders in this matter. NERL's sister company, NSL, is a shareholder in the Aireon joint venture and NERL is proposing to

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<sup>1</sup> At the World ATM Congress 2020, which was cancelled due to Covid-19, Indra had planned to disclose its new projects and solutions. Of note for the present matter, its Space Based Communication, Navigation and Surveillance (CNS) system: "a platform to offer surveillance, real time voice and data services from a constellation of satellites." For more information, see [https://www.indracompany.com/sites/default/files/d7/Sectores/ATM/indra\\_space\\_based\\_cns.pdf](https://www.indracompany.com/sites/default/files/d7/Sectores/ATM/indra_space_based_cns.pdf)



source the SB ADS-B surveillance services that are the subject to the proposed data charges from Aireon. IATA is of the view that these inter-company dealings affect the terms on which SB ADS-B services are supplied to, and charged to, NERL and its users. IATA is in particular concerned by the 12-year duration of the contract entered into by Aireon and NERL and NERL's failure to conduct a transparent, competitive procurement process for the selection of the service and/or provider at issue.

5. In its Provisional Findings Report (the "**Provisional Report**") the CMA has concluded that it is no part of its functions on this reference to consider these matters. This is (as explained below) incorrect. The CMA is both permitted and required to investigate and report on whether a licence condition which permits charging for SB ADS-B services is in the public interest.
6. The CMA is therefore respectfully requested to give proper consideration to this matter by reference to both:
  - a) IATA's January Response, as developed in IATA's oral representations; and
  - b) The significant change to market conditions following the collapse in global demand for passenger air travel due to the Covid-19 pandemic.

## II. The CMA's Role

7. The CMA's preliminary view (as set out at §11.26 of the Provisional Report) is that it would not be appropriate for the CMA to "revisit" the decision to implement SB ADS-B. This conclusion rests on the premise that it is not "the role of the competition authority to revisit decisions made by sector experts about technical matters such as the right way to address safety".
8. This premise (and consequently the CMA's provisional conclusion) is mistaken. Not only may the CMA address this issue as a matter of substance, it must do so. This is because of sections 12 and 13 of the Transport Act 2000, which provide (relevantly) as follows:

### "12. References to Competition and Markets Authority.

(1) The CAA may make to the Competition and Markets Authority (referred to in this Chapter as "the CMA") a reference requiring the CMA to investigate and report on—

(a) whether any matters which are specified in the reference and which relate to the provision of air traffic services by or on behalf of a licence holder operate against the public interest or may be expected to do so;

(b) if so, whether the effects adverse to the public interest which the matters have or may be expected to have could be remedied or prevented by modifying the conditions of the licence.

...

(8) In deciding under this section whether a matter operates, or may be expected to operate, against the public interest the CMA must have regard to the matters as respects which duties are imposed on the Secretary of State and the CAA by sections 1 and 2.

...



### 13. Reports on references.

(1) In making a report on a reference under section 12 the CMA —

(a) must include definite conclusions on the questions contained in the reference and such an account of its reasons for the conclusions as in its opinion facilitates a proper understanding of the questions and of the conclusions;

(b) if it concludes that any of the matters specified in the reference operate against the public interest or may be expected to do so, must specify the effects adverse to the public interest which the matters have or may be expected to have;

(c) if it concludes that any adverse effects so specified could be remedied or prevented by modifications of the conditions of the licence, must specify modifications by which the effects could be remedied or prevented. ...”

9. For present purposes, the effect of these provisions is that:

- a) The CAA may make a reference to the CMA in relation to any matter relating to whether the provision of air traffic services by or on behalf of a licence holder operates (or may be expected to operate) against the public interest (s. 12(1)(a)).
- b) Where the CAA makes such a reference, the CMA is required to investigate and report on that question, as well as whether any adverse effects identified may be remedied or prevented by modification of the licence conditions (s. 12(1)).
- c) When fulfilling this obligation, s. 12(8) requires that the CMA must have regard “to the matters as respects which duties are imposed on the Secretary of State and the CAA by sections 1 and 2”. This in turn requires consideration of the need to promote efficiency and economy on the part of licence holders. Further, s. 2(3) refers specifically to interests regarding the range, continuity, cost and quality of air traffic services, including (s. 2(4)) by promoting competition in the provision of air traffic services.
- d) The CMA must in its report include “definite conclusions on the questions contained in the reference” and “such an account of its reasons for the conclusions as in its opinion facilitates a proper understanding of the questions and of the conclusions” (s. 13(1)(a)).

10. The scope of the reference explicitly included Condition 22 in its entirety. This is made clear in the CAA’s Reference to the Competition and Markets Authority of the NERL RP3 price controls (CAP 1857) at:

- a) §1.4: “The licence modifications that the CAA is requesting that the CMA reviews are: .... Condition 22: Oceanic charges and the introduction of a space-based automatic dependent surveillance – broadcast ([SB] ADS-B) system.”
- b) §2.78 (under the heading “Our decisions”): “We are of the view that there is a positive benefits case of introducing the [SB] ADS-B for Oceanic services. This is based on our analysis of the costs and benefits of its introduction that we consider to be based on relatively conservative assumptions. While some stakeholders disagreed with this analysis, we have received no compelling evidence that suggests we had over stated the benefits of [SB] ADS-B.”



11. Further detail of the CAA's approach was set out in Appendix F, with the final decisions recorded at F28 as follows (emphasis added):

"Our final decisions, therefore, **allowed implementation of [SB] ADS-B and associated data charge**, but:

- applied a 5% efficiency to the data charge which we considered to be in line with our wider efficiency challenge on non-staff related opex;
  - included requirements for the monitoring of delivery of performance;
  - improvements against metrics that would be agreed with users;
  - provided for a review of costs and observed benefits within the RP3 period; and
  - required the NATS Board to certify that it is operating a full [SB] ADS-B-based service for its Shanwick airspace, in order for NERL to be permitted to recover the allowed [SB] ADS-B costs through the Oceanic charge from the beginning of RP3."
12. The effect of the approach adopted in the Provisional Report is to ignore entirely the emphasised passage above – i.e. the key decision made in respect of SB ADS-B. This is not a course which is open to the CMA, as the reference requires the CMA to consider whether Condition 22 as a whole operates against the public interest (having regard, amongst other things to the need to promote efficiency and economy on the part of licence holders as well as the range, cost and quality of air traffic services). This assessment cannot sensibly be considered without scrutinising the case for permitting SB ADS-B, given the centrality of SB ADS-B charges to the calculation of the maximum permissible charges in accordance with the formulae set out in Condition 22.
  13. The consequence is that the CMA ought now to consider, and reach substantive conclusions on, the matters raised in IATA's earlier representations. In so doing, there is no warrant for deferring to the CAA's conclusions on matters which the Transport Act 2000 explicitly tasks the CMA with assessing. In this regard, the Provisional Report was (with respect) correct at §3.20 when it stated that the CMA's approach "should build on, but not be unduly constrained by" the analysis already carried out by the CAA.
  14. Similarly, the CMA ought to investigate and reach conclusions as to the accuracy of assertions from NERL regarding the nature of its relationship with Aireon, including as to Aireon's global pricing policy (see §11.15). The Transport Act 2000 provides a suite of powers which the CMA can and should use to enable accurate conclusions to be drawn. For example, section 12(B)(a) permits the CMA to require the production of documents concerning the negotiations conducted by NERL to test NERL's assertion that it has very little buyer power. This assertion should be treated sceptically in light of evidence provided in IATA's January Response indicating that ANSPs without commercial links with Aireon (and therefore motivated to achieve a balanced and cost-effective deal with Aireon) have been able to negotiate advantageous contractual terms.

### III. Impact of Covid-19

15. As the Provisional Report rightly notes (at §9) there has been an unforeseen and highly material change of circumstances during the period in which the CMA has been considering this reference, namely the Covid-19 pandemic. The effects of this are profound, and will be long-lasting. The significance is such that the case for SB ADS-B must be re-assessed in light of these changed circumstances.



16. This is because the Covid-19 pandemic has led to a sharp and almost complete drop in demand for air travel. This will continue for as long as the pandemic lasts, and recovery in demand is likely to be delayed by the economic recession which will inevitably follow. As matters stand, traffic levels in the NAT are unlikely to return to pre-crisis levels for quite some time. IATA's January Response explained that it was unlikely that traffic density in the NAT would require the separation levels afforded by the proposed SB ADS-B separation standards until at least 2025–2028. In light of the current and anticipated steep reduction in demand, this need will not arise until even later. This underscores the central tenet of IATA's submissions, that it makes no sense to require airlines to pay for a service that manages traffic at levels that NATS can in fact manage safely for many years to come without the addition of SB ADS-B.

**a. Impact on Air Travel**

17. The spread of Covid-19 around the world has led to an unprecedented decrease in air travel demand. The leading consultants McKinsey estimate that the deep, immediate demand shock faced by the air and travel industry is some five to six times greater than that which occurred after the September 11 terrorist attacks.<sup>2</sup> It is not yet known how long this will last.

18. All airlines are desperately trying to survive in the most difficult times imaginable. In its most recent impact assessment (dated March 24, 2020), IATA estimated that industry passenger revenues could be \$252 billion or 44% below those of 2019.

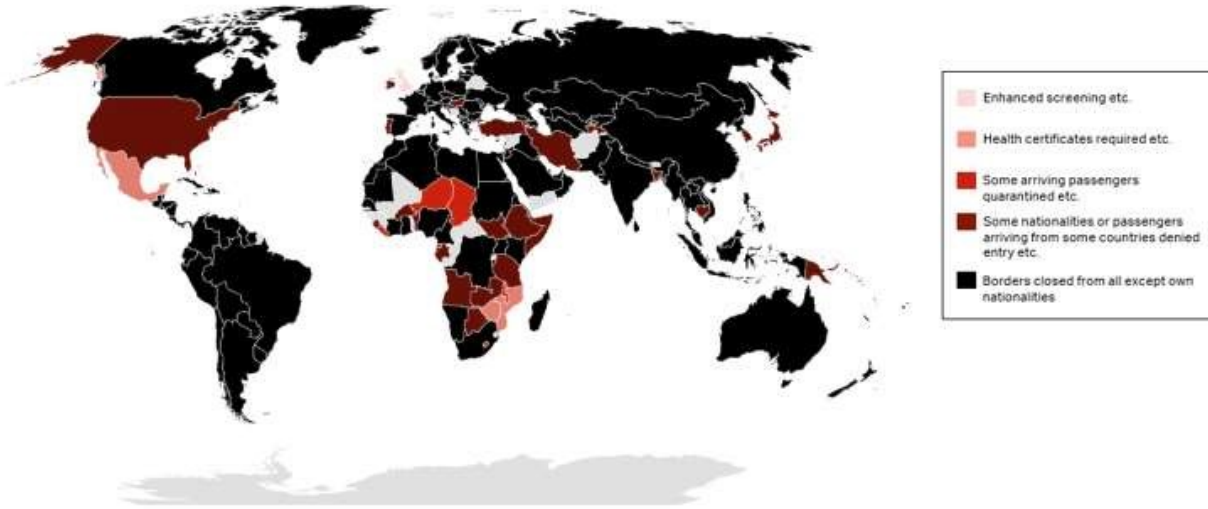
19. As well as travel bans and government-imposed border restrictions applied to curb the spread of Covid-19, there have been restrictions placed on flights, passengers and crew functions, essentially closing destinations to operators. As illustrated in the table below, this covers markets which account for some 98% of global passenger revenues.

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<sup>2</sup> McKinsey Company *Covid-19: Briefing Materials* (March 25, 2020) at page 23: <https://www.mckinsey.com/~/media/mckinsey/business%20functions/risk/our%20insights/covid%2019%20implications%20for%20business/covid%2019%20march%2025/covid-19-facts-and-insights-march-25-v3.ashx> (Annex 1). See updated version dated April 3, 2020 and in particular page 30 at: <https://www.mckinsey.com/~/media/mckinsey/business%20functions/risk/our%20insights/covid%2019%20implications%20for%20business/covid%2019%20march%2030/covid-19-facts-and-insights-april-3.ashx> (Annex 2).

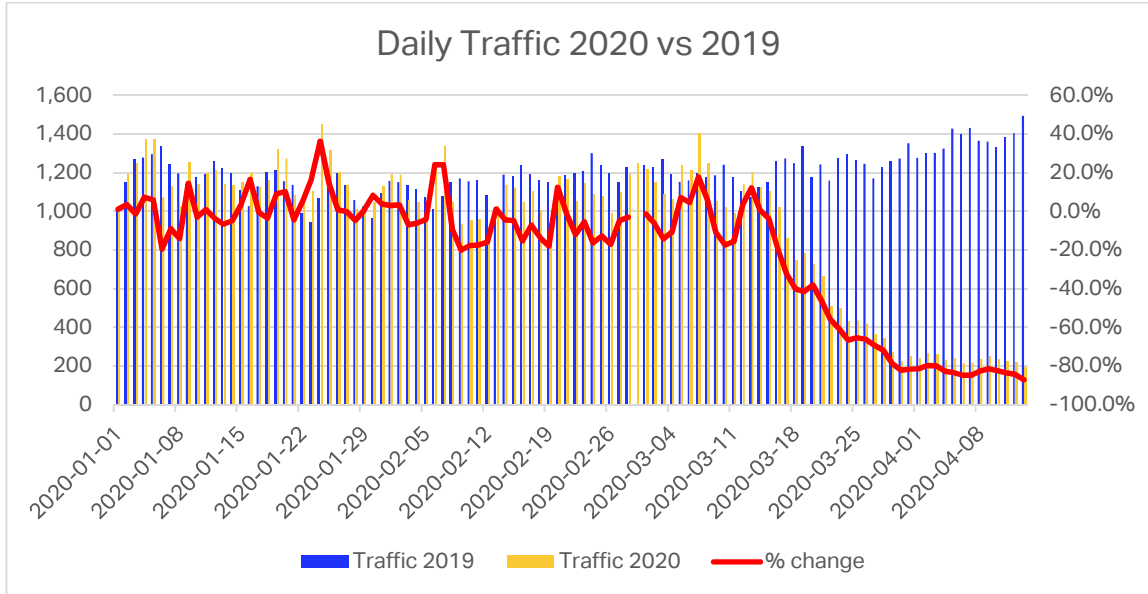


**Travel restrictions are closing down international aviation**



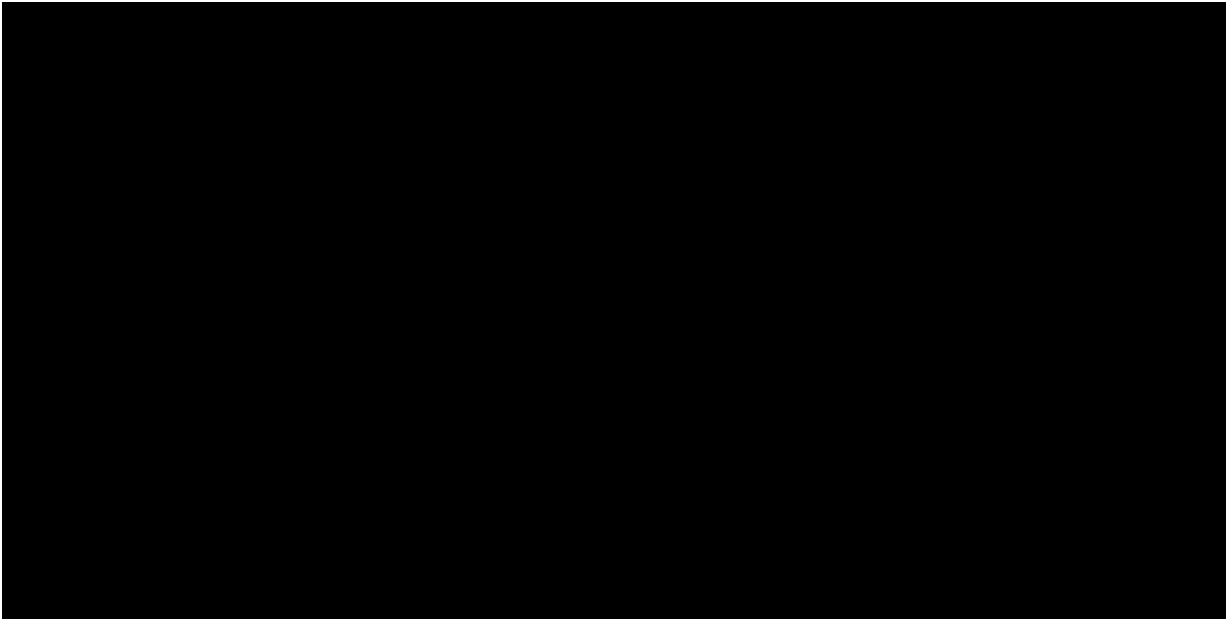
Source: IATA, Covid-19 – Impact assessment, 13 April 2020

20. The scale of the impact on traffic in the Shanwick oceanic control area can be seen in the following table:



Source: Eurocontrol NMIR (Network Manager Interactive Reporting) dashboard

21. Also striking is the sharp and significant decrease in international flight bookings to and from the United Kingdom, as illustrated in the following table showing the year on year change in flight bookings by month of travel.



22. The consequence of this collapse in demand is that many airlines face financial liquidity crises that will only get worse the longer the global pandemic lasts. Furthermore, it is to be expected that the predicted global recession will delay recovery. In particular, the post-crisis economic recession is likely to significantly affect post-crisis traffic in the NAT. The reality is that the traffic level in the NAT is unlikely to return to pre-crisis levels for the foreseeable future.

**b. Unprecedented nature of the crisis acknowledged by industry stakeholders**

23. Airlines are taking drastic measures. For instance, Lufthansa Group announced, in a recent press release, the permanent decommissioning of 18 aircraft, the discontinuation of Germanwings flight operations, and fleet adjustments at Austrian Airlines, Brussels Airlines and SWISS International Air Lines.<sup>3</sup>
24. NAV Canada and NERL manage such low traffic that the number of tracks (ATS routes) has been reduced to one eastbound and one westbound:



Tracks pre-Covid-19 crisis



Tracks in today's situation

25. On April 7, 2020, the European Organisation for the Safety of Air Navigation (EUROCONTROL) announced that its 41 Member States agreed on a financial package enabling airlines to defer the payment of up to

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<sup>3</sup> Annex 3.



EUR1.1 billion of air traffic control fees. Eamonn Brennan, Director General of EUROCONTROL, acknowledged the collapse in travel demand and welcomed the decision of Member States to support airlines through extraordinary measures:

*"I am really delighted that our Member States have approved this essential measure. It will provide much needed liquidity support. Many airlines contacted EUROCONTROL to confirm that they would not be in a position to facilitate their next payments. With traffic down 90%, our Member States have clearly recognised the shared challenge. This payment deferral will ease the immediate burden on airlines and it provides certainty on financial planning to both airlines and the air navigation service providers (ANSPs) on when payments will be made after the crisis has abated.*

*It is important to acknowledge the overwhelming support provided by our Member States for this measure, along with their air navigation service providers, as it provides vital assistance to the airline industry in their hour of need."*<sup>4</sup>

26. Airports Council International (ACI) for Europe have called on the European Commission, the EU/EEA States and Switzerland urgently to define and enact a *European Aviation Relief Programme*<sup>5</sup> to restore air connectivity. Both the ACI for Europe press release dated 9 April 2020 and the 2019 vs. 2020 comparison of traffic volumes published by EUROCONTROL illustrate the magnitude of the crisis and the pressing need for measures:

*"Passenger traffic fell by -59.5% during the month of March, dragging Q1 passenger traffic down by -21%. But while Europe's airports still handled 5,120,000 passengers on 1 March (-11.7% compared to the same day in 2019), that number had reduced to just 174,000 by 31 March (-97.1% compared to the same day in 2019)."*<sup>6</sup>



Source: EUROCONTROL, snapshot of what the traffic looked like on Sunday 29 March 2020 compared to Sunday 31 March 2019 across the EUROCONTROL area

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<sup>4</sup> See: <https://www.eurocontrol.int/press-release/eurocontrol-states-assist-airlines-11bln-deferral> (Annex 4). For more background information on EUROCONTROL's decision, see Annex 5.

<sup>5</sup> See: <https://www.aci-europe.org/downloads/resources/20-03-16%20ANNEX%20COVID-19%20%20AVIATION%20European%20Aviation%20Relief%20Programme%20PUBLIC.pdf> (Annex 6).

<sup>6</sup> See: <https://www.aci-europe.org/media-room/247-unprecedented-impact-of-pandemic-on-european-airports-clear-as-march-passenger-numbers-are-released.html> (Annex 7).



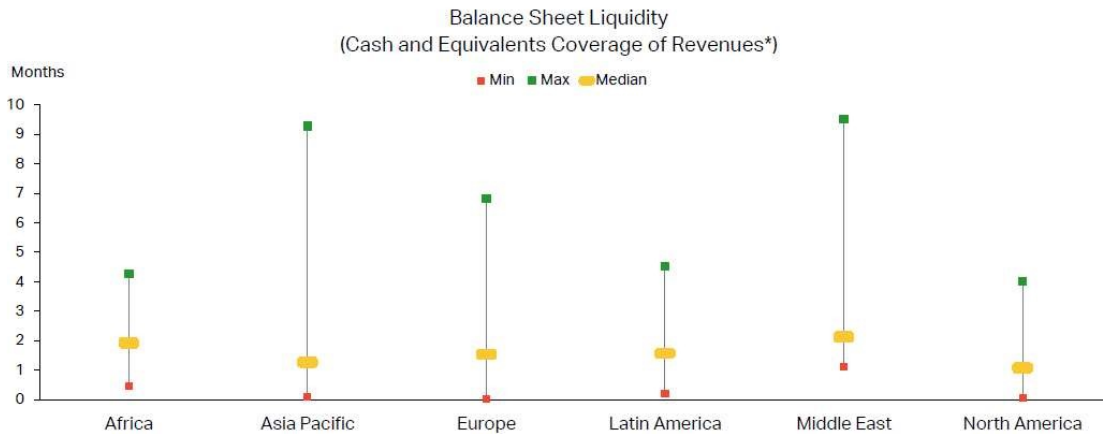


**c. Conclusions on impact of Covid-19**

- 27. The assessment conducted by the CAA and CMA has been overtaken by events. An assessment of whether or not the implementation of Aireon’s SB ADS-B data services and associated charges is in the public interest must be conducted by reference to current data as to the necessity for those services. If it were otherwise, the claimed safety, technological and operational benefits received from adding SB ADS-B services will be being assessed on the basis of a reality which no longer exists.
- 28. The re-assessment must also consider the fact that permitting NATS to charge airlines for a service for which there is no need will place additional financial pressures on airlines which are already facing acute cashflow issues (see table below). This increases the risk that those airlines will run out of cash before the recovery arrives, to the obvious detriment of the public interest in ensuring the “range, availability, continuity, cost and quality of air traffic services.” and in competition for passenger air travel services.

## Airlines will run out of cash before recovery arrives

### The typical airline had 2 months of cash at the start of this year



*\*Latest available 12 months cumulative revenues Africa, Latin America and the Middle East might not be representative due to small sample size.*

Source: IATA Economics using the Airline Analyst



- 29. As the Provisional Report correctly concludes at §4.6, NERL is “a relatively low-risk business, which benefits from the significant protection of a statutory monopoly and from significant regulatory protection against the risks that could arise from traffic volumes turning out to be lower than forecast”. It is not in the public interest that NERL, which (as explained in the IATA January Response) purchased the SB ADS-B service for its own commercial reasons, should be able to pass on to operators the commercial risks related to that decision.
- 30. Furthermore, IATA fears that NERL could seek to increase charges in future so as to recoup the fees it is currently paying to Aireon.

**IV. Independent review**

- 31. Finally, given the current circumstances related to aircraft operations, we believe it is not appropriate to maintain a position that establishes a review of the imposition of fees in two years’ time. This is because:



- a) For the reasons explained in IATA's earlier representations there was no need for SB ADS-B (and the associated charges and cashflow implications for airlines) to have been implemented.
  - b) In any event, there is no need to wait for two additional years to conduct a review. This is because:
    - i) SB ADS-B has already been in use for one year; and
    - ii) The Covid-19 crisis calls for an immediate response. The whole value chain is impacted by the crisis. IATA assumes that NERL is under significant pressure to pay Aireon and that Aireon is under significant pressure to pay Iridium. NERL is charging for a service that is not required under the current circumstances or in the foreseeable future. IATA is of the view that were NERL not motivated by its commercial links with Aireon, it would be actively exploring how to manage its costs, for example by invoking *force majeure* or seeking to re-negotiate its commercial terms with Aireon, including the level of fees and the duration of the agreement.
32. There is in any event a lack of clarity as to how the review is to be conducted. Should (contrary to IATA's submissions) the CMA confirm its provisional conclusions regarding the permissibility of SB ADS-B charging, IATA would request that the CMA clarify the scope of the review. In particular, the review ought to consider all factors relevant to whether the continued imposition of SB ADS-B charges was compatible with the public interest (within the meaning of the Transport Act 2000), having regard in particular to the need to promote competition in the provision of air traffic services, promote efficiency and economy by licence holders and secure that licence holders will not find it unduly difficult to finance activities authorised by their licences. This will mean that it will be necessary for the review to consider the following matters, which should be explicitly specified in the terms of reference:
- a) Retrospectively, whether the charges levied during the previous two years were based on recovery of costs for services provided, or did the charges outweigh the benefits actually received by the operators (and whether there ought to be reimbursement of charges to reflect this).
  - b) Prospectively, whether the benefits outweigh the costs, having regard to the provision of services and the availability of alternative technologies, and of SB ASD-B services offered by other providers.
  - c) In both cases:
    - i) As indicated in the Provisional Report (§11.32), airlines must be able to participate in providing reliable information on flight efficiency benefits that have occurred over the period under review.
    - ii) Whether these matters were affected by the impact of the Covid-19 crisis. This will be particularly relevant when considering whether the claimed efficiencies are properly attributable to the addition of SB ASD-B services.<sup>7</sup>

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<sup>7</sup> Levels of traffic are currently low. Airlines' filed flight plans and pilot requests for desired profiles (routes, flight level, ECON speed) are therefore likely to be approved at a much higher rate with the current low density of traffic. Any efficiencies in the current environment will likely be as a result of extremely low traffic volumes and operational steps taken in response. For example, in a letter dated 26 March 2020 the NAT SPG Chair and ICAO Regional Director Europe and North Atlantic advised as follows: "*NAT airspace users are advised that due to the decrease in traffic caused by the COVID-19 crisis, there is a significantly higher chance of flights being cleared as requested. Therefore, dispatchers and pilots should be encouraged to file and request their optimal profiles at all stages of the flight, including for example, optimal route, flight plan step climbs, pilot requested cruise climbs and 'ECON' speeds, which has been enabled by the recent NAT implementation of operations without assigned fixed speed*" (Annex 8).



- iii) Whether the analysis is affected by NERL's accounting practices. For example, if UK NATS decides to pay losses and increases with a specific reserve account, this would artificially impact on the cost/benefit analysis.
- iv) Whether the loss of revenue due to the Covid-19 crisis, negatively impacted other areas of the operation, or offered an opportunity to remove inefficient and costly technology to reduce the overall charges.

**V. Conclusion**

33. For the reasons set out above, the CMA is invited to reconsider the approach which it has taken to Condition 22 in the Provisional Report, and to assess the permissibility of the SB ADS-B charges by reference to IATA's previous representations and these further representations, and in light of the global collapse in demand for passenger air travel due to the Covid-19 pandemic.

Yours faithfully,

**International Air Transport Association (IATA)**