


# Final Advice on Market Conditions for Terminal Air Navigation Services in the UK

CAP 1648



**Civil Aviation Authority, 2018**

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## Chapter 1

# Introduction and Summary

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- 1.1 This document sets out the findings of our review, requested by the Department for Transport (DfT), of whether the UK terminal air navigation services (TANS) sector is subject to market conditions at relevant UK airports. This assessment is based on criteria set out in relevant EU legislation ahead of Reference Period 3 (RP3) of the Single European Sky (SES) Performance Scheme (2020-2024).
- 1.2 We have found that TANS provision at the airports in scope of this review is subject to market conditions. If the DfT adopts our advice, it can then apply to the European Commission (EC) for exemption from those elements of the EC's Implementing Regulation No 391/2013 (charging regulation) that apply to the provision of TANS. If accepted by the EC, the UK will not be required to calculate determined costs, set financial incentives, and set terminal unit rates for TANS for RP3.

## Legal framework

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- 1.3 The performance scheme – under the European Commission's (EC) Implementing Regulations No's 390/2013 (the performance regulation) and 391/2013 (the charging regulation) – sets out measures to improve the overall performance of air navigation services, through setting targets to drive performance in four key performance areas (safety, environment, capacity, and cost-efficiency).
- 1.4 Member States must apply the performance regulation to TANS provided at airports with 70,000 or more instrument flight rules (IFR) air transport movements (ATMs) per year. Member States may decide not to apply the performance regulation to TANS provided at airports with fewer than 70,000 IFR ATMs per year.<sup>1</sup> The airports currently in scope are: Heathrow, Gatwick, Manchester, Stansted, Luton, Edinburgh, Birmingham, Glasgow and London City. Bristol and East Midlands airports were not included in the previous review. However, as their traffic is close to but below the

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<sup>1</sup> Article 1(3) of Implementing Regulation (EU) No 390/2013 says that Member States may decide not to apply this Regulation to TANS at airports with fewer than 70,000 IFR ATM per year; which is available from: <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32013R0391>

70,000 IFR ATM threshold, they may reach the threshold during RP3. The DfT asked us to consider all of these airports in our review.

- 1.5 The charging regulation lays down a common charging scheme for air navigation services and allows for exemptions from some aspects of the performance scheme, including the requirement to set cost efficiency targets for TANS, where the provision of TANS is subject to market conditions (as defined by the criteria set out in Annex I of the charging regulation and are included in this document at Appendix A).
- 1.6 The CAA has conducted this review in response to a request from the Director of Aviation at the DfT. The DfT requested that the CAA provide advice to the Secretary of State for Transport (SoS) under section 16(1) of the Civil Aviation Act 1982.<sup>2</sup> Under this section, the CAA has a duty to provide advice to the SoS when requested to do so.
- 1.7 In 2015, the CAA examined whether TANS in the UK was subject to market conditions. Our report – ‘Review of advice on SES Market Conditions for Terminal Air Navigation Services (TANS) in the UK’<sup>3</sup> – showed that a number of significant changes within the market for the provision of TANS in the UK had taken place since our 2013 assessment of market conditions. These changes included TANS transitions at UK airports to both self-supply and third-party entry into the market. These developments demonstrated that market conditions exist, and this conclusion was adopted by the EC on 6 October 2016.<sup>4</sup>
- 1.8 In CAP 1293<sup>5</sup> we said that if, by the end of 2016, most of the airport operators whose contracts were nearing termination at that time had not notified some form of open tender for TANS provision, we would conduct a formal review of the market. In this review, we found that TANS provision continues to be subject to market conditions and that there is no compelling case at this stage for a further review of the market. We will continue to encourage airport operators to tender their TANS provision when TANS

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<sup>2</sup> Letter to Andrew Haines CEO (CAA) from Dan Micklethwaite Director of Aviation (DfT), 24 October 2017, available at:

<https://www.caa.co.uk/WorkArea/DownloadAsset.aspx?id=4294986929>

<sup>3</sup> CAP 1293 ‘Review of advice on SES Market Conditions for Terminal Air Navigation Services in the UK’, May 2015 available at: [www.caa.co.uk/cap1293](http://www.caa.co.uk/cap1293)

<sup>4</sup> Commission Implementing Decision (EU) 2016/1940 of 6 October 2016 on the establishment of market conditions for terminal air navigation services in the United Kingdom, available at <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32016D1940>

<sup>5</sup> Paragraph 7.4 CAP 1293, ‘Review of advice on SES Market Conditions for Terminal Air Navigation Services in the UK’, May 2015, which is available from: [www.caa.co.uk/cap1293](http://www.caa.co.uk/cap1293)

contracts approach their end.

- 1.9 We do not yet know how the UK's exit from the EU will impact on the applicability of the SES Performance Scheme. For the purposes of this review we are assuming that the SES Performance Scheme will continue to apply to the UK throughout RP3. The DfT has also advised that irrespective of the UK's future relationship with the EU there is a need to put in place a performance plan with targets for the UK's air navigation services from 2020. This would need to be informed by up to date information on the provision of air navigation services and so this review is consistent with this wider policy context.

## Context for our assessment

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- 1.10 We have not carried out a competition assessment using our concurrent competition law powers, for example a market study under the Enterprise Act 2002, or an investigation under the Competition Act 1998.<sup>6</sup> Further, we do not consider that the Annex I criteria constitute a test of whether the market for TANS is fully competitive, whether any individual operator holds a position of significant market power or whether there are any other features of the market that may have an appreciable effect on competition that we might consider separately under our competition powers. As part of this assessment, we are not required, nor have we sought, to define the scope of the market(s), assess any potential market dominance and/or address actual or potential behaviour(s) displayed by any party. We do not consider that we are bound by our assessment under this test in relation to any potential investigatory or enforcement action we may take in the future using our concurrent competition law powers, or any other powers.
- 1.11 We note that the EC has not published guidance on the application of the test set out in Annex I of the charging regulation. We have conducted this review in line with our earlier assessments.<sup>7</sup>
- 1.12 We also note that the EC is currently reviewing the performance and charging regulations, with a view to amending them ahead of RP3. The EC has yet to come forward with drafting proposals, so we are unable to say whether there will be changes to the market conditions provisions. We do not currently envisage significant changes to the assessment criteria for RP3 and the EC is aware we are conducting a review for RP3.

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<sup>6</sup> CAP 1235 'Guidance on the application of the CAA's Competition Powers', May 2015, is available from [www.caa.co.uk/CAP1235](http://www.caa.co.uk/CAP1235)

<sup>7</sup> CAP 1004 and CAP 1293.



## Summary of our assessment

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- 1.13 We consider that the sector continues to be subject to market conditions on the basis of the assessment set out in Chapter 6, as summarised below:
- we have not found any significant legal or economic barriers that prevent a service provider from offering to provide or withdraw from the provision of TANS;
  - we have not found any significant legal or economic barriers that prevent airport operators from exercising choice in service provider or to self-supply;
  - there is a range of TANS service providers and there are public tendering processes available to UK airports;
  - all airports in the UK are either subject to economic regulation or actively compete for airline business – and so all face commercial incentives to manage the costs of TANS;
  - where TANS providers also provide en route air navigation services, these activities are subject to separate accounting and reporting arrangements;
  - this assessment applies to TANS operations at all airports in the UK subject to the relevant EC regulation.
- 1.14 The assessment of market conditions does not mean that the TANS market is fully competitive. We have taken a number of steps to encourage the development of competition. For example, in 2015, we wrote to stakeholders encouraging them to respond positively to the expected decision by the EC that the market conditions existed in the UK for the provision of TANS.<sup>8</sup> This included encouraging airports operators to follow open tender processes when their TANS contracts come to an end. We commissioned Steer Davies Gleave (SDG) to review recent TANS transitions and published in February 2018 an information note to stakeholders following that review.<sup>9</sup>
- 1.15 We continue to encourage airport operators to tender their TANS provision when TANS contracts approach their end and, where appropriate, we will react to significant market developments. This could include considering whether there are any initiatives that would support the development of

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<sup>8</sup> This letter is available at: <https://www.caa.co.uk/WorkArea/DownloadAsset.aspx?id=4294978478>

<sup>9</sup> This is available in [www.caa.co.uk/cap1633](http://www.caa.co.uk/cap1633).

competition in this sector. For example, in the section on “NSL/NERL<sup>10</sup> interface” in Chapter 4 we note that steps can be considered to provide further information to market participants in the context of tenders and the tools at our disposal to enforce the separation arrangements between NERL and NSL that exist in NERL’s licence.

- 1.16 If you would like to discuss any aspect of this document please contact Rod Gander ([Rod.Gander@caa.co.uk](mailto:Rod.Gander@caa.co.uk)) or Pedro Pinto ([Pedro.Pinto@caa.co.uk](mailto:Pedro.Pinto@caa.co.uk)).

## Timetable

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- 1.17 This review had the following milestones:
- 24 October 2017: request for advice made by the DfT;
  - 13 November – 8 December 2017: we called for evidence from industry regarding the provision of TANS in the UK. The questions we asked are set out in Appendix B; and
  - A list of respondents to the call for evidence, and the stakeholders we interviewed to support the evidence gathering, is set out in Appendix E;
  - 15 February 2018: we published draft advice for consultation;
  - 12 March 2018: the deadline for written responses to the draft advice consultation;
  - End of March 2018: we provide advice to the SoS (this document);
  - May 2018: we expect to be able to publish our advice to the SoS; and
  - Under the current charging regulation, the EC has up to six months from submission of any application by the DfT for exemption, to determine and advise whether it agrees that market conditions have been established.

## Responses to the Consultation on CAA’s draft advice

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- 1.18 This final advice follows the publication, in February 2018, of our draft advice for consultation (CAP 1634).<sup>11</sup> We received four responses<sup>12</sup> to our consultation and while no respondent considered that the CAA’s conclusion – that TANS in the UK is subject to market conditions – was not correct,

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<sup>10</sup> NATS Services Ltd (NSL) and NATS En Route Plc (NERL)

<sup>11</sup> Available at [www.caa.co.uk/cap1634](http://www.caa.co.uk/cap1634)

<sup>12</sup> We received responses from Prospect ATCOs and ATSS’ Branch; British Airways (BA); NATS (Services) Limited (NSL); and Air Navigation Solutions (ANSL). These are available at <https://www.caa.co.uk/Commercial-industry/Airspace/Air-traffic-control/Air-navigation-services/Air-Navigation-Service-Provision--The-Contestability-Assessment/>.

stakeholders made relevant points for this review. These are noted and discussed in chapters 3 to 5.

## Structure of this advice document

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- 1.19 The remainder of this document sets out our analysis and findings. It is structured as follows:
- Chapter 2 covers the definition and history of TANS.
  - Chapter 3 analyses the following high-level issues:
    - stakeholders' overarching views on market conditions;
    - alternative providers; and
    - views on recent transitions.
  - Chapter 4 focuses on contracting and staffing issues and, in particular:
    - approach to TANS contracting;
    - contract duration;
    - NSL/NERL Interface;
    - Trust of a Promise (ToaP) /staff transfer from incumbent provider; and
    - access to qualified ATCOs.
  - Chapter 5 discusses other relevant issues for this assessment:
    - transition set-up costs;
    - new technology – remote towers;
    - consultation with airspace users; and
    - benefits to users.
  - Chapter 6 provides our assessment against the criteria of the market conditions test.

## Chapter 2

# Definition and history of TANS

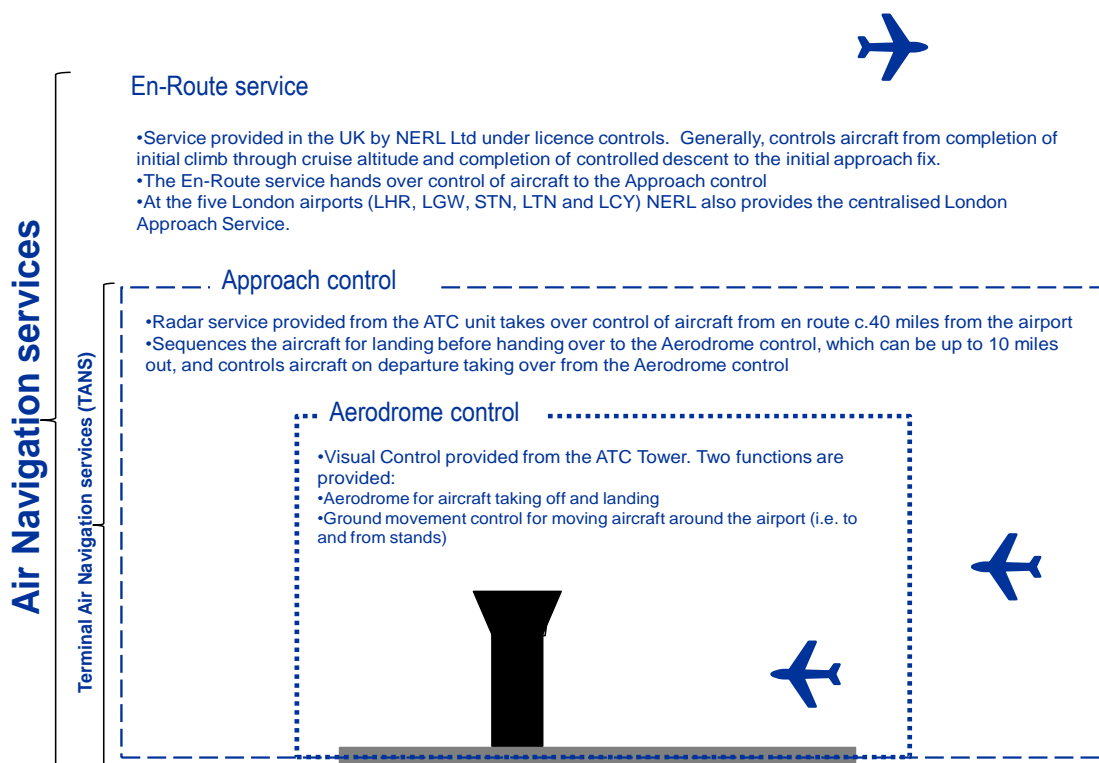
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- 2.1 This chapter outlines the development of TANS in the UK to date and covers milestones that have led to this review. It is structured as follows:
- definition of TANS; and
  - history of UK TANS provision.

## Definition of TANS

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- 2.2 Air traffic services are separated into the “en route” service, which controls traffic during the cruise phase of the flight away from the airport environment, and TANS. TANS itself normally consists of two elements: (a) the “radar approach and departure” (approach) service and; (b) the aerodrome service. The approach service typically controls the aircraft within 40-50 nautical miles from the airport. The approach service for a number of airports can be combined and, in the case of the airports within the London terminal manoeuvring area, these have been centralised for safety and efficiency reasons. The unified approach service, the so called “London Approach” service, is provided by NATS En Route Plc (NERL) under its licence granted under the Transport Act 2000. We have not examined the London Approach service as this is provided under licence by NERL and is not subject to competition.
- 2.3 Figure 1 (below) illustrates the scope of TANS.

**Figure 1: Illustrative definition of air navigation services**

## History of UK TANS provision

- 2.4 The Transport Act 2000 paved the way for the privatisation of NATS through a Public-Private Partnership (PPP).
- 2.5 In March 2004, the European Parliament and the Council of the European Union adopted the first Single European Sky (SES) legislative package. This set out the initial framework for a pan-European approach to the regulation and governance of airspace. Since 2004, the SES legislation has provided the framework for the regulation of TANS.
- 2.6 In 2011, Luton Airport conducted the first public tender process for TANS. The contract was awarded to the incumbent, NATS Services Ltd (NSL). This was followed in 2012 by a public tender by Birmingham Airport, which resulted in a move to self-supply.
- 2.7 In February 2012, at the request of the DfT, we published an assessment of whether TANS in the UK is subject to market conditions under Annex 1 of the EC Regulation 1794/2006. This assessment found that the market conditions did not exist under the conditions of the test due to a low level of market activity in the provision of TANS in the UK.

2.8 Consequently, the DfT did not seek derogation for TANS from the SES Performance Scheme<sup>13</sup> regulatory requirements.

## 2013 to 2015

2.9 Based on 2013 data, NSL accounted for around 60 per cent of aircraft movements at airports in the UK. The remaining 40 per cent was self-supply. There were no third-party TANS providers providing TANS at commercial airports. However, a number of contracting events took place at UK airports in 2013 and 2014 including:

- change of provider for the TANS service at Birmingham Airport from NSL to Birmingham Airport Air Traffic Ltd (BAATL). BAATL is wholly owned by Birmingham Airport;
- NSL was awarded a further five-year contract by Belfast International Airport in April 2013;<sup>14</sup>
- NSL was awarded a further five-year contract by Cardiff Airport in January 2014;<sup>15</sup>
- the announcement by GAL in July 2014 that it would be awarding, after a tender process, its contract for TANS to Air Navigation Solutions Limited (ANSL, a subsidiary of Deutsche Flugsicherung GmbH (DFS), the main ANSP in Germany);<sup>16</sup> and
- NSL was awarded a ten-year contract by the Manchester Airports Group (MAG) in August 2014 to provide TANS at both Manchester and Stansted airports.<sup>17</sup>

2.10 In 2015, we advised that TANS in the UK was subject to market conditions, primarily on the basis of the new contracting events that had allowed for change in TANS provider at a number of airports. A summary of the relevant findings from CAP 1293<sup>18</sup> is available in Appendix C.

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<sup>13</sup> Now Annex I of EU 390/2013: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:128:0001:0030:EN:PDF>

<sup>14</sup> This airport is not in scope of this review. For further information see <http://www.nats.aero/news/belfast-and-gibraltar-airports-renew-contracts-with-nats/>

<sup>15</sup> This airport is not in scope of this review. For further information see <http://www.nats.aero/news/nats-secures-five-year-contract-cardiff-airport/>

<sup>16</sup> For further information see <http://www.mediacentre.gatwickairport.com/News/Gatwick-announces-contract-award-for-air-traffic-control-services-921.aspx>

<sup>17</sup> For further information see: <http://www.nats.aero/news/mag-nats-announce-ten-year-deal/>

<sup>18</sup> CAP 1293, 'Review of advice on SES Market Conditions for Terminal Air Navigation Services in the UK', May 2015, which is available from: [www.caa.co.uk/cap1293](http://www.caa.co.uk/cap1293)

## 2015 to present day

2.11 Since the publication of CAP 1293<sup>19</sup> the main developments in the TANS sector include:

- that new service providers have successfully established operations at Birmingham and Gatwick airports with no issues of service continuity or quality of service;
- we commissioned Steer Davies Gleave (SDG) to review the transitions at both airports.<sup>20</sup> SDG found that no issues had emerged in terms of continuity or quality of service, but identified a number of challenges that had emerged between the incoming and outgoing providers, particularly in relation to the transfer of staff and the transfer of information and data. A summary of reviews of Birmingham and Gatwick transitions is provided in Appendix D. An information note to TANS stakeholders, based on the SDG report, is available on our website<sup>21</sup>;
- Edinburgh Airport decided, after a tender process, to change provider from NSL to ANSL. ANSL is due to commence operations in 2018;
- Belfast City Airport (which is below the threshold to be affected by the Charging Regulation), after a tender process, changed from self-supply to NSL in 2016;
- some airport operators have re-negotiated or extended their contracts with NSL, including London City which is planning to move from provision based in the control tower at the airport to remote provision;
- Luton Airport, whose current contract with NSL expires in October 2018, has appointed NSL to continue providing TANS for five years, following an open and competitive tender process<sup>22</sup>; and

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<sup>19</sup> See CAP 1293 – Review of advice on SES Market Conditions for Terminal Air Navigation Services in the UK, available at: [www.caa.co.uk/cap1293](http://www.caa.co.uk/cap1293).

<sup>20</sup> This report is available at: [https://www.caa.co.uk/uploadedFiles/CAA/Content/Accordion/Standard\\_Content/Commercial/Airspace/Air\\_Traffic\\_Control/TANS%20provider%20transition%20review%20-%20Final%20Consolidated%20Report.pdf](https://www.caa.co.uk/uploadedFiles/CAA/Content/Accordion/Standard_Content/Commercial/Airspace/Air_Traffic_Control/TANS%20provider%20transition%20review%20-%20Final%20Consolidated%20Report.pdf)

<sup>21</sup> This is available at [www.caa.co.uk/cap1633](http://www.caa.co.uk/cap1633)

<sup>22</sup> See <https://www.nats.aero/airports/london-luton-airport-chooses-nats-air-traffic-service-provider/>

- AGS (the airport operator of Aberdeen, Glasgow and Southampton airports) extended its TANS contracts so that the three airport operators will end their TANS contracts at the same time (March 2021) when it intends to tender for TANS for all its airports.



## Chapter 3

# High-level issues

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- 3.1 This chapter covers stakeholders' views and our views for the following high-level issues:
- stakeholders' overarching views on market conditions;
  - alternative providers; and
  - views on recent transitions.

### **Stakeholders' overarching views on market conditions**

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- 3.2 NSL considered that our 2015/16 assessment of the TANS market and more recent developments are evidence that the UK TANS market continues to evolve in a competitive manner and remains firmly subject to market conditions. In NSL's view, since our last review, the market has been very active with a range of open and competitive tenders, contract negotiation processes and airport operators changing to or from self-supply of TANS. It noted the successful transitions of TANS providers at Gatwick and Birmingham airports and the award of Edinburgh Airport's TANS contract to ANSL, following an open tender process.
- 3.3 ANSL is a recent entrant in the UK TANS sector. It has bid and successfully secured contracts for the provision of TANS at Gatwick and Edinburgh airports and is committed to grow its presence in the UK market. It has, however, expressed a number of concerns over how the market is functioning and has said that these issues should be addressed to encourage a more competitive and open TANS market. ANSL has not called for performance regulation of TANS to be introduced. Instead it would like to see more market opening action, either through changes in the regulation of NERL, new legislation and/or the application of competition law.
- 3.4 Of the UK airport operators that responded to the Call for Evidence, none considered that the provision of TANS at airports in scope of the regulations is not subject to market conditions.
- 3.5 Heathrow Airport is of the view that "there is contestability in the market for the provision of TANS in the UK following the recent changes." Heathrow Airport said it has no material concerns regarding barriers to changing TANS provider and has seen NSL become more responsive to the needs of

its customers as the threat of an alternative provider has increased.

- 3.6 Gatwick Airport considered that the TANS market has developed well, with NSL having to work harder to retain contracts. It said that increased competition in the TANS sector has driven down costs and improved service.
- 3.7 London City Airport considered that the TANS market has changed substantially in the past five years and there is more competition. It noted that NSL has not been able to re-secure a number of airport operator contracts and new players coming in (notably ANSL) and there is the potential for other European ANSPs partnering with technology providers to provide new TANS solutions. It said that airport operators have increasingly much more choice and do not need to rely on the national UK en route ANSP. It also considered that NSL has become more customer oriented and innovative as a result.
- 3.8 MAG considered that there have been improvements in market conditions over the last five years and that NSL has been directly impacted by recent changes in TANS provider at a number of airports across the UK.
- 3.9 Birmingham Airport said that recent changes have made the UK TANS providers and their customers more aware of the potential for changing providers. Birmingham noted that “this has, undoubtedly resulted in some airport operators negotiating their TANS contracts under more favourable conditions.”
- 3.10 AGS indicated that “the market has become more active in recent years” and that NSL is “aware of the competitive forces at play”. AGS also noted that, at this stage, it does not have any concerns about potential barriers to changing TANS provider.
- 3.11 Luton Airport considered that recent events demonstrated that there is competition in the UK TANS market and that there have been benefits from tendering services and these should continue in the future.
- 3.12 Southend Airport said that “the TANS market for the larger UK airports is competitive, however, the evidence for regional airports suggests that TANS provision is largely through self-supply.”
- 3.13 IATA agreed that there has been some maturing of market conditions with UK TANS, with some encouraging changes in service providers. However, IATA did not consider this to be a fully functioning market that demonstrably delivers benefits to airspace users as there is no evidence showing that efficiencies have been achieved and passed on to airport users in the form of lower charges.

- 3.14 British Airways (BA) and Virgin agreed that there does appear to be a market developing for TANS in the UK but they also agreed with IATA's view that the UK is yet to have a fully-functioning TANS market that is demonstrably delivering benefits for airspace users.
- 3.15 Prospect<sup>23</sup> considered that the UK TANS market remains subject to market conditions, but that a cost-benefit analysis should be undertaken to determine whether the enforcement of a fully commercial and competitive market is the right approach for TANS and its stakeholders.

#### **Further stakeholder views**

- 3.16 None of the respondents to the consultation on our draft advice changed their views significantly on the matters discussed above.

#### **CAA's views**

- 3.17 We note that no stakeholder said that the provision in TANS in the UK should be subject to performance targets under the SES performance and charging regulations. Most stakeholders agreed that the market was subject to market conditions and/or have noted positive market developments in recent years, while some noted remaining concerns on whether the sector is fully competitive.

### **Stakeholders' views on alternative providers**

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- 3.18 NSL told us that it viewed ANSL, Serco, LFV/Ports of Jersey Ltd, IAA and ATCSL/Peel as actual or potential competitors. Also, NSL expects more competitors to emerge as, in its view, the UK is becoming increasingly attractive to European ANSPs looking for opportunities to grow their business. NSL also expects new business models to emerge, including those using new types of TANS technology, i.e. remote towers.
- 3.19 DFS (ANSL's parent company) is one of the largest ANSPs in Europe. It is responsible for en route airspace and the operation of the majority of TANS in Germany. Its TANS operations include large airports such as Frankfurt and Munich. ANSL said it is committed to the UK market and would like to grow its presence in it. In its view, the challenges it faced with transition required a committed ANSP with broad shoulders to take on the risks associated with transition. It does not consider that many other potential market participants would be able to provide the level of competition that it

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<sup>23</sup> Prospect is a trade union that represents almost 2000 ATCOs and 1000 air traffic systems specialists within the UK air traffic management system.

has brought to the market.

- 3.20 The UK TANS market has, nevertheless, attracted interest from other European ANSPs and from other smaller UK ANSPs looking to grow their businesses (such as ATCSL).<sup>24</sup> ATCSL has previously bid for TANS at Luton, Birmingham and Belfast City. ATCSL did not bid for Gatwick and Edinburgh airports TANS contracts because it considered Gatwick Airport's operation too big for ATCSL and, in the case of Edinburgh Airport, it considered that either NSL or ANSL, already having taken Gatwick, were better placed. ANSL and ATCSL represent two different forms of provision. One is developing its offering from the base of an extensive operation in its home country while the other is commercialising in-house provision.
- 3.21 In the tender run by Gatwick Airport, it had 14 providers interested in the contract, five submitted pre-qualifying questionnaires, from which they selected four, three of which eventually submitted compliant bids. Following the process ANSL won the contract.<sup>25</sup>
- 3.22 The tender run by Edinburgh had eight providers interested including NSL, ANSL, LFV Sweden<sup>26</sup>, ATCSL and a number of other European ANSPs. Three providers proceeded to the invitation to tender stage and one of these withdrew from bidding during the process. The tendering process then proceeded to an evaluation and negotiating stage with NSL and ANSL, with ANSL being the successful bidder. Edinburgh Airport told us that it has learnt from how other airport operators have previously tendered for TANS.
- 3.23 Additionally, Birmingham Airport has taken the decision to bring TANS in-house. NSL said that other airport operators have credibly threatened to take service in-house as part of negotiations.<sup>27</sup>
- 3.24 As a result of these changes, by 2018 the make-up of the industry will be quite different to that observed in 2013. Figure 2 (below) shows a forward look to 2018 for the share of UK ATMs, based on 2013 movement data, when changes in TANS operators are taken into account. Figure 2 includes the vast majority of UK airports, including those that are not in scope of this review (i.e. those below 70,000 IFR ATMs).

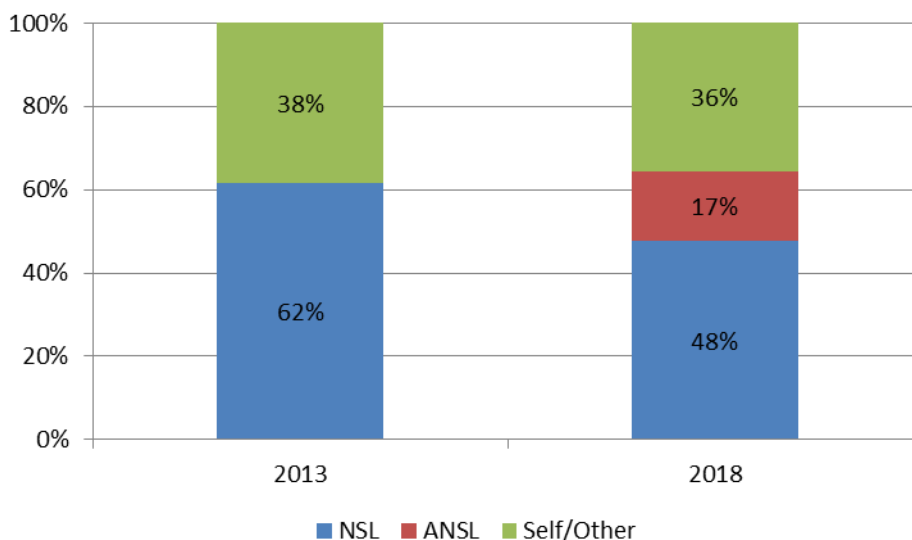
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<sup>24</sup> ATCSL is a UK ANSP responsible for TANS at Liverpool John Lennon Airport, Robin Hood Doncaster Sheffield and Durham Tees Valley. These airports effectively self-supply as these airports and ATCSL are owned by the Peel Group.

<sup>25</sup> Gatwick, TANS call for evidence, 14 January 2014

<sup>26</sup> Sweden's main ANSP

<sup>27</sup> NATS, NSL's response to CAP1226: Provision of Terminal Air Navigation Services (TANS) in the UK: Call for evidence, 7 November 2014

**Figure 2: Share of ATMs by operator in 2013 and 2018**

Source: CAA Statistics, NOTE: 2018 estimated on 2013 data with TANS provision change

- 3.25 The successful transitions of Gatwick Airport to ANSL (i.e. between two third-party operators) and Birmingham Airport to self-supply made it clear to airport operators that both forms of transition were credible alternatives to NSL.
- 3.26 Although MAG did not tender, it stated that its ability to assess an in-house solution and consider third-party alternatives allowed it to apply commercial pressure on NSL during its recent negotiations.<sup>28</sup> NSL also told us that when the Manchester Airport contract was up for renewal, MAG had the opportunity to compare it with the contract at Stansted Airport, which MAG had recently acquired.
- 3.27 Southend Airport considered that, even though there is clear evidence that the TANS market for the larger UK airports is competitive, the evidence for regional airport operators suggests that TANS provision is largely through self-supply. In their view, there appears to be a more limited scope for small to mid-sized regional airport operators to find a cost-effective way of tendering for an outsourced TANS provision.
- 3.28 London City Airport decided, in 2016, to run a pre-tender exercise, before awarding the TANS contract to NSL, in order to exploit the market and find the best opportunity.<sup>29</sup>

<sup>28</sup> MAG, Provision of Terminal Air Navigation Services in the UK: Call for Evidence, 19 January 2015.

<sup>29</sup> See <http://ted.europa.eu/TED/notice/udl?uri=TED:NOTICE:17668-2016:TEXT:EN:HTML>.

**Further stakeholder views**

- 3.29 None of the respondents to the consultation on our draft advice changed their views significantly on the matters discussed above.

**CAA's views**

- 3.30 It is evident that with ANSL there is now at least one credible alternative provider in addition to NSL and self-supply. There are a number of other companies that, while they do not currently provide TANS in the UK, are credible alternative providers who have shown interest in tender activities. There are also other smaller ANSPs currently supplying a small number of medium-sized airport operators that are credible alternatives for other small-medium UK airport operators.

**Views on Recent Transitions**

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- 3.31 NSL and Gatwick Airport said that the Birmingham and Gatwick airports' transitions showed that the perceived barriers in switching suppliers were not insurmountable. NSL added that these successful transitions had become a model for other airport operators and had increased their confidence in their ability to choose an alternative provider. For example, the agreement on the principles governing secondments at Edinburgh Airport represented a development on those previously agreed at Gatwick and Birmingham airports.
- 3.32 Heathrow Airport said that it had reviewed the learnings from the Birmingham and Gatwick airports' transitions, and was working to incorporate them into its exit management plan in case it changes provider in the future.

**Further stakeholder views**

- 3.33 None of the respondents to the consultation on our draft advice changed their views significantly on the matters discussed above.

**CAA's views**

- 3.34 We agree that the Birmingham and Gatwick airports' transitions have shown that switching providers is possible and can be done without affecting service quality and continuity. This has also worked to assure airport operators that they can, if they choose, switch providers.

- 3.35 The lessons of the Birmingham and Gatwick airports' transitions, such as greater knowledge of how Trust of a Promise (ToaP)<sup>30</sup> works in practice and the need to allow enough time for conversations with existing staff and to train new staff, has reduced the risks of transitions.

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<sup>30</sup> Trust of a Promise (ToaP) provides certain employment protections to NATS staff employed prior to the PPP. In the event of a transfer of service, such as the loss of a tower following competitive tender, NATS staff covered by ToaP have the right to remain with NATS rather than transfer to the new operator. Its impact on this assessment is covered in Chapter 4.

## Chapter 4

# Contracting and Staffing Issues

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4.1 This chapter covers contracting and staffing issues and, in particular:

- approach to TANS contracting;
- contract duration;
- NSL/NERL Interface;
- ToaP/staff transfer from incumbent provider; and
- access to qualified ATCOs.

## Approach to TANS contracting

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### Evidence on tendering and contracting strategies

4.2 In the past five years, there have been a number of contracting processes with respect to TANS provision at UK airports. The details of these are set out in the Figure 3 (below) and include:

- Edinburgh Airport tendered and switched from NSL to ANSL as a result. The new provider will be in place from April 2018.
- Luton Airport tendered and London City Airport has run a pre-tender exercise. London City Airport then decided to renew (following bilateral negotiation) its TANS provision contract with NSL, which facilitated the introduction of remote tower solution. NSL won the contract to continue providing TANS to Luton Airport for five years from November 2018 (with an option to extend for a further two years).<sup>31</sup>
- Glasgow Airport's contract with NSL has been extended following renegotiation with the existing provider until March 2021. This allowed all AGS's TANS contracts (at Aberdeen, Glasgow and Southampton airports) to expire on the same date. The airport operator stated that it will tender for TANS post March 2021 for the three airports.

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<sup>31</sup> See <https://www.nats.aero/news/london-luton-airport-chooses-nats-air-traffic-service-provider/>.



**Figure 3: Recent TANS contracting activity at airports with over 70k IFR ATMs**

<b>Airport operator</b>	<b>Services tendered</b>	<b>Date(s) of tender</b>	<b>Process</b>	<b>Outcome / Airports' comments</b>
Heathrow Airport	Aerodrome and Engineering	2014/15	Renegotiated - market testing - benchmarking - transfer of assets to Heathrow as they are replaced	- NSL - ten-year contract - live in April 2015 - may consider other suppliers at end of the contract
Gatwick Airport	Aerodrome and Engineering	2013/14	Tender: 3 Bids	- ANSL - ten-year contract - live in March 2016
Manchester Airports Group (MAG)	Group Contract for Manchester (MAN) and Stansted (STN) airports Approach (MAN only), Aerodrome and Engineering	N/A	Renegotiated	- NSL - ten-year contract - live March 2015
Luton Airport	Aerodrome and Engineering	2017	Tender	- NSL - five years + option to extend two years
Birmingham Airport	Approach, Aerodrome and Engineering	2012/13	Tender: 1 Bid and the development of a self-supply alternative	- Self-supply - live in April 2015
Edinburgh Airport	Approach, Aerodrome and Engineering	2016	Tender	- ANSL - ten-year contract - goes live April 2018
London City	Aerodrome and Engineering	2016	Renegotiated (following tender that was cancelled)	- NSL - ten-year contract - Introduction of Remote Tower Technology
Aberdeen Glasgow and Southampton (AGS)	Approach, Aerodrome and Engineering	N/A	Renegotiated – three separate contracts were combined into a single contract terminating in March 2021	- NSL - airport operator says it will tender for TANS post March-2021

Source: Press releases and evidential submissions

## Tender processes

- 4.3 The Official Journal of the European Union (OJEU) process is available and has been used by some airport operators.
- 4.4 Previously, Part O of Category 7 of Schedule 1 of the Utilities Contracts Regulations 2006 (UCRs) set out that the regulations applied to airport operators. However, this condition was removed in 2013 by Section 5 of Schedule 1 of the Civil Aviation Act 2012 (Regulation of Operators of Dominant Airports) (Consequential Amendments) Regulations 2013.
- 4.5 Airport operators have taken different views on whether they are obliged to tender or whether it is in the best interests of their business to do so.
- 4.6 In December 2015, we published an open letter advising stakeholders that we expected airport operators and TANS providers to respond positively to the expected decision by the European Commission that the market conditions exist in the UK for the provision of terminal air navigation services. In this letter, we encouraged airports operators to follow open tender processes when their TANS contracts come to an end.<sup>32</sup>

### Operation of Open tender processes

- 4.7 As set out in Figure 3 above, there have been four open tender processes held recently in the UK. On the other hand, Heathrow, Manchester, Stansted, and Glasgow airports did not hold an open tender. London City Airport ran a pre-tender exercise for its TANS contract but new requirements for a remote tower meant that it ended up negotiating a new contract with NSL.
- 4.8 Luton Airport's 2012 tender<sup>33</sup> was the first major open tender of TANS in the UK and followed an OJEU tender process. Luton Airport reported receiving significant interest in the opportunity to tender for its contract and received two compliant bids.
- 4.9 The Birmingham Airport tender also took place using an OJEU tender process. Birmingham Airport received some interest in its tender. Ultimately, however, it received only one compliant bid.
- 4.10 The Gatwick Airport tender took place in 2013 and, again, was initiated with an OJEU notification. They initially received more than 14 expressions of interest. This resulted in five pre-qualifying questionnaire submissions

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<sup>32</sup> This letter is available at: <https://www.caa.co.uk/WorkArea/DownloadAsset.aspx?id=4294978478>

<sup>33</sup> Luton tendered again in 2017/18, as mentioned below.

followed by three compliant bids.<sup>34</sup>

- 4.11 Edinburgh Airport's tender conducted in 2016 followed a similar process. The airport operator told us that it had an open day to introduce potential bidders to Edinburgh Airport's TANS requirements. The tender was launched with a "voluntary advertisement" as it was not obliged to tender. It was an open and transparent process. There was then a pre-qualification stage to ensure bidders met the required technical standards. The airport operator published an invitation to tender. Three bidders proceeded to the invitation to tender stage. One then opted out. There was then an evaluation and negotiation stage with ANSL and NSL. ANSL was the successful bidder.

### **Evidence provided by airport operators**

- 4.12 Luton Airport considered that it benefited from the open tender process through obtaining:<sup>35</sup>
- transparency surrounding the cost base;
  - a more productive relationship with the supplier; and
  - a clear set of responsibilities in the contract.
- 4.13 Luton Airport's second tender (2017/18) concluded in January 2018. NSL won the contract for another five-year period (and there is an option to extend for another the contract for another two years). The airport operator stated that its parent group policy requires tendering of all service contracts when they expire. ANSL told us that it withdrew from Luton's bidding process and that a key driver for that decision was that the five-year contract was too short. ANSL said that they had told the airport operator that they required at least seven years and that ten or more years would be optimal. They also said that a lack of regulatory guidance on Trust of a Promise (ToaP) and other exit and transition provisions meant the risk associated with bidding was unacceptably high.
- 4.14 Birmingham Airport ultimately opted for an in-sourced solution as it did not consider that the market could provide an adequate service at a suitable price. It also said that if it had been in a position to delay its tender by a year, there may have been more interest from other European providers.<sup>36</sup>
- 4.15 Gatwick Airport awarded its contract to ANSL. Gatwick Airport undertook

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<sup>34</sup> CAA, Gatwick Airport Ltd TANS Open Tender, 22 Dec 2014

<sup>35</sup> London Luton Airport Response to the Call for Evidence on Provision of Terminal Air Navigation Services in the UK, 5 November 2014

<sup>36</sup> Birmingham, Open Tender response, 17 October 2014

specific steps to engage with potential bidders prior to the invitation to tender. It also took steps to ensure that the tender process did not provide unwarranted advantage to the incumbent.<sup>37</sup>

- 4.16 Edinburgh Airport awarded the contract to ANSL and says it had benefitted from the experience of other airport operators' tendering processes. Edinburgh Airport stated that the tender process has resulted in lower costs, more transparency over the costs involved in delivering TANS, benefits from a closer relationship with its TANS provider and it was left in a better position to be able to switch TANS providers again in the future.
- 4.17 Heathrow Airport took the decision to renegotiate in order to maintain stability due to its broader resilience programme. The airport operator said it used a negotiated procedure to test and evaluate the market base, and to challenge the incumbent provider. They also said that the TANS provider "*was benchmarked with a number of suppliers against a fixed set of criteria and compared results to ensure best value and best technical fit*".
- 4.18 London City Airport initially decided to run a pre-tender exercise to exploit the market and find the best opportunities.

#### **Evidence from Air Navigation Service Providers**

- 4.19 NSL was the incumbent provider for all four of the open tenders. NSL consider that the operation of four tenders by different airport operators demonstrates the airport operators' ability to run successful tender processes.<sup>38</sup>
- 4.20 NSL noted that bidding for TANS contracts can take a number of different forms, all of which are consistent with a competitive market process (and a competitive outcome). NSL considered that contract negotiation (and renegotiation) are a common (and often more cost effective) feature of open and competitive markets.
- 4.21 NSL said that where it was asked to negotiate with airport operators directly, the outcome still generated further operating and cost efficiency benefits, providing an outcome similar to that of a competitive tender.
- 4.22 ANSL considered that Gatwick Airport's tender was a step change with the airport operator really looking for a market solution rather than just a better deal from the incumbent provider. ANSL said that this is evidence that some airport operators are willing to understand the provision of TANS and

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<sup>37</sup> CAA, Gatwick Airport Ltd TANS Open Tender, 22 Dec 2014

<sup>38</sup> NATS, NSL's response to CAP1226: Provision of Terminal Air Navigation Services (TANS) in the UK: Call for evidence, 7 November 2014

to challenge the status quo.<sup>39</sup>

- 4.23 However, ANSL considered that there is evidence to suggest that NSL is the dominant market provider of TANS services in the UK and that it has been able to convince a number of airport operators (Manchester, Stansted, Heathrow, Farnborough, Belfast International, London City, Glasgow, Aberdeen and Southampton) to extend or renew contracts without market testing.
- 4.24 ANSL called for us to initiate a full market review and satisfy itself that there has been no abuse of dominance or anti-competitive behaviour in each of the contractual arrangements conducted bilaterally between NSL and the various airport operators listed above, noting our previous statement about undertaking a review of this sector if most airport operators did not put TANS services to tender.

#### **Further stakeholder views**

- 4.25 In response to our draft advice, ANSL reiterated its view that the sector should be subject to a “formal review” and called on us to undertake one.<sup>40</sup> ANSL considered that we had “not delivered on clear commitments made and that this had an adverse impact on fair competition in the TANS market”.
- 4.26 BA considered that we should re-state our recommendation to the DfT that airport operators should be required to tender for TANS.

#### **CAA’s views**

- 4.27 We consider that it is through contracts coming to market that airport operators will be able to reap the full benefits of the developing market conditions. It is evident from the above that a number of tender processes have taken place and we encourage airport operators to tender their TANS provision when their contracts approach their end. Some airport operators have also said that they could tender for TANS in the future.
- 4.28 Where airport operators have not tendered, they appear to have at least undertaken some form of informal market testing and have benefited from this action and from the open actions of other parties.
- 4.29 As stated in paragraph 1.8 we consider that this review is a proportionate and appropriate response to the commitment we made in CAP 1293 to

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<sup>39</sup> Amended ANSL response to CAP 1226, 12 January 2015

<sup>40</sup> ANSL noted paragraph 1.8 of the CAP1634, where we considered that this review of market conditions fulfilled the commitment made to review the market if most airport operators whose contracts were nearing termination had not notified some form of open tender for TANS provision.

carry out a formal review the market.

- 4.30 We have previously recommended that the Government reviews the position on whether there should be duty on airport operators to publicly tender TANS services. We continue to consider that it is best practice for airport operators (particularly those covered by the charging regulation) to tender longer-term TANS contracts, although we do not have powers to compel airports to tender. We will raise this issue with DfT who may consider this in the context of its current aviation strategy consultation or other future initiatives.

## **Contract duration**

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- 4.31 Figure 4 (below) sets out the contract durations of TANS contracts in operation at airport operators covered by our review (both at the time of CAP 1296 (2015) and our latest information from 2017).

**Figure 4: Contract duration**

Airport	ANSP	Contract duration (years)	Contract expiry date	ANSP	Contract duration (years)	Contract expiry date
	CAP 1293			Latest		
Heathrow	NSL	5 + 5yr extension	Mar-18 <sup>+</sup>	NSL	10	Mar-25
Gatwick	NSL	5 + 2 + 0.5 yr extension	Sep-15	ANSL	10	Feb-26
Manchester	NSL	10	Mar-25 <sup>*</sup>	NSL	10	Mar-25
Stansted	NSL	10	Mar-25 <sup>*</sup>	NSL	10	Mar-25
Edinburgh	NSL	3 + 7yr extension	Mar-18	ANSL	10	Mar-28
Birmingham	NSL	9 + 1yr extension	Mar-15	Self-Supply	N/A	N/A
Luton	NSL	3 + 2yr extension	Oct-17	NSL	5 (option to extend for another 2 years)	Oct-2023
Glasgow	NSL	3 + 7yr extension	Mar-18	NSL	Renegotiated	Mar-21
London City	NSL	14 (5-years renegotiated twice)*	Mar-17	NSL	10	Mar-27
Bristol	NSL	20	2025	NSL	20	2025
East Midlands	Self-Supply	N/A	N/A	Self-Supply	N/A	N/A

Source: CAP 1293 and stakeholder submissions

Notes: \*corrected; <sup>+</sup>the new contract had already been agreed at the time of CAP1293 but it was not yet live.

### Stakeholders' views

4.32 In its response to the call for evidence Heathrow Airport stated that “A 10-year contract was chosen with the intention of creating a partnering agreement with [NSL]. Heathrow is of the view that a longer contract term provides greater certainty for the supplier allowing it to invest in the skill set of its employees and in its technology, which in turn helps to drive a better service quality and return for Heathrow and its users. It should also be noted that the ATC service at Heathrow is a safety and operationally critical service and as such we would want to limit the number of transitions between providers and therefore look to stability of service over a 7 to 10-year period.”

- 4.33 Gatwick Airport said that the criticality of service provision continuity, the need to develop know-how, expertise and a partnership with a service provider, as well as anticipated technological developments influenced its choice of contract length.
- 4.34 MAG stated “Our choice of ten years as the contract length reflects the fact that the nature of air navigation services means there is often a high level of investment from both parties, both in terms of equipment, technology, resources and training. Contracts must therefore be of sufficient length to allow time for investments to be made and commissioned, as well as costs to be recovered.”
- 4.35 AGS said that it aims to “review the suitability of [the TANS] contract for this critical service every five years.” AGS said it will tender for TANS at its three airports when its contract expires.
- 4.36 London City Airport said that the planned transition to a remote tower service in 2020, which NSL will oversee, determined the length of the contract.
- 4.37 ANSL considered that Luton Airport’s insistence that bidders submit bids for five-years makes it less attractive for new entrants to bid, as it would not allow sufficient time to recoup set-up costs. In the context of the Luton tender, ANSL also told the CAA that, to be able to make a competitive bid, it requires a contract duration of at least seven years and that ten or more years would be optimal.
- 4.38 The issue of contract length is not directly relevant for airport operators that provide it in-house, but these airports may nonetheless wish to market test the provision of these services from time to time.

#### **Further stakeholder views**

- 4.39 In response to the CAA’s draft advice, NSL said that it does not consider that re-negotiations without material new investment should result in “shorter” contract durations. NSL said that customers (airport operators) stated that they are able to exercise choice and determine the overarching conditions of any tender or negotiation process. As such, NSL considered that contract length should not be prescribed by regulatory guidance.

#### **CAA’s views**

- 4.40 In relation to recent contracting activity, we note the ten-year contracts awarded by Gatwick and Edinburgh airports. In these cases, we would expect significant set up costs for ANSL as a wholly new entrant to the UK. The duration of the contract appears to provide scope for ANSL to amortise



these cost over a longer period and make a reasonable return. We expect it would be normal to observe longer contract lengths for new entrants.

- 4.41 We have previously said that awarding long-term contracts (ten years) in the context of a bilateral negotiation and without new significant investments to be unnecessary and unhelpful to the development of effective competition.<sup>41</sup> However, we consider that long contracts between airport operators and ANSPs can be justified by the need to spread new investment costs over a number of years, such as when an airport operator or an ANSP are introducing new technologies. Nonetheless, the length of the contract should be proportionate to the investment and the time to recover reasonable costs. We note NSL's response to the draft advice, but our views remain as above, and we regard this as a proportionate and reasonable approach that will protect the interests of users.
- 4.42 Airport operators may also be able to obtain more attractive prices and benefit from stability in what is a critical aeronautical service. However, long-term contracts may also be seen as a barrier to effective competition to develop. Airport operators should be able to review their options and market test the provision of TANS at their sites with some regularity, as market conditions shift and innovative propositions emerge.
- 4.43 Our current view is that the prevailing range of contract length of up to ten years, particularly in the context of a competitive and open tender, is not inconsistent with the presence of market conditions in the TANS market. However, longer contract lengths make it even more critical that airport operators re-tender at that point.

## **NSL/NERL interface**

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- 4.44 The Birmingham and Gatwick airports' transitions were achieved without operational disruption. This provides some assurance to airport operators that a change in TANS provider can be achieved without adversely affecting the en route service they receive from NERL.
- 4.45 Some respondents to the consultation said that at some airports where NSL is the TANS provider, NERL has delegated part of the en route function to NSL, where it is beneficial for operational or cost efficiency reasons to do so. There are no delegations at the airport operators that have at least 70,000 annual IFR ATMs. The largest airport operators with delegations are

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<sup>41</sup> See CAP 1293

Bristol and Aberdeen.<sup>42</sup>

- 4.46 ANSL considered that the delegation of NERL services to NSL could be open to abuse, with potential to allow NSL an unfair competitive advantage. ANSL said that if the delegation of NERL functions is considered to be the most operationally and cost-efficient method of delivery this should be the case regardless of the TANS provider. It wanted to see delegated functions and the associated payments from NERL being available to all bidders for TANS contracts.
- 4.47 ANSL also wanted the CAA to satisfy itself that costs were being fairly allocated between NERL and NSL, particularly overhead and management costs. ANSL considered this to be important where NSL uses NERL assets, particularly as there appears to be a push towards centralising various services (such as electronic flight progress strips hosting and remote towers) in NERL's Swanwick en route centre.
- 4.48 NSL said it provides delegated services on an arms-length basis through separate Inter-Company Agreements with NERL. Should there be a change in TANS provider, meaning that it is no longer appropriate for NSL to provide the en route service, NSL said that the future provision of the service would be a matter for NERL. For example, NERL could resume service provision or seek an agreement with the new provider.

#### **Further stakeholder views**

- 4.49 In response to the CAA's draft advice, NSL considered that delegated services should be outside of the scope of this assessment and noted that these services were funded by airlines through the en route unit rate and not by airport operators. NSL also considered that increasing the transparency of delegated services would be unnecessary and unjustified.

#### **CAA's views**

- 4.50 We note that ANSL said that where there was a change in TANS provider the delegation should be available to the new provider. There are conditions in NERL's licence that govern its arrangements with NSL. Such arrangements must be on an arm's length basis and not involve any cross-subsidy.<sup>43</sup> Each year NERL is obliged to send a certificate to the CAA

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<sup>42</sup> At Aberdeen, NERL has delegated to NSL the provision of a service to helicopters operating in the North Sea. This is a function that has been given to in its economic licence. The other airports at which NERL has delegated an en route function to NSL are: Cardiff, Southampton, Belfast International and Farnborough.

<sup>43</sup> Condition 5(19)(c) of NERL's licence prohibits NERL, without the CAA's consent, to enter into any agreement or any arrangement with any affiliate or related undertaking other than on an arm's length basis and on normal commercial terms. Condition 9(1) prohibits NERL from giving any

confirming its compliance with the prohibition of cross subsidy under Condition 9 of its licence. At each five-year price control review, the CAA has reviewed NERL's cost allocation to ensure that, among other things, that costs are reasonably allocated between NERL and NSL.

- 4.51 We are satisfied that the conditions in NERL's licence provide some comfort that NERL is not favouring NSL when making delegations. However, we acknowledge that there may be some lack of transparency around some of these arrangements.
- 4.52 Although it is not currently in the scope of the charging regulation the DfT asked us to include Bristol Airport in this review. We note that NSL provides delegated services at Bristol Airport and NSL's comments that as airlines pay for delegated services (rather than airports) then these matters should be outside the scope of this review. For the purposes of this review our interest in delegated services is not about en route charges, but the transparency of the arrangements which provide for payments from NERL to NSL for the provision of these services. This could make it more difficult for other ANSPs to assess the costs of providing the service at the airports affected, and discourage them from bidding for contracts when they are tendered. Therefore, it is appropriate that such services are considered as part of this review and we may consider taking further steps to increase transparency in relation to these matters. These could include seeking commitments from NERL to provide more information on delegations when TANS contracts come up for review or putting forward modifications to NERL's economic licence to include new transparency requirements.

## **Trust of a Promise (ToaP)**

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- 4.53 ToaP provides certain employment protections to NATS staff employed prior to the PPP. In the event of a transfer of service, such as the loss of a tower following competitive tender, NATS staff covered by ToaP have the right to remain with NATS rather than transfer to the new operator.

### **Figure 5: ATCOs covered by ToaP**

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Separate Business or part of a Separate Business any cross-subsidy.

Airport	Number of ATCOs Nov-17	% ATCOs covered by ToaP 2011/12	% ATCOs covered by ToaP 2013/14	% ATCOs covered by ToaP (Nov-17)
Heathrow	71	56	53	55
Gatwick	36 (2013)	64	64	---
Manchester	55	91	82	62
Stansted	31	50	52	52
Edinburgh	30	76	68	70
Birmingham	30 (2013)	63	50	---
Luton	26	52	50	31
Glasgow	31	68	65	52
London City	19	41	41	32

Source: NATS.

Note: The ATCO numbers quoted refer to the number of ATCOs based at each airport operational unit and include a number of trained ATCOs who are in managerial or other non-operational roles.

- 4.54 Figure 5 shows the ToaP coverage at the airports covered by the review. This ranges from 30 to 70 per cent with an average coverage of about 50 per cent. This is a fall on the prior assessments which had an average coverage at the nine airports of 65 and 60 per cent. This illustrates, as expected, a fall in the coverage of ToaP over time. However, it still covers a significant proportion of staff within the NSL operation.
- 4.55 ToaP remains an issue for airport operators considering tendering for TANS provision. This affects the bidding process and transition in a number of ways, which would not occur under a standard transfer under the Transfer of Undertakings (Protection of Employment) Regulations (TUPE).
- 4.56 ToaP means that new entrants have additional costs to cover the risk of staff not transferring (i.e. to train and replace staff that do not transfer). This can have the following effects:
- at the bidding stage where a potential entrant will have to build these costs in to its bid;
  - following the bid, where a portion of this cost has to be incurred regardless of whether ToaP comes into play. Given that staff are not required to decide whether to transfer until a late stage in the transfer process, the new entrant may have to train staff to cover the risk to ensure a smooth transition in the service;
  - in the event that insufficient staff transfer or train in time, ToaP may force the new entrant to request secondments from NSL; and

- airport operators that are aware of this provision may consider the risk to transition through lack of suitable trained staff is too great to move to a formal tender.

- 4.57 Despite this, each of the processes conducted by Edinburgh, Birmingham and Gatwick airports to date demonstrate that this issue can be overcome so that it does not operate as an insurmountable barrier to entry.
- 4.58 ANSL said it considered transition and set-up costs to be one of the biggest barriers to a fair and equitable market place. It thought that ToaP skewed the TUPE process where NSL was the incumbent, as the lack of clarity around the conditions and general arrangements strengthened the competitive position of the incumbent while weakening and adding risk to challengers. It said the CAA had committed to work bilaterally to resolve this issue with NSL, but there has been little or no progress to date, leaving challengers exposed when they could have reasonably expected a framework to be established.
- 4.59 We note that Edinburgh Airport has a relatively high proportion of staff covered by ToaP. It is therefore interesting to note that this did not prevent ANSL from procuring sufficient ATCOs to be in a position to transition operations successfully.

#### **Further stakeholder views**

- 4.60 In response to the CAA's draft advice, NSL did not support the suggestion that it should be required to publish a price list for ATCO secondments in the event of a bidding process for TANS services. However, it stated that it will continue to support prospective bidders with all necessary information, including staffing related costs, via a data-room on a confidential basis.
- 4.61 ANSL re-stated that new entrants bid without any knowledge of how many ToaP will transfer and the terms on which secondments may be offered.

#### **CAA's views**

- 4.62 The successful entry of new providers does suggest that the potential barrier posed by ToaP may not be as high as previously considered and continues to erode over time, as qualifying staff retire or otherwise end employment with NSL. We consider that market participants are now much more aware of the possible implications of ToaP and are more able to factor it in when planning for transitions.
- 4.63 We also consider that ToaP is an issue that does not necessarily work in favour of NSL. ToaP acts to raise NSL's costs relative to other providers, as it is required to retain a defined benefits pension scheme for those staff who qualify for it.

- 4.64 ANSL suggested that NSL should publish the terms and conditions for secondments in the event of loss of a tower so that this can be more clearly built into bidding costs. We consider that airport operators, where NSL is the incumbent, could seek to introduce provisions in their contracts that set expectations about how any secondment agreements would work if there was a change in provider. We also consider that NSL should make staffing costs (including rates for ATCO secondments) available to airport operators and prospective bidders in the event of a bidding process for TANS services. We note NSL's commitment to do so. We understand NSL's concerns about a requirement to publish more widely such confidential salary information and, because of that, we have amended our position on these matters from that set out in our February 2018 consultation.

## **Access to qualified ATCOs**

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- 4.65 For new entrant TANS providers to be successful, they need to be able to employ ATCOs that are qualified to operate at the airport in question. These can be staff currently employed by the incumbent, who decide to change to the new employer or other ATCOs specifically recruited and trained by the new provider.

### **Stakeholders' views**

- 4.66 NSL noted the agreement reached with ANSL regarding a staff secondment agreement at Edinburgh Airport, which it considers to be a development on those previously agreed at Gatwick and Birmingham airports. NSL said that "The agreement clarified each parties' risks and obligations (pre and post transition), and provides an extended period for transition above and beyond that required for an efficient recruitment and training programme."
- 4.67 ANSL considers that staff transitions and other set-up costs are important barriers to a fair and equitable market place. It urged the CAA to make progress to address the recommendations in the SDG report and other previous commitments made.
- 4.68 ANSL also said staff transition and training have been "extremely challenging" at Gatwick Airport, largely due to a difficult relationship with NSL and the short transition timescales. While Edinburgh transition is still in progress, the relationship to date with NSL has been more cooperative and the longer contractual lead in has enabled far better training progression ahead of contract handover. ANSL also considers that where secondments are required due to ToaP, the length of time they are made available to the new provider and the cost associated are crucial both commercially and operationally.

- 4.69 A number of industry participants have told us that demand for ATCOs currently exceeds available supply putting upward pressure on salaries. ANSL considered this to be an issue for new entrants. To mitigate this ANSL, has established UK certified rating courses at the DFS college in Langen, Germany. Any excesses capacity may be provided to other TANS providers in due course.
- 4.70 Smaller TANS providers report even more pressure, as larger providers are actively recruiting available ATCOs. For example, Southend Airport, which has in-house provision of TANS, has noted the challenges it has faced in recruiting, training and retaining ATCOs. It particularly noted the limited training capacity at key training colleges in the UK.
- 4.71 ANSL told us that it is recruiting from Europe and has tried to recruit experienced controllers from further afield however, current safety regulatory requirements still meant that non-European ATCOs would need to attend a full training course, rendering these attempts unviable.

#### **Further stakeholder views**

- 4.72 None of the respondents to the consultation on our draft advice changed their views significantly on the matters discussed above.

#### **CAA's Views**

- 4.73 Securing sufficient numbers of qualified ATCOs is an important issue that existing and incoming TANS providers need to address to be able to operate successfully. Recent transitions suggest that market participants are now more aware of the issues involved in staff transitions and have developed strategies to cope with them, including by securing alternative ATCO training arrangements and by reviewing terms and conditions.
- 4.74 As noted in paragraph 2.11 (above), we are publishing an information note to stakeholders following the SDG review of transitions at Gatwick and Birmingham. This includes recommendations on training for ATCOs.

## Chapter 5

# Other Issues

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5.1 This chapter covers other relevant issues for our assessment including:

- transition set-up costs;
- new technology – remote towers;
- consultation with airspace users; and
- benefits to users.

### Transition set-up costs

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5.2 SDG found that the costs to BAATL and ANSL in taking over TANS provision at Birmingham and Gatwick airports respectively were both higher than originally expected.

5.3 We note that higher than expected staff costs have been the largest element of overall transition costs being higher for TANS providers than expected – and we have explained our views in relation to these matters in Chapter 4 of this document.

5.4 Equipment costs and costs associated with operational documentation (such as MATS Part 2) may also be incurred when airport operators change TANS provider. Historically, assets have often been owned by the TANS provider. However, airport operators may purchase the assets, and they seem increasingly aware of the need to have arrangements for doing so should they decide to change TANS provider.

5.5 Figure 6 shows the responses from airport operators to our question in CAP 1605 on asset ownership.



**Figure 6: TANS asset ownership**

Airport respondent	Who owns the equipment
Heathrow	Agreement to transfer assets to airport as they are replaced in line with its asset replacement plan
Gatwick	Airport operator owns the equipment
MAG	For assets owned by NSL, provision for transition, access and/or purchase of any required assets is provided in contracts to allow MAG to change provider should it choose to do so
Birmingham	Airport operator
AGS	Either leased or owned by NSL at Glasgow and Aberdeen. Southampton airport owns its control tower
Luton	Airport operator
Edinburgh	Control tower owned by the airport operator. Some of the equipment is leased by NSL. Airport operator is in transition discussions with NSL to take over the leases
London City	Airport operator at the moment. When remote tower comes in, London City will own all the equipment at the airport and NSL all the equipment at Swanwick
Southend	Airport operator

Source: Airport operators' submissions

### Further stakeholder views

5.6 None of the respondents to the consultation on our draft advice changed their views significantly on the matters discussed above.

### CAA Views


5.7 ANSL and Birmingham Airport adopted different approaches to operational documentation during the Gatwick and Birmingham transitions. ANSL purchased MATS Part 2 from NSL. BAATL produced its own documentation. Both approaches have been shown to be feasible and airport operators could include provisions in their contracts to govern the arrangements for such documentation during a transition.

## New technology – remote towers

5.8 Remote towers (the use of technology that allows for TANS services to be provided away from the airport or for it to be enhanced by video capture) are increasingly a feature of this sector. They have the potential to change the competitive landscape of TANS in a positive direction but also could also raise some competition concerns.

- 5.9 London City Airport is introducing a remote TANS service, where the TANS ATCOs will be located in NATS' Swanwick en route centre rather than at the airport.

### Stakeholders' views

- 5.10 On London City Airport's (LCY) remote tower solution, NSL stated that despite this being a fundamental technological development, *"it will be feasible for another provider to take the data from the relevant services at LCY. Indeed, there is nothing in the proposed set up of digital towers at LCY that would prevent another ANSP from competing effectively for the contract in the future."*
- 5.11 NSL also considered that *"digital towers enhance market conditions by offering more choice about how air navigation services can be provided. All related assets are replicable (by other TANS providers), and the digital tower equipment installed to provide the service at LCY will be standard commercial off-the-shelf equipment supplied by an industry supplier."* NSL also noted that *"there is nothing in the proposed set up of digital towers at London City that would prevent another ANSP from competing effectively for the contract in the future."*
- 5.12 ANSL did not consider that remote towers and the new technology that enables them was necessarily a problem for contestability. However, it expressed concerns over the effects of aspects of London City Airport's remote tower solution for future transitions. In ANSL's view, once ATCOs had transferred from London City Airport to Swanwick transferring them elsewhere would be difficult. Furthermore, ANSL would expect the CAA to ensure that any and all arrangements between NERL and NSL are reasonable and fair.
- 5.13 ATCSL said that whenever they re-equip they *"now consider including the capability for providing remote services Approach Radar and Tower Control."*
- 5.14 London City Airport considered that . It also considered that its new contract provided far more transparency on what it covers and costs. They understand that NSL will be using some facilities that are owned by NERL and rented by NSL. There are provisions in the contract that allow the airport operator to audit NSL's costs annually.
- 5.15 Heathrow Airport said it has a programme of innovation with NSL, which is associated with its asset replacement plan, looking to automate controller support functions, integrate new technology such as high-resolution cameras, replace its virtual tower facility and improve arrival and departure capacities.

- 5.16 Highlands and Islands Airports announced that it will invest an estimated £28 million, over the next ten to 15 years, in remote towers and centralised approach surveillance control, which will mirror an already successful project in Sweden. This is expected to transform TANS operations at some Highlands and Islands Airports including Stornoway, Inverness and Dundee.<sup>44</sup>
- 5.17 BA said the development of remote tower operations, as demonstrated by NSL at London City Airport, indicates the potential for this new form of TANS provision to augment and improve service and reduce costs.

### Further stakeholder views

- 5.18 Prospect suggested that the CAA takes account of the impact of the introduction of remote tower technology on staff, which is not dissimilar to the effects of the liberalisation and commercialisation of TANS.

### CAA's views

- 5.19 The development of remote tower operations indicates the potential to augment and improve service and reduce costs. We also consider that in time, it can lead to more competitiveness between ANSPs.
- 5.20 While there may be a limited number of suppliers that are able to provide these types of solution currently, as technology matures and there are examples of it being applied successfully, we expect to see new entrants providing competition to existing providers of remote tower technology and more traditional forms of TANS provision, both at large airports but also at smaller regional airports (that could benefit more substantially from scale economies).
- 5.21 While we understand that remote tower technology can have impacts on staff, the focus of this review is on market and competition issues.

## Consultation with airspace users

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- 5.22 We asked airport operators and airspace users the extent to which airport operators consulted their users on decisions about TANS provision at the airport.
- 5.23 Some airport operators told us that they consult airspace users as part of their normal engagement with airlines in a variety of *fora*. Some told us that they did not consult airspace users specifically on the TANS contract,

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<sup>44</sup> See <http://www.hial.co.uk/wp-content/uploads/2018/01/Hial-seeking-to-Future-Proof-regional-Airport-Operations.pdf>

mostly because they understand airspace users' operational requirements or they are not proposing to change the operation as part of the tendering/renegotiation progress

- 5.24 Heathrow Airport said it has no specific plans to consult airspace users on the provision of TANS, but noted that the TANS contract at Heathrow is part of the cost base which is subject to wider economic regulation.
- 5.25 Gatwick Airport said it will consult airspace users to gain feedback and understand requirements, typically through various user and community groups.
- 5.26 Birmingham Airport stated that airspace users are regularly consulted on operational developments through the airport operator's Flight Safety Committee.
- 5.27 AGS said it plans to consult with its airlines about the standards of the service provider before making any future decision on TANS provision through its flight safety group. AGS also noted that it discusses service levels and investment plans annually with airlines when it consults on airport operator charges.
- 5.28 MAG said that it would expect to consult airspace users before making any future decision on TANS provision.
- 5.29 Luton, Southend and London City airports stated that they do not tend to consult airspace users. London City Airport noted that it has significant experience of airspace matters in the Terminal Area.
- 5.30 IATA said that it has not been contacted by airport operators regarding TANS provisions. BA and Virgin reported limited contact from airport operators regarding TANS provision. BA and Virgin noted some information sharing and engagement at Gatwick Airport which was positive and effective in terms of managing transition from NSL to ANSL. However, airlines also did not have any sight on the changes in costs at Gatwick Airport as a result of the change in service. BA and Virgin noted that at Heathrow Airport the 2015 renegotiation of the NSL contract was done by Heathrow Airport without any airline consultation or engagement. The airlines also considered that airport operators (particularly regulated including Heathrow and Gatwick) should be required to consult airlines formally when they make changes to TANS provisions.

### **Further stakeholder review**

- 5.31 In response to the CAA's draft advice, BA considered that the CAA should encourage transparency to airlines of the contracts reached between airport operators and TANS providers. BA also considered that, when airports

receive service quality rebates for poor performance from TANS providers, airports should pass these onto airlines (which often bear most of the financial costs of disruption). In the context of Heathrow's regulation, BA noted that the length of Q6 means that the benefits of TANS renegotiation are not passed downstream for six years, which, in its view, is too long.

### CAA's Views

- 5.32 Although some airport operators do not specifically consult airspace users on TANS, we consider that airspace users have the opportunity to raise any concerns they have with airport operators. We do not consider that this has impacted negatively on the existence of market conditions in the TANS sector.
- 5.33 We do not consider that the costs of TANS contracts need to be published or consulted on with airspace users by airport operators, as this may be commercially sensitive information.
- 5.34 We encourage airport operators to be transparent with airlines about their costs, and consider that they could provide information on TANS contracts to airlines on a confidential basis. However, we do not consider that such transparency is within the scope of this review. We also do not consider that the Heathrow price control is part of this review.

### Benefits to users

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- 5.35 Airspace users that responded (IATA, BA and Virgin) thought that more information was required to show how changes in the TANS sector benefited airlines and their customers through increased cost efficiency and reductions in airport operator charges, while assuming there has been no reduction in safety or loss of capacity.
- 5.36 Some airport operators told us that they had seen benefits from a more competitive TANS sector.
- 5.37 Gatwick Airport told us that increased competition had driven down costs and improved service.
- 5.38 Edinburgh Airport noted a number of benefits realised through the tender process:
- more transparency (Edinburgh Airport now understands much better the biggest contract on its site);
  - lower costs;

- the relationship with ANSL is more of a partnership looking to the future compared with the former more contractual relationship with NSL; and
- more flexibility, with different intellectual and property rights contractual provisions to avoid issues on the ownership of the IP, MATS part 2, etc and stronger ANSP exit provisions that would facilitate future tendering.

- 5.39 London City Airport is happy with the contract it established with NSL to deliver the innovative remote tower technology, which will bring significant operational and cost benefits compared with a traditional provision of TANS. It also noted that its contract with NSL was much more robust than its previous contract in terms of how it defines service level agreements and now had more similarity to the airport operator's contracts with other service providers.
- 5.40 Birmingham Airport noted that it brought the service in-house in order to have better control of costs and of a major asset essential to the operation of the airport.
- 5.41 Gatwick and Heathrow airports noted that TANS is part of their operating expenditure, which is subject to regulation by means of a licence issued by the CAA under the Civil Aviation Act 2012.
- 5.42 Other airport operators told us that TANS provision is part of their costs and therefore needs to be considered when they set their airport charges. For example, MAG said that TANS costs are taken into account in setting tariffs and negotiating airport charges with airlines on a commercial basis. MAG said that it actively competes for airline business, and thus cost pressures have an impact on the level of its airport operator charges. MAG also said that it could not automatically pass these costs through to airlines.

### **Further stakeholder review**

- 5.43 In response to the CAA's draft advice, Prospect reiterated its request that the CAA conduct a cost-benefit analysis of the introduction of market conditions in the UK TANS market. Furthermore, Prospect considered that the CAA should take a closer look at the "impact on staff of the pursuit of open market conditions for TANS". It also considered that many contracting and staffing potential problems raised by Prospect were left unanswered.

### **CAA's views**

- 5.44 We consider that a more contestable market for TANS that has developed in the UK in the past five years is likely to have brought benefits to users. Any cost changes resulting from the tendering or renegotiation of the TANS services are likely to be felt initially by airport operators and eventually passed on to their users. The extent to which they are passed on to

consumers will depend on a number of factors (including on how airport operators' expenditure is regulated and on the level of competition in downstream airport operator and airline markets).

- 5.45 We note the request from some stakeholders for a cost-benefit analysis on whether or not this sector should be subject to market conditions or regulation. Such analysis is not a requirement of Annex I of the charging regulation and we consider that the responses we received to this review (particularly from airport operators – the demand side of this market) is sufficient for us to conclude that the provision of TANS in the UK is subject to market conditions and that the case for the introduction of economic regulation is unlikely to be in the interests of consumers.
- 5.46 While we acknowledge Prospect's concerns regarding wider staffing and contracting issues, we note that most of those concerns are outside of the scope of this review, insofar as they do not affect the ability of new TANS providers to enter the market. We note that TANS providers continue to be subject to UK employment laws and other commitments made to their staff, regardless of this review.

## Chapter 6

# Market conditions test

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6.1 This Chapter sets out the CAA's conclusion against each criterion of the test, provided for in the charging regulation.

<b>Criterion 1. The Extent to which service providers can freely offer to provide or withdraw the provision of these services:</b>
(a) the existence or otherwise of any significant legal or economic barriers that would prevent a service provider from offering to provide or withdrawing the provision of these services;
(b) the contract durations; and
(c) the existence of a procedure allowing assets and staff to be transferred from one air navigation service provider to another.

6.2 We have not found any significant legal or economic barriers that prevent a service provider from offering to provide or withdraw from the provision of TANS.

6.3 Barriers previously discussed have been overcome by alternative TANS providers. This is evidenced by:

- the successful transfers of the TANS service at Birmingham Airport to self-supply;
- the successful transfers of the TANS service at Gatwick Airport where a new entrant (ANSL) won the tender; and
- the outcome of the more recent tender by Edinburgh Airport, which awarded the TANS contract to ANSL, where the transition appears to be going smoothly.

6.4 The 2011 tender at Luton Airport, which was won by the incumbent, as well as the 2017/18 tender at Luton Airport, also show the ability of a range of competitor providers to actively participate in tenders.

6.5 As discussed above, longer contract durations (up to ten years) may help to facilitate meaningful tendering and new entry. They may also lead to better outcomes for airport operators and their users. However, longer contract durations may be less necessary in the case of simpler renegotiations.

6.6 To the extent that there remain some barriers from ToaP, the CAA considers these to be eroding over time and that they can be overcome.



during the tender process.

6.7 All of the above indicate that criteria 1 is satisfied.

**Criterion 2. The extent to which there is a free choice in respect to service provider, including, in the case of airport, the option to self-supply:**

(a) the existence or otherwise of legal, contractual, or practical barriers to change service provider or in the case of terminal air navigation services to move towards self-supply of air navigation services by airports;

(b) the role of airspace users' representatives in selecting the service provider.

6.8 We have not found any significant legal or economic barriers that prevent airport operators from exercising choice in service provider or to self-supply.

6.9 With respect to practical barriers, Gatwick Airport is the busiest single runway in the world and Birmingham and Edinburgh airports are among the largest UK airports outside London. The ability of these airport operators to tender and find an alternative provider for their respective TANS requirements is indicative of the availability of choice at the full range of airports covered by this report.

6.10 On this basis criteria 2 is satisfied.

**Criterion 3. The extent to which it can be chosen from a range of service providers:**

(a) the existence of a public tendering process (not applicable in the case of self-supply);

(b) if applicable, evidence of alternative service providers participating in the tendering process and having provided services in the past, including the option of self-supply for the airport.

6.11 The evidence presented to the CAA suggests that there is a range of TANS service providers and there are public tendering processes available to UK airports.

6.12 In CAP 1293, we considered that there were sufficient alternative providers for market conditions to exist and we continue to hold that view. Gatwick Airport's successful transition to ANSL and Edinburgh Airport's decision to appoint ANSL have shown that there is at least one alternative to the current provider in addition to self-supply. We note that a number of other potential suppliers have engaged in the tendering processes.

6.13 Birmingham Airport's successful transition to an in-house solution indicates that self-supply is a possibility for larger airport operators.

6.14 These factors indicate that criteria 3 is satisfied.

**Criterion 4. For terminal air navigation services, the extent to which airports are subject to commercial cost pressures or incentive based regulation:**

(a) whether airports actively compete for airline business;

(b) the extent to which airports bear the air navigation service charge;

(c) whether airports operate in a competitive environment or under economic incentives designed to cap prices or otherwise incentivise cost reductions.

6.15 The CAA currently regulates both Heathrow and Gatwick airports.<sup>45</sup> The CAA has deregulated Stansted Airport recognising that it faced sufficient competition such that it no longer had substantial market power and therefore is subject to active competition for airline business.<sup>46</sup> For other large UK airports we can conduct a market power determination (MPD) and would impose economic regulation if the MPD process indicated that this was a proportionate response to market power.

6.16 Accordingly, as was the case in previous assessments of TANS, all airports in the UK (even those with substantial market power) are either subject to economic regulation or actively compete for airline business – and so all face commercial incentives to manage costs.

6.17 Therefore, criteria 4 is satisfied.

6.18 This view is without prejudice to any future decision that the CAA or other competition authorities may take in relation to the level of or any assessment under competition law competition at any UK airport.

**Criterion 5. Where the provider of terminal air navigation services [...] also provides en route air navigation services, these activities shall be subject to separate accounting and reporting.**

6.19 NSL is a wholly owned subsidiary of NATS Ltd which also owns NERL, the monopoly en route provider. ANSL is a subsidiary of DFS (German en

<sup>45</sup> For more detail please see: <https://www.caa.co.uk/Commercial-industry/Airports/Economic-regulation/Licensing-and-price-control/Economic-licensing-of-Heathrow-Airport/> and <https://www.caa.co.uk/Commercial-industry/Airports/Economic-regulation/Licensing-and-price-control/Economic-licensing-of-Gatwick-airport/>

<sup>46</sup> For more detail please see: CAP 1135: Market power determination for passenger airlines in relation to Stansted Airport – statement of reasons: [www.caa.co.uk/cap1135](http://www.caa.co.uk/cap1135) and CAP1153: Market power determination for cargo services in relation to Stansted – statement of reasons: [www.caa.co.uk/cap1153](http://www.caa.co.uk/cap1153)

route provider), and it also produces separate accounts. NERL and NSL are however separate legal entities and are, therefore, required by law to lodge separate accounts with Companies House. Additionally, NERL is required by its licence to produce separate regulatory accounts and to report on its en route activities. On this basis criteria 5 is satisfied.

**Criterion 6. For TANS, the assessment in Annex I of EC Regulation 391/2013 shall be carried out at each individual airport, as appropriate.**

- 6.20 We have consulted all the airports that meet the threshold in the charging regulation<sup>47</sup> in the UK and considered whether criterion 1 to 5 apply at each airport and whether the conditions might apply differently at different groups of airports (e.g. relatively large airports and smaller airports).
- 6.21 We consider that most legal or economic barriers to switching in the TANS sector, to the extent they exist, are likely to apply in a similar way at all UK airports in scope of the charging regulation. As noted above, some airport operators have told us that successful transitions at other airports have made them more likely to tender in the future or helped them renegotiate their TANS contracts.
- 6.22 Therefore, we consider that criteria 6 is satisfied.

## Conclusion

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- 6.23 Based on the assessment of TANS in the UK against the criteria above, the CAA's advice is that the market conditions test set out in Annex I of the charging regulation is met and that the provision of TANS in the UK is subject to market conditions.

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<sup>47</sup> 70,000 IFR ATM threshold

## Appendix A

# Assessment of the existence of market conditions for the provision of Terminal Air Navigation Services [...]

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The conditions to be assessed for determining whether terminal air navigation services [...] are provided under market conditions<sup>48</sup> are as follows:

1. The extent to which service providers can freely offer to provide or withdraw the provision of these services:
  - a) the existence or otherwise of any significant legal or economic barriers that would prevent a service provider from offering to provide or withdrawing the provision of these services;
  - b) the contract duration; and
  - c) the existence of a procedure allowing assets and staff to be transferred from one air navigation service provider to another.
2. The extent to which there is a free choice in respect to service provider, including, in the case of airports, the option to self-supply:
  - a) the existence or otherwise of legal, contractual or practical barriers to change service provider or in the case of terminal air navigation services to move towards self-supply of air navigation services by airports;
  - b) the role of airspace users' representatives in selecting the service provider.
3. The extent to which it can be chosen from a range of service providers:
  - a) the existence of a public tendering process (not applicable in case of self-supply);
  - b) if applicable, evidence of alternative service providers participating in the tendering process and having provided services in the past, including the option of self-supply for the airport.
4. For terminal air navigation services, the extent to which airports are subject to commercial cost pressures or incentive-based regulation:
  - a) whether airports actively compete for airline business;
  - b) the extent to which airports bear the air navigation service charge;
  - c) whether airports operate in a competitive environment or under economic incentives designed to cap prices or otherwise incentivise cost reductions.
5. Where the provider of terminal air navigation services [...] also provides *en route* air navigation services, these activities shall be subjected to separate accounting and reporting.
6. For terminal air navigation services, the assessment in this Annex shall be carried out at each individual airport, as appropriate.

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<sup>48</sup> European Regulation (EU) No 391/2013 ('the Charging Regulation') is available from: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:128:0031:0058:EN:PDF>

Appendix B

## CAA questions to stakeholders in the November 2017 Call for Evidence

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### Airport Operators

1. Who provides TANS at your airport? Is it provided in-house or is there a contract for TANS provision?
2. When did the contract start? When is the contract due to end? Is there a break clause (Y/N)? If yes please provide details.
3. What factors influenced the choice of contract length?
4. Who owns the equipment and infrastructure used to provide TANS at your airport?
5. If you contract out, what do you plan to do when the contract expires?
6. What factors did you take into account in choosing whether to hold a tender before awarding the TANS contract? What was the determining factor?
7. If you have tendered, what were the main reasons for doing so? What process did you follow and what criteria did you use to select providers?
8. If you renegotiated a contract renewal, please tell us about the negotiation. How did the talks commence and what were your key requirements from the provider?
9. Do you plan to consult airspace users before making any future decision on TANS provision? If so, how are you planning to do so?
10. What do you consider will be your main priorities for your next TANS contract?
11. Are you considering moving to new technology for TANS provision? If so, please give details.

12. Are you concerned about any potential barriers to changing TANS provider, including any issues around the transfer of assets and staff, or including any existing interactions with en-route services? If so, to what extent are those barriers surmountable? Do you have any evidence of such barriers?
13. Do you have any observations about recent changes in the UK TANS Market<sup>49</sup>? Do the changes make you more likely to tender in the future? Do you consider that your existing provider is more aware of the potential competitive forces in the TANS market?
14. To what extent can you pass the costs of air navigation service charges on to users? Do you operate in a competitive environment and/or are you subject to economic incentives designed to cap prices or reduce costs? Do you actively compete for airline business?<sup>50</sup>
15. Do you have any other comments you would like to make?

We may want to discuss the process by which you awarded your current TANS contract, or are planning to award your next contract. Please can you provide us with contact details of who we can approach if we wish to arrange such a discussion.

We note that under Article 3 (3) of Regulation 391/2013 we may need to ask you for tender documentation and contracts relating to the provision of TANS at UK airports so please have such documentation available in anticipation of us requesting it from you.

## **ANSPs**

1. How do you find out about possible changes of TANS providers at UK airports?
2. Have you considered bidding for a TANS contract in the UK (Y/N)? If yes, for which airport(s)? If not, why have you not considered bidding?

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<sup>49</sup> In particular, the changes of provider at Gatwick and Edinburgh and the move to self-supply at Birmingham, as well as any changes since we published CAP 1293.

<sup>50</sup> See point 4 of the Annex I of Regulation 391/2013 for context.

3. Where you have been aware of a possible change of TANS provider at a UK airport did you bid? If not, why not?
4. What do you consider are the main barriers in offering or withdrawing TANS services at one airport, including any issues around the transfer of assets or staff? To what extent are those barriers surmountable? Can you provide evidence to substantiate your answer?
5. Do you have any observations about recent changes in the UK TANS Market<sup>51</sup>? Did that make you more likely to bid for other airports' TANS contracts in the future?
6. Are you considering moving to new technology for TANS provision? If so, please give details.
7. Do you also provide en-route services? If so, are those activities subject to separate accounting and reporting? Please give details. Do you provide en-route or other services under contract with NERL<sup>52</sup>? Could those be provided by another provider?
8. Have you any other comments you would like to make?

We may want to discuss your experience of the UK TANS market with you. Please can you provide us with contact details of who we can approach if we wish to arrange such a discussion.

We note that under Article 3 (3) of Regulation 391/2013 we may need to ask you for tender documentation and contracts relating to the provision of TANS at UK airports so please have such documentation available in anticipation of us requesting it from you.

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<sup>51</sup> In particular, the changes of provider at Gatwick and Edinburgh and the move to self-supply at Birmingham, as well as any changes since we published CAP 1293.

<sup>52</sup> These include activities such as delegated en-route functions and services to North Sea helicopters.

## Airspace users

1. Have any airport operators, whose contract for the provision of TANS is coming to an end, consulted you on the potential way forward/options for new set-up? If so, what was your response to them?
2. Are there any developments in the UK TANS market since the transition of services in Birmingham and Gatwick that you wish you raise that you think will be relevant to our review?
3. Have you any other comments you would like to make?

We may want to discuss your views on the UK TANS market with you. Please can you provide us with contact details of who we can approach if we wish to arrange such a discussion.



## Appendix C

# Summary of reviews of Birmingham and Gatwick transition

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1. In 2016, the CAA commissioned SDG to review the transitions of TANS provider at Birmingham and Gatwick airports.<sup>53</sup> We asked SDG to consider the transition process, including what went well and what did not go well; and in particular, to identify any issues that impacted, positively or negatively, on the either the cost or the length of time of the transitions.
2. This chapter summarises SDG's reviews of both transitions and its recommendations for airport operators, the CAA and incoming TANS providers for future transitions.

## Birmingham transition

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3. In 2012, Birmingham Airport tendered for TANS provision. Only one compliant bid was received, from NSL. In 2013, the airport decided to move to in-house provision and set up a subsidiary company Birmingham Airport Air Traffic Limited (BAATL). BAATL took over the TANS service from NSL in April 2015.

## Staffing issues

4. At the time of transition, about 60 per cent of NSL employees at Birmingham were subject to ToaP. Under ToaP, if the new provider does not match the terms and conditions provided by NSL through its defined benefit pension scheme, employees who have been continuously employed by NATS since its part privatisation in 2001 have the right to remain employed by NATS and not transfer to the new provider. BAATL did not match NSL's terms and conditions so staff subject to ToaP could choose to stay with NATS. BAATL's business plan was based on 30 per cent of staff covered by ToaP transferring to it. It actually retained 60 per cent of ToaP staff, however, the numbers were only confirmed in January 2015. BAATL said that the time taken to establish its staff mix presented significant challenges for its training and recruitment planning.

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<sup>53</sup> This report is available at:  
[http://www.caa.co.uk/uploadedFiles/CAA/Content/Accordion/Standard\\_Content/Commercial/Airspace/Air\\_Traffic\\_Control/TANS%20provider%20transition%20review%20-%20Final%20Consolidated%20Report.pdf](http://www.caa.co.uk/uploadedFiles/CAA/Content/Accordion/Standard_Content/Commercial/Airspace/Air_Traffic_Control/TANS%20provider%20transition%20review%20-%20Final%20Consolidated%20Report.pdf)

5. To deal with the uncertainty about staffing BAATL proposed to NSL secondment arrangements that would allow:
  - new BAATL staff to be seconded to NSL, enabling them to train alongside existing air traffic controllers (ATCOs) before BAATL took over service provision; and
  - NSL staff to continue to work at Birmingham after BAATL started operations and until it was fully staffed by trained BAATL employees.
6. By decoupling some training and staff decisions from continuing operations, the secondment arrangements increased flexibility to the overall transition process. It had been planned that nine ATCOs would be seconded to BAATL, however, with some late staff decisions to transfer to BAATL, only two were actually required.

### **Assets, equipment and information**

7. The equipment used for TANS was owned by Birmingham before the transition. This removed the need for negotiations between NSL, BAATL and the airport for the transfer of these assets.
8. NSL offered to sell the MATS Part 2 document to BAATL. As BAATL considered the price to be too expensive, it decided to produce its own MATS Part 2. BAATL found this relatively straightforward as it could draw on publicly available information, procedures the airport already had in place and procedures agreed with NERL and nearby airports.

### **Timing and costs**

9. The key challenge for the transition timeline was staffing and training. Uncertainty around ToaP and the limited NSL process to deal with it meant that issues took time to resolve. BAATL informed SDG that its transition costs were approximately £300,000 higher than planned by. It did not share with SDG its transition budget, so it is unclear how large this overspend was in relative terms.

### **Quality of service**

10. Airlines did not report any impact on their operations at the airport during the transition.

### **Gatwick transition**

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11. In 2013, Gatwick Airport tendered for TANS provision, deciding to award the contract to ANSL in July 2014. NSL mounted a legal challenge to the airport's decision which delayed the signing of the contract with ANSL until

December 2014, following the out of court settlement agreed between Gatwick Airport and NSL. ANSL commenced operations in March 2016.

### **Staffing issues**

12. At the time of transition 60 per cent of Gatwick ATCOs were covered by ToaP. ANSL planned on securing half of NSL's ATCOs, in practice they retained about 57 per cent. However, ANSL planned to have five new ATCOs validated by the time of the transition but in fact had no new ATCOs validated. This left ANSL requiring a two-year secondment agreement (extendable to a third year) for 15 ATCOs. ANSL considered that NSL had the ability to determine the rates for the secondments and the rate at which new staff could be trained at the airport.

### **Assets, equipment and information**

13. Most of the equipment at Gatwick was owned by banks and leased to NSL. During the transition, the leases on this equipment were transferred from NSL to the airport. ANSL did not receive as much supporting documentation for the equipment as expected, so it had to bring in additional engineering support to develop the documentation necessary for its certification and designation.
14. ANSL bought MATS Part 2 from NSL and developed its own unit training plan and unit competence manual.

### **Timing and costs**

15. The transition timetable was considered tight by the CAA, and required ANSL to make a number of compromises, some of which had cost implications (such as buying MATS Part 2). The key challenges to the timeline were staffing and training, and engineering documentation. Uncertainty around the implementation of ToaP and negotiations around secondment agreements required time to resolve.
16. ANSL said that it incurred additional costs as it had to second more staff than expected, at a higher rate than expected and incur training and secondment costs over a longer period than expected.

### **Quality of service**

17. Airlines did not report any impact on their operations at the airport during the transition.

### **SDG recommendations for future transitions**

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18. Drawing on the findings of its review, SDG made some recommendations to tendering airports, the CAA and incoming TANS providers.

19. The recommendations were largely about drawing the attention of airports and ANSPs to the issues that arose during the Birmingham and Gatwick transitions. SDG's recommendations included that:
- airport operators should recognise that shorter contracts might not be viable for incoming providers;
  - airport operators and incoming providers should be aware of the complexities around ToaP;
  - incoming providers should have access to the ToaP agreement and relevant legal advice when responding to tenders;
  - incoming providers should understand the risks around the transfer of staff process by ToaP and, by extension, the recruitment and training of new staff;
  - airport operators should provide an estimate of the attrition rate of staff covered by ToaP;
  - airport operators should make provisions for exit management so that outgoing providers cooperate during a transition process;
  - incoming providers should consider the balance between buying Intellectual Property (IP) from outgoing providers or investing resources in developing new IP; and
  - airport operators where NSL is the incumbent should develop a clear understanding of how any delegated en route functions are delivered on-site by NSL on behalf of NERL.
20. The recommendations to the CAA were a mixture of issues that it should draw to the attention of airport operators and/or incoming providers, and comments on CAA processes.
21. The recommendations are set out in greater detail in an information note to TANS stakeholders, which is available on our website.<sup>54</sup>

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<sup>54</sup> Available at [www.caa.co.uk/cap1633](http://www.caa.co.uk/cap1633).

## Appendix D

## Summary of the relevant findings from CAP 1293

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1. This appendix summarises the findings in CAP 1293<sup>55</sup> and explains how the CAA assessed each of the criteria on market conditions set out in Annex I of the charging regulation. CAP 1293 set out the CAA's view that TANS in the UK was subject to market conditions.

### Criterion one

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2. Criterion one is:

*"The extent to which service providers can freely offer to provide or withdraw the provision of these services:*

*a) The existence or otherwise of any significant legal or economic barriers that would prevent a service provider from offering to provide or withdrawing the provision of these services;*

*b) The contract duration; and*

*c) The existence of a procedure allowing assets and staff to be transferred from one air navigation service provider to another."*

3. The CAA did not find any significant legal or economic barriers that prevented a service provider from offering to provide or withdraw from the provision of TANS.
4. CAP 1293 considered that the decisions to transfer TANS provisions at Birmingham and Gatwick airports and the Luton Airport tender process evidenced that any remaining barriers to switching could be overcome during the tender process.
5. Barriers previously identified in CAP 1004 had been overcome by alternative TANS providers. This was evidenced by the forthcoming transfer of the TANS service at Birmingham Airport and in the outcome of the subsequent tender by Gatwick Airport. The 2011 Luton Airport tender, which was won by the incumbent, showed the ability of a range of competitor TANS providers to actively participate in tenders.

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<sup>55</sup> See CAP 1293 – Review of advice on SES Market Conditions for Terminal Air Navigation Services in the UK, available at: [www.caa.co.uk/cap1293](http://www.caa.co.uk/cap1293).

6. The CAA considered that any concerns that previously had arisen over contracting behaviour, particularly contract duration, could be dealt with, as appropriate, under our competition powers.<sup>56</sup>
7. To the extent that there remain some barriers, the CAA considered these to be lower than previously thought and that they could be overcome during the tender process.

## Criterion two

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8. Criterion two is:  
*The extent to which there is a free choice in respect to service provider, including, in the case of airports, the option to self-supply;*
  - a) *the existence or otherwise of legal, contractual or practical barriers to change service provider or in the case of terminal air navigation service to move towards self-supply of air navigation by airports;*
  - b) *the role of airspace users' representatives in selecting the service provider.*
9. CAP 1004 and CAP 1293 did not find any significant legal or economic barriers that prevented airport operators from exercising choice in service or to self-supply.
10. With respect to practical barriers, Gatwick Airport is the busiest single runway in the world and Birmingham is a large regional airport. The CAA considered that the ability of these two airports to market and find an alternative provider to their respective TANS requirements was indicative of the availability of choice at the full range of airports covered by this report.

## Criterion three

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11. Criterion three is:  
*The extent to which it can be chosen from a range of service providers:*
  - a) *the existence of a public tendering process (not applicable in the case of self-supply);*
  - b) *if applicable, evidence of alternative service providers participating in the tendering process and having provided services in the past, including the option of self-supply for the airport.*

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<sup>56</sup> CAP 1235 'Guidance on the application of the CAA's Competition Powers', May 2015, is available from [www.caa.co.uk/CAP1235](http://www.caa.co.uk/CAP1235)

12. In CAP 1004, the CAA found that there was a lack of credible alternatives for the provision of TANS and that self-supply may be difficult for the larger airport operators to consider. While in CAP 1293, the CAA concluded that there were now sufficient alternative providers for market conditions to exist.
13. The evidence presented to the CAA in relation to events between 2012 and 2015, changed the view that we held in CAP 1004. Birmingham Airport's move to an in-house solution indicated that self-supply was a possibility for larger airports. Gatwick Airport's decision to appoint ANSL and other airport operators' engagement in open tenders had shown that there was at least one credible alternative to the current provider in addition to self-supply.
14. The CAA's conclusion was that there were sufficient alternative providers for market conditions to exist.

## Criterion four

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15. Criterion four is:  
*For terminal air navigation service, the extent to which airports are subject to commercial cost pressures or incentive based regulation:*
  - a) *whether airports actively compete for airline business;*
  - b) *the extent to which airports bear the air navigation service charge;*
  - c) *whether airports operate in a competitive environment or under economic incentives designed to cap prices or otherwise incentivise cost reductions.*
16. As in CAP 1293 and CAP 1004, the CAA did not see any issue with this criterion in the UK.
17. The CAA economically regulates both Heathrow and Gatwick airports. The CAA had deregulated Stansted Airport recognising that it faced sufficient competition such that it no longer had substantial market power and therefore was subject to active competition for airline business.
18. Accordingly, all airports in the UK (even those with substantial market power) compete for airline business and bear the cost of TANS provision, and operate in a competitive environment or under economic incentives. This view was without prejudice to any future decision that the CAA or other competition authorities may take in relation to the level of competition at any UK airports.

## Criterion five

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19. Criterion five is:

*Where the provider of terminal air navigation services or CNS, MET and AIS services also provides en route air navigation services, these activities shall be subject to separate accounting and reporting.*

20. As in CAP 1293 and CAP 1004, criterion 5 is only an issue where NSL is the incumbent TANS provider. NSL is a wholly owned subsidiary of NATS Ltd which also owns NERL, the monopoly en route provider. NERL and NSL are however separate legal entities and are, therefore, required by law to lodge separate accounts with Companies House. Additionally, NERL is required by its licence to produce separate regulatory accounts and to report on its en route activities.
21. Given the legal requirements for separate accounting for NERL and NSL, the CAA was satisfied that this criterion was met for the TANS provided airports included within the review.

## **Criterion six**

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22. Criterion six is:

*For terminal air navigation services, the assessment in Annex I of EC Regulation 391/2013 shall be carried out at each individual airport, as appropriate.*
23. The CAA did not carry out an individual assessment by airport. We interpreted the criterion as giving us discretion on whether to apply the test at a tower level, where we consider it is appropriate to do so. We did not consider that it was appropriate to consider TANS in the UK on an individualised basis. Specifically, we found that market conditions existed as airports had a realistic possibility of choosing from a reasonable range of different TANS providers. For the purposes of the previous review, (and for the avoidance of doubt without prejudice to the approach the CAA may take in the future in relation to any of its other powers), we considered that the geographic scope of TANS should be viewed on a national level.
24. We took this approach since it was unhelpful to consider individual towers as this pre-supposed that each tower forms a market on its own. This would imply that, once a contract is signed; there would be no possibility of market conditions for that particular tower. This approach would ignore any potential wider market or competitive dynamics that may be present due to market conditions in the wider industry.
25. We also noted that, in the renegotiations observed, it was clear that changes in supplier had at least in part been motivated by the actions of Birmingham, Gatwick and Luton airports in seeking a market based solution.



## Conclusion

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26. Having assessed the provision of TANS in the UK against the criteria set out in the charging regulation the CAA considered that the test was met and that TANS was subject to market conditions.
27. This assessment against the criteria was, however, qualified. In particular, the CAA considered that a distinction should be drawn between the existence of market conditions on the one hand, and of the market being subject to effective competition on the other. For the purposes of the charging regulation, the test is whether market conditions exist. The CAA was satisfied that this test was met. The CAA did not consider that it was required to assess whether the market is effectively competitive.

## Appendix E

## List of stakeholders consulted

We have sought evidence for the review through a Call for Evidence (CfE) and interviewed several stakeholders. The stakeholders we consulted, those who responded and those we interviewed are listed below.

Stakeholder	Consulted on Call for Evidence	Response to CfE received	Interview	Responded to CAP1634 (Draft Advice)
<b>Airport operators</b>				
1. Heathrow	✓	✓	✓	
2. Gatwick	✓	✓	✓	
3. MAG (Manchester, Stansted and East Midlands airports)	✓	✓		
4. Luton	✓	✓		
5. Edinburgh	✓		✓	
6. Birmingham	✓	✓		
7. AGS (Glasgow, Aberdeen and Southampton airports)	✓	✓		
8. London City	✓	✓	✓	
9. Bristol	✓			
10. Southend		✓		
<b>Air Navigation Service Provides (TANS providers)</b>				
11. NSL	✓	✓	✓	✓
12. ANSL	✓	✓	✓	✓
13. MAG	✓	✓		
14. ATCSL (Liverpool, Doncaster Sheffield and Durham Tees Valley airports)	✓	✓		
15. Southend		✓		

Stakeholder	Consulted on Call for Evidence	Response to CfE received	Interview	Responded to CAP1634 (Draft Advice)
<b>Airspace users</b>				
16. BA	✓	✓		✓
17. Virgin	✓	✓		
18. easyJet	✓			
19. Ryanair	✓			
20. IATA	✓	✓		
21. Thomas Cook	✓			
22. Thomson / TUI	✓			
23. Flybe	✓			
<b>Other stakeholders</b>				
24. Prospect Trade Union		✓		✓