



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

30 June 2020

Sent by email only to 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 – Response to consultation on approach to COVID-19

The International Air Transport Association (IATA) welcomes the opportunity to respond to the CMA's provisional conclusions on the appropriate approach to take in this referral from the CAA concerning the impact of COVID-19. Through this consultation, the CMA is seeking views on the following provisional conclusions:

- That it should not make specific adjustments to its provisional findings to take account of the impact of the COVID-19 pandemic;
- That the period for the price control that will be determined in its final report should be limited to three years.

As a preliminary matter, IATA would like to note that the written and oral representations made to the CMA on 17 January 2020, 27 January 2020 and 15 April 2020 ("IATA's previous representations") are incorporated in below remarks by reference.

I. The impact of the COVID-19 pandemic cannot be ignored

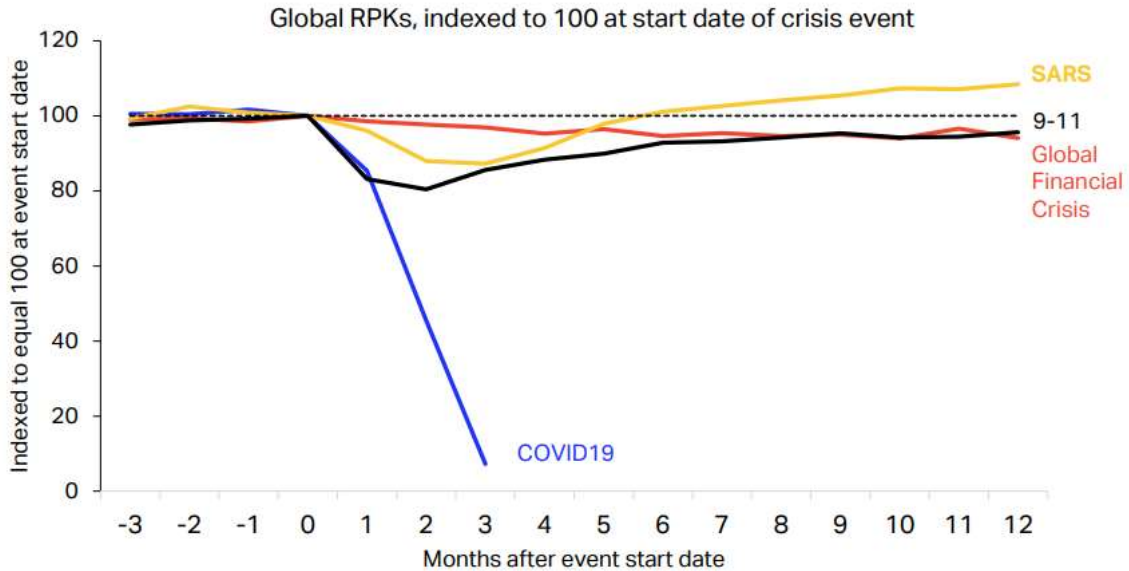
1. The effects of the COVID-19 pandemic on air travel are profound and have already forced several airlines to restructure or cease operations.¹ As outlined in IATA's previous representations, the significant and long-lasting impact of COVID-19 call for a re-assessment of the business and safety case for Space-Based Automatic Dependent Surveillance-Broadcast ("SB ADS-B").

¹ British Airways and Virgin Atlantic have announced significant job cuts to survive the crisis (see <https://www.reuters.com/article/us-health-coronavirus-britishairways/british-airways-says-it-will-cut-more-than-a-quarter-of-its-jobs-idUSKCN22A2WC> or <https://www.ft.com/content/24cc7e2e-5361-4bcd-bfad-b95cae695d86>). The effects of the crisis are also felt in airports: "Heathrow has seen a 90% reduction in passenger numbers since start of the outbreak and we are no longer seeing high volumes of flights per hour as a result" (see <https://www.heathrow.com/customer-support/faq/coronavirus-covid-19>).



Impact on air travel

2. As illustrated below, the depth of COVID-19 impact far exceeds previous crises.



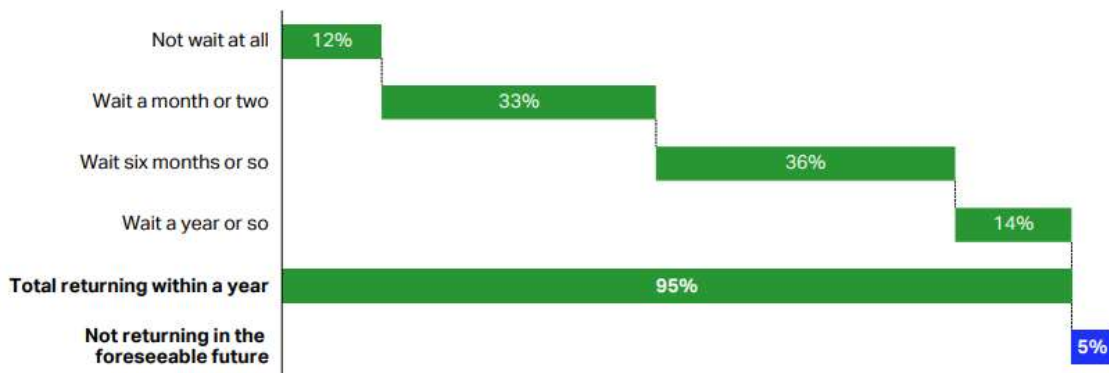
Source: IATA Economics

<https://www.iata.org/en/iata-repository/publications/economic-reports/Flexibility-will-be-critical-to-restart/>

3. Demand for air travel has been affected by the global spread of COVID-19, as well as ensuing measures adopted by governments. On both sides of the North Atlantic, airspaces have been closed, travel restrictions and quarantines put in place. Based on a recent IATA passenger survey, consumers are increasingly reticent to returning to air travel, and IATA expects that the cautious behaviour of travellers will continue to negatively affect travel demand beyond 2020.

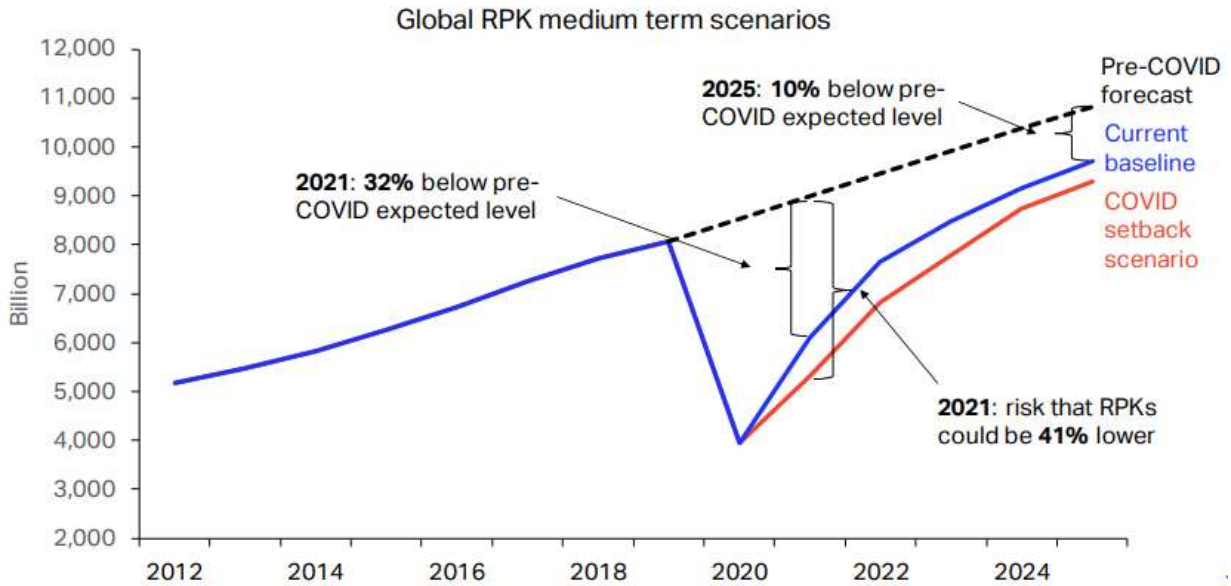
**Latest survey shows passengers even more cautious
Now only 45% will fly within 1-2 months. Previous survey shows 60%**

Once the pandemic has subsided, how long would you wait, if at all, to return to your usual travel plans?

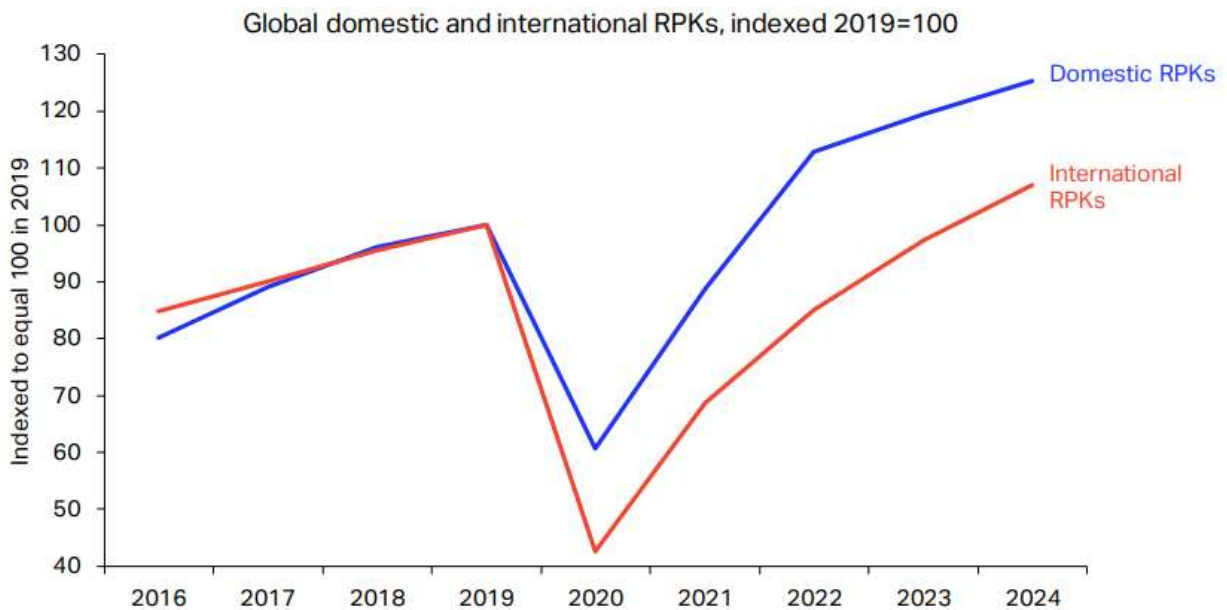


Source: IATA Economics using data from end May-early June passenger survey by Rockland Dutton for IATA

4. IATA estimates that global RPKs will be 32%-41% below expected levels in 2021² and that international RPKs will lag domestic air travel markets.



Source: IATA/Tourism Economics, Air Passenger Forecasts, April 2020



Source: IATA/Tourism Economics, Air Passenger Forecasts, April 2020

² Eurocontrol also envisages that traffic volumes across its 41 member countries' airspace will still be materially below 2019 levels in February 2021. See Annex 1 to the CMA's consultation.



5. In its recent Customer Consultation, NERL itself admitted that it was "*unlikely to see a return to similar levels [of traffic] until 2023/24.*"³ In fact, NERL recognised that its "*plan needs to reflect both the new prevailing market conditions and the uncertain nature of traffic recovery. As a result, we will need to deliver a different investment programme during RP3.*"⁴
6. NERL's primary objective in its decision to deploy SB ADS-B for use over the North Atlantic was to "*deliver the safety and capacity benefits that the airspace requires to keep pace with demand.*"⁵ However, the significant contraction of air travel demand such as the one currently faced and forecasted for several years to come, requires an end be put – at least momentarily – to the continuation of such a deployment.

Financial impact

7. The global airline industry is forecast to lose a record \$84 billion in 2020, which is 3.2 times higher than the financial losses during the global financial crisis in 2008-2009. Although economic activity is expected to improve in 2021, returning to pre-crisis levels of air transport is not expected for several years.⁶
8. NERL is not left unscathed by the crisis and has sought to minimise the impact of COVID-19 through reducing costs "*wherever possible to do so.*"⁷ The purpose of these measures is in particular aimed at – it claims – "*alleviating any necessary recharge of lost revenues in the future.*"⁸ It is however unclear at this stage how NERL intends to proceed with regard to Oceanic charges and IATA calls for the CMA to make specific adjustments to Oceanic charges to take account of the impact of the COVID-19 pandemic on already struggling airspace users.

Conclusions

9. In light of the above, the CMA's position that it will continue to base its final report on its provisional findings, without making specific adjustments to take into account the impact of the COVID-19 pandemic is simply untenable.
10. All industry players have adopted appropriate measures. For instance, ICAO has relaxed the procedures on the North Atlantic until September to accommodate aircraft which are not suitably equipped. In a letter dated 19 June 2020⁹, ICAO explained: "*This temporary accommodation for non-[Datalink Mandate or DLM] compliant aircraft was agreed on the basis that the NAT service provider States and organisations ensure the conduct of appropriate safety management work and that there would be no consequential safety and/or operational limitations within the NAT and its interface areas with other Regions.*" To operate in the NAT, non-DLM compliant aircraft require a flight plan be submitted. Dispatchers and pilots have been encouraged to file and request their optimal profiles at all stages of the flight as the declines in traffic have significantly increases the chances of a flight be cleared as requested. It is another clear indication that neither the traffic volumes nor the safety aspects require full SB ADS-B implementation at this time. Both the business and safety case for continued use of SB ADS-B must be revisited.

³ See NERL 2020 interim Service and Investment Plan (iSIP20) – Draft for Customer Consultation, Annex 1, page 20.

⁴ *Id.*, page 11.

⁵ NATS Holding Limited, Annual Report and Accounts 2018, page 10, available at: https://www.nats.aero/wp-content/uploads/2018/07/NATS6766_AnnualReport2018_FULL.pdf

⁶ <https://www.iata.org/en/iata-repository/publications/economic-reports/airline-industry-economic-performance-june-2020-report/>;

See NERL 2020 interim Service and Investment Plan (iSIP20) – Draft for Customer Consultation, Annex 1, page 20.

⁷ See NERL 2020 interim Service and Investment Plan (iSIP20) – Draft for Customer Consultation, Annex 1, page 5.

⁸ *Id.*, page 5.

⁹ See Annex 2.



11. In fact, the historically unprecedented impact of COVID-19 is of such magnitude that NERL is "*unable to provide a realistic view of the benefits [it] expect[s] to be delivered*" in the coming years.¹⁰ Why would airlines be required to continue to pay for SB ADS-B data services where NERL's promised benefits will not be realized for several years according to their own admission?
12. As indicated in IATA's previous representations, the current and near-future traffic demand in the Shanwick airspace does not call for a reduction in separation that would require the use of an enhanced surveillance system; thus, services based on SB ADS-B were not needed pre-crisis and, as further illustrated above, COVID-19 pushed any theoretical need for such services further into the future. The associated data charges for oceanic flights are therefore unjustified, disproportionate and unduly onerous to airspace users.
13. Permitting NERL to charge airlines for a service for which there is no need, places additional and unnecessary financial pressures on airlines which are already facing acute cashflow issues, ultimately putting their viability at risk, to the obvious detriment of the public interest.

II. CMA's assessment

14. As indicated in IATA's previous representations, the CAA's 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.
15. The consequence is that the CMA ought to consider, and reach substantive conclusions on, the matters raised in IATA's previous representations, and to investigate the accuracy of assertions from NERL regarding the nature of its relationship with Aireon.
16. In that regard, IATA also expects the CMA to investigate whether NERL has worked with Aireon to, for instance, waive certain charges or renegotiate its long-term, exclusive contract in light of the COVID-19 pandemic. The COVID-19 pandemic has led to a situation that has rendered the execution of NERL's contractual obligations vis-à-vis Aireon more onerous. IATA is of the view that NERL ought to argue for the application of the duties of good faith and equity to renegotiate certain terms of the contract. NERL's inertia in that regard would further support IATA's arguments relating to NERL's participation into Aireon and NERL's incentives to advance the interests of the Aireon joint venture over its obligations to serve the interests of its users.
17. IATA invites the CMA to reconsider the approach which it has taken to Condition 22 in its 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.
18. Were the CMA to confirm its provisional findings with regard to oceanic charges (contrary to IATA's submissions), IATA would request the CMA to clarify the scope of the independent review on the implementation of SB ADS-B and how it expects the CAA to combine, and balance, this independent review with the review of the new price control announced in the CMA's consultation, which would be based on a

¹⁰ See NERL 2020 interim Service and Investment Plan (iSIP20) – Draft for Customer Consultation, Annex 1, page 20.



new Business Plan and updated forecasts and financial assumptions.¹¹ As indicated in IATA's previous representations, these reviews ought to consider all factors relevant to whether the continued imposition of SB ADS-B charges is compatible with the public interest, and involve an effective stakeholder consultation.

We confirm that this response does not contain any confidential information and we are happy for it to be published on the CMA's website.

Yours faithfully,

International Air Transport Association (IATA)

¹¹ The impact of Brexit on this exercise also remains unclear at this stage.