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Vehicle Technology and Aviation Bill 2016-17

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Summary

This paper explains the policy background to and contents and purpose of the *Vehicle Technology and Aviation Bill 2016-17* (HC Bill 143).

The Bill was introduced in the House of Commons on 22 February 2017. It is scheduled to receive Second Reading on 6 March.

Different parts of the Bill extend to the various nations of the UK. Parts 2 (electric vehicles) and 3 (civil aviation) and clause 22 (laser offence) extend to the whole of the UK. Part 1 (automated vehicles), clause 21 (vehicle testing and fees) and clause 23(1), (3) and (6) (alternative courses for road traffic penalties) extend to the whole of Great Britain. Clause 23(2) (alternative courses for road traffic penalties) also extends to Northern Ireland.

Insurance for automated vehicles

The application of 'intelligence' to cars is gathering pace and there is a strong push by manufacturers to develop automated vehicles which will drive themselves. Currently, insurance law is driver-centric: all (human) drivers have to have insurance in order to provide compensation for third parties for personal injury or property damage due to a driving related incident. The Government's view is that such principles need to be extended to cover automated vehicles when the car is the driver and the 'driver' is sometimes a passenger.

The intention behind the legislation is to emphasise that if there is an insurance 'event' (accident) the compensation route for the individual remains within the motor insurance settlement framework, rather than through a product liability framework against a manufacturer.

The Government believes that answering the insurance questions sooner rather than later will encourage manufacturers to develop transport technology in the United Kingdom with the confidence that they can exploit market opportunities.

Electric vehicles

Since 2009 UK governments of all parties have sought to provide a framework in which electric vehicles, or 'ultra low emission vehicles' (ULEVs) can grow. The decarbonisation of both private cars and goods and passenger carrying vehicles is seen as critical to helping the UK achieve its climate change obligations and to improving air quality, particularly in cities such as London.

The measures in the Bill are intended to help deliver the aim in the Conservative Manifesto commitment for almost every car and van to be a zero emission vehicle by 2050. Taken together, the proposed powers would allow Government to regulate if necessary in the coming years, to improve the consumer experience of electric vehicle charging infrastructure, to ensure provision at key strategic locations like Motorway Service Areas (MSAs), and to require that charge points have 'smart' capability.

ATOL

The Air Travel Organisers' Licence (ATOL) is a consumer protection scheme for package holidays that include a flight. It is managed by the Civil Aviation Authority (CAA) on behalf of the Secretary of State for Transport. If an ATOL-licensed firm goes out of business, the CAA can refund protected consumers or, if they are already on holiday, ensure their safe repatriation home.

In recent years, there have been significant changes in the travel market. In particular, consumers are using the internet to 'mix and match' or 'dynamically package' the components of their holiday. In order to meet the needs of the modern consumer, the ATOL scheme was updated in 2012. Following a consultation in 2016, the Government believes that further legislative change is now needed. The measures in the Bill are intended to ensure that ATOL keeps pace with innovation in the travel market and align the scheme with a revised EC Directive on package travel and linked travel arrangements (2015/2302/EU), which must be implemented by 1 January 2018.

Air Traffic Services

NATS Holdings Ltd. (NATS, formerly National Air Traffic Services) is an air navigation service provider in the UK, responsible for providing air traffic services within UK and Eastern North Atlantic airspace. NATS is split into two main business units that provide distinct services. One, NATS (En-Route) plc (NERL), provides en-route air traffic control services and a centralised approach service at the London airports. NERL provides these services pursuant to a licence granted to it by the Secretary of State for Transport under the *Transport Act 2000*, as amended. It is economically regulated under that licence, by the Civil Aviation Authority (CAA).

The measures in the Bill are intended to modernise the licensing framework by updating the CAA's regulatory powers, giving the CAA access to a wider range enforcement tools when regulating NATS, and updating the Government's powers to extend the licence notice period, thereby promoting NATS' ability to arrange more efficient financing.

Vehicle testing and fees

The Bill introduces a power for the Secretary of State to designate premises for vehicle testing and cap testing station fees. The Government believes that these changes are necessary to plug the gap in the law and allow authorised testing facilities to charge a pit fee on a statutory footing rather than on a contractual basis.

Shining a laser at a vehicle

The Bill would change the law so that an offence is committed when the actions of an offender result in a pilot, driver, or captain being dazzled or distracted by a laser.

Diversionary courses

The Bill would provide a specific legal basis for charging for diversionary courses. The Government's view is that road traffic offenders would not notice any difference as the same range of courses would be offered as before, on the same conditions, for the same fee. The change is a purely technical one, to remove any doubt as to the legal basis for charging.

This paper will be updated as the Bill progresses through its Parliamentary stages.

Further information on road/motor vehicle and aviation policy can be found on the transport policy page of the Parliament website.

1. What the Bill is and where it came from

The current Bill started life in the 2016 Queen's Speech as the *Modern Transport Bill*. The background notes to the speech stated that the Government's intention with the Bill was to cut red tape and "put the right framework in place to allow innovation to flourish". To this end the measures in the Bill would:

- encourage potential investors in autonomous vehicles (AV), spaceplane operations and spaceports;
- put the UK at the forefront of safe technology in the AV industry, including drones and spaceplanes;
- provide appropriate insurance to support the use of autonomous and self-driving vehicles; and
- improve protection for customers by updating ATOL, the UK's financial protection scheme for holidays.[1]

However, it became clear by the early part of 2017 that the spaceflight provisions would be part of a separate, draft Bill.[2] Furthermore, the Government had indicated its intention to include other provisions in the Bill, such as on vehicle testing and the misuse of lasers.[3]

On 22 February 2017 the Government published its *Vehicle Technology and Aviation Bill*, which includes all those provisions which were intended for the *Modern Transport Bill* (barring space travel) and those subsequently announced in various documents.

The Bill and the Explanatory Notes are available on Parliament's dedicated Bill page, along with five impacts assessments looking at the Bill as a whole and four key aspects.

On its dedicated Bill page, the Department for Transport has collated background policy documents that feed into the Bill.

[1] HMG, *Queen's Speech 2016: background briefing notes*, 18 May 2016, pp17-18
[2] DfT press notice, "Government announces boost for UK commercial space sector", 9 February 2017
[3] See: DVSA, *Motoring Services Strategy*, 12 May 2016, para 5.4 and DfT press notice, "New powers to crack down on laser attacks", 5 February 2017

2. Automated vehicles: liability of insurers etc. (clauses 1-7 and Schedule 5)

2.1 Background

Part 1 of the Bill sets out the broad parameters of how automated vehicles, or self-driving cars, involved in accidents, will be treated for insurance purposes.

Steadily, over a number of years, technology companies and car manufacturers have worked together to develop cars that are more and more independent of human interaction. Already, new cars are full of technology beyond that which has been used for years to manage the drivetrain.[4] Fairly common examples include automated parking, 'intelligent' lighting and assisted emergency braking.

The industry's wish to develop self-driving cars is not simply a 'because it's there' response, but it moves in tandem with other features of the developing market for personal transportation. It is thought that in the future car ownership will decline and new business models that allowing sharing or renting of cars will emerge. There is increasing interest in MaaS (Mobility as a Service). For the technology companies, there are numerous applications for highly sensitive and accurate spatial awareness functionality, well beyond car manufacture.[5]

Insurance

Solving the question of how automated vehicles can be insured is essential if they are to become a feature on British roads. Currently all vehicles have to be insured under the *Road Traffic Act 1988*.[6] By virtue of the Act, the insurance must cover third party risks as set out in Section 145 of the Act:

> the policy—
>
> (a) must insure such person, persons or classes of persons as may be specified in the policy in respect of any liability which may be incurred by him or them in respect of the death of or bodily injury to any person or damage to property caused by, or arising out of, the use of the vehicle on a road or other public place in Great Britain[7]

As it stands now the insurance premium depends on a variety of factors, one of which is the driving record of the driver and their previous history of claims. In many cases of claims there is a determination of 'fault' and it will be the insurer of the 'at fault' driver which will pay the bulk of the claim. However, even where there is no 'fault', victims are assured of compensation. In cases where there is no insurance or the other driver

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[4] For an explanation of the drivetrain, see: Mister Transmission, *What is a drivetrain?* [accessed 2 March 2017]

[5] ABI press notice, "Automated vehicles: Government consultation response adopts insurance industry proposals", 10 January 2017

[6] Section 143

[7] Section 145(3)

cannot be contacted, the Motor Insurers Bureau (MIB) steps in as insurer of last resort. In short the compensation process is driver-centric.

Clearly this cannot be the case with self-driving cars. With automated vehicles, the vehicle user could either be a driver or a passenger, depending on which mode the car is in.

The question of 'who pays' and who owes a duty of care to other road users in accidents is not directly connected to the skill or history of the driver but to the manufacturer of the vehicle. Thus one question might be: should insurance be product liability insurance (on the manufacturer) or still reside with the driver – or both?

The Department for Transport (DfT) recognised this issue early on in its consultation on the issue and in more general reviews of current transport issues which recognise that in the future the driver of a vehicle may be 'legitimately disengaged' from the driving task.

The Bill's Impact Assessment sets out the issue thus:

> Automated vehicles (AVs) will allow the driver to disengage from the driving task, handing full control and responsibility to the vehicle when the automated systems are active, without needing to intervene or monitor. This creates an issue for motor vehicle insurance. UK law requires the driver to be insured, so when the driver uses automated mode, gaps would emerge in the insurance framework, making it difficult and time consuming for victims to claim compensation. Third parties might not be covered without the proposed intervention, which is a market failure. With such vehicles expected to be on the road in 5 to 10 years, Government intervention is required to resolve this issue, to provide clarity to motorists and industry.[8]

Insurance was a key issue in the consultation paper issued by DfT in July 2016: *Pathway to Driverless Cars: Proposals to support advanced driver assistance systems and automated vehicle technologies*. A summary of the new issues is shown below:

> In a world where all vehicles are fully automated, and require no human input at all, it would be easy to place liability on the manufacturer (ie product liability) and let them deal with claims arising from a collision. Collisions should be rarer than they are today because the vehicles will be programmed to drive more safely than humans tend to. As noted in the introduction, it is likely to take a significant amount of time before these vehicles come to market.
>
> The transitional world of mixed fleets, made up of both conventional and automated vehicles, is the more complex and difficult one to handle. Determining liability in the event of a collision where the driver has activated the AVT to come out-of-the-loop to a degree, and has disengaged from the driving task, could prove to be complex and time consuming.
>
> It is possible that the fault could rest with the driver (eg if they have failed to retake control when the system exceeds its performance limits), or with the manufacturer (eg product failure, which would be covered by product liability). This means there is a significant chance of potential increased friction between the

[8] DfT, *Pathway to Driverless Cars: Insurance for Automated Vehicles*, IA No: DfT00366, 7 October 2016, p1

> different parties over who and what caused the collision, resulting in delays in compensation to victims. In addition, claiming against product liability has the potential to be more difficult as it could be more complicated to determine issues such as when the technology failed and whether the user was asked to take control.
>
> Furthermore, a vehicle owner who is 'driving' the highly automated vehicle might have legitimately disengaged from the driving task, with the vehicle having taken over control. If the technology fails and injures the 'driver', the current legislation only requires insurance to cover third parties and not the driver. It is up to the policy owner to seek additional insurance to cover any injury they do to themselves as a result of their own actions or negligence. If the AVT fails then the driver, in effect, becomes a victim as their injuries are not as a result of their own actions or negligence. We therefore need to protect the driver as a potential victim.[9]

The response of the car industry was not uniform – some were happy to 'self-insure' their vehicles, others not so. Potentially this could create confusion amongst adopters of the new technology as to what their liabilities might be.

The Government's proposed approach was:

- Extending the compulsory insurance requirements for automated vehicles so that the owner must also ensure that there is an insurance policy in place that covers the manufacturers' and any other entities' product liability.
- Requiring this additional compulsory product liability insurance for automated vehicles to also cover injuries to the 'not at fault' automated vehicle driver as well as passengers and third parties.
- To develop a system to classify an automated vehicle so that manufacturers, insurers and consumers know which vehicles this particular insurance requirement applies to.[10]

The Government published the response to the consultation on 6 January 2017 and indicated its intention to "proceed to make the minimum legislative changes required to enable the market to develop appropriate AV insurance products". However, it also indicated that it had amended the insurance proposal to:

> … extend compulsory motor vehicle insurance creating a single insurer model to protect victims where the AV causes a crash in automated mode. The victim will have a direct right against the motor insurer and the insurer in turn will have a right of recovery against the responsible party to the extent there is a liability under existing laws, including under product liability laws.[11]

The insurance industry is very positive towards the concept of self-driving cars because, it believes, it will be make a bigger contribution to

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[9] DfT, *Pathway to Driverless Cars: Proposals to support advanced driver assistance systems and automated vehicle technologies*, July 2016, paras 2.3-2.6

[10] Ibid., para 2.9

[11] DfT, *Pathway to driverless cars: Consultation on proposals to support Advanced Driver Assistance Systems and Automated Vehicles Government Response*, 6 January 2017, para 1.10

road safety than even the seatbelt.[12] Oral evidence to the Lords' Select Committee on Science and Technology gave examples of why:

> The accident statistics for the UK fall into two very broad groups. One is "did not look properly" in an urban area. You can see that a higher level of automation might help that. Increased sensors in human-driven vehicles that identify something you have missed might also help that. The other one, on rural roads, is loss of control: you were going too fast, you went round the bend too fast, and hit something. Again, vehicle sensors at the moment could contribute to that, and connected vehicles could tell you that round the corner there is a tractor going quite slowly.[13]

The Association of British Insurers (ABI) said in a press release that the Government had broadly accepted their recommendations at the consultation stage:

> It's good to see the Government adopting the insurance industry's proposals to keep motor insurance as straightforward as possible for customers in a world of increasingly automated vehicles. We look forward to seeing further details in the Modern Transport Bill. In the meantime we will be continuing our productive relationship with the Government's Centre for Connected and Autonomous Vehicles, helping officials work through the various challenges created by this evolving technology. Automated vehicles have the potential to revolutionise our transport systems and dramatically improve road safety, but it's right the insurance system is developed in parallel to give motorists confidence in using them.[14]

2.2 The Bill

Summary

Part 1 of the Bill (clauses 1–7) addresses the insurance issues that will arise when responsibility for a vehicle is shared between driver and the car itself. The application of 'intelligence' to cars is gathering pace and there is a strong push by manufacturers to develop automated vehicles which will drive themselves. Currently it is a requirement that all (human) drivers have to have insurance when they drive in order to provide compensation for third parties for personal injury or property damage due to a driving related incident. Such principles need to be extended to cover automated vehicles.
The Government believes that answering the insurance questions sooner rather than later will encourage manufacturers to develop transport technology in the United Kingdom with the confidence that they can exploit market opportunities.

Part 1, comprising Clauses 1- 7 of the Bill, deals with the insurance of automated vehicles.

[12] ABI press notice, "Automated Driving: Insurers back the safety revolution 100%", 17 May 2016
[13] House of Lords Select Committee on Science and Technology, *Corrected oral evidence: Autonomous Vehicles*, 22 November 2016, Q58
[14] Op cit., "Automated vehicles: Government consultation response adopts insurance industry proposals"

Clause 1 would require the Secretary of State to maintain a list of relevant automated vehicles to which the legislation would apply. The list would include vehicles that:

> (a) are or might be used on roads or in other public places in Great Britain,
>
> and
>
> (b) are in the Secretary of State's opinion designed or adapted to be capable, in at least some circumstances or situations, of safely driving themselves without having to be monitored by an individual.[15]

Clause 2 sets out the conditions under which the insurer would be liable for damage due to an accident. The conditions are:

> (a) an accident is caused by an automated vehicle when driving itself,
>
> (b) the vehicle is insured at the time of the accident, and
>
> (c) an insured person or any other person suffers damage as a result of the accident[16]

'Damage' here means personal injury or death and any third party property. The limit to the liability would be the same as the limit (£1.2 million) that applies in 'normal' motor insurance set by section 145 of the *Road Traffic Act 1988.* The main extension to insurance law would be that where the car is driving automatically, and caused the incident, first instance liability is on the insurer and the (human) driver is also covered.

The key policy point in this clause is that following a claims 'event' the process would follow the insurance route – as now – rather than become a 'consumer-manufacturer' product liability action, which is inevitably longer and more costly.

Clause 3 would limit liability for damage when the injured party contributed to the cause of the accident. In this case provisions under the *Law Reform (Contributory Negligence) Act 1945* (Section 1 in particular) would apply.

Clause 4 addresses one of the unique aspects of automated vehicles – the computer software. Under clause 4(1), insurers would be able to limit their liability if the operating system of the car was tampered with, or if updates to the system were not installed or updated by the insured. In such cases if there were damage to a third party and the insurer paid for those damages, they could claim that payment back from the insured in some circumstances.

The key provisions regarding tampering or failing to update are shown below:

> (a) alterations to the vehicle's operating system made by the insured person, or with the insured person's knowledge, that are prohibited under the policy, or

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[15] Clause 1(1)
[16] Clause 2(1)

> (b) a failure to install software updates to the vehicle's operating system that the insured person is required under the policy to install or to have installed.[17]

Clause 5 follows on from the effect of Clause 2, its main intention is to emphasise the fact that an insurer involved in a claim would have a right to make a subsequent claim against the manufacturer of the car where that is thought to be the cause of the accident.

Clause 6 ties in the new insurance arrangements with currently existing rights under other legislation in England & Wales and in Scotland. The Explanatory Notes outline the impact:

> This clause has the purpose of preserving the various forms of liability in measures such as the Fatal Accidents Act 1976, the Damages (Scotland) Act 2011, and all the other Acts to which this clause refers, and ensuring that the new system of liability being created by this Act is joined up with them. For example, the Fatal Accidents Act 1976 provides for a victim's dependents to be able to recover damages where the victim's death was caused by "wrongful act, neglect or default". This form of liability from the Fatal Accidents Act 1976, by means of this clause, is being preserved and linked to the system of liability being created by this Act, such that where an accident involving an automated vehicle causes death, it will be deemed to be due to the liable person's "wrongful act, neglect or default" within the meaning of the Fatal Accidents Act 1976, so that the provisions of that Act are brought to bear.[18]

The full list of affected legislation is:

- *Fatal Accidents Act 1976*
- *Damages (Scotland) Act 2011*
- *Congenital Disabilities (Civil Liability) Act 1976*
- *Law Reform (Contributory Negligence) Act 1945*
- *Civil Liability (Contribution) Act 1978*
- *Law Reform (Miscellaneous Provisions) (Scotland) Act 1940*

Clause 7 gives formal definitions of terms used in Part 1.

Schedule 5 (Part 1) introduces two consequential amendments.

First, it clarifies the regimes for the limitation of time in which actions can be taken both between Scotland and England & Wales and as between product liability claims and personal injury claims. The measure sets the period within which actions must start to three years. Actions brought by insurers against manufacturers under Clause 5 must be started within two years.

Secondly, there is a little known exemption in the *Road Traffic Act 1988* which allows for an alternative to the standard third party insurance requirements, namely the depositing of a bond for £500,000 with the Accountant General. This option is not to be available for automated vehicles. The whole thrust of the earlier measures is to facilitate and

[17] Clause 4(1)
[18] Explanatory Notes

reinforce the insurance claims process. This measure supports this aim by excluding the lesser-used alternative.

3. Electric vehicles: charging (clauses 8-15)

3.1 Background

Further information on electric vehicles and infrastructure can be found in HC Library briefing paper CBP 7480

Since 2009 UK governments of all parties have sought to provide a framework in which electric vehicles, or 'ultra low emission vehicles' (ULEVs) can grow. The decarbonisation of both private cars and goods and passenger carrying vehicles is seen as critical to helping the UK achieve its climate change obligations and to improving air quality, particularly in cities such as London.

The present Government believes that infrastructure is best planned and delivered locally by public authorities, businesses and individuals and provides various grants for those purposes. It makes available separate vehicle grants for private cars, taxis and buses. It also delivers locally-focused packages of funding in partnership with the motor industry as part of the 'Go Ultra Low' cities scheme.

The Government's April 2014 strategy paper on ULEVs pledged that by the end of 2014 there would be a rapid charge point at every motorway service station and that there would be a network of over 500 rapid chargers across the country by March 2015. It also pledged £32m for charging infrastructure in 2015-20.[19] There are more than 11,000 public charge points across the UK and the Government says that the UK has Europe's largest network of rapid charge points.[20]

In its September 2016 report on sustainability at the DfT the Environmental Audit Select Committee said that the Government should be clearer about its target for ULEV update by 2020 and said that it had "no confidence that the UK will achieve 60% market share by 2030".[21] The same month *The Times* published analysis showing that drivers faced a "postcode lottery" as regards charging points and that there were "more chargers available in the Orkney Islands than in Blackpool, Grimsby and Hull combined".[22]

The Government has two further targets: that by 2040 every new car in the UK will be a ULEV and that by 2050 almost every car and van on the road will be a zero emission vehicle.[23]

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[19] OLEV, *Investing in ultra low emission vehicles in the UK, 2015 to 2020*, April 2014, p16

[20] DfT press notice, "Government gears up for zero emission future with plans for UK charging infrastructure", 24 October 2016

[21] EAC, *Sustainability in the Department for Transport* (Third Report of Session 2016-17), HC 184, 1 September 2016, para 25, p14; the response is available at: *Fourth Special Report of Session 2016–17*, HC 819, 11 November 2016

[22] "Owners of electric cars are struggling to get plugged in", *The Times*, 24 September 2016

[23] OLEV, *Uptake of Ultra Low Emission Vehicles in the UK: A Rapid Evidence Assessment for the Department for Transport*, August 2015, executive summary; and *Conservative Manifesto 2015*, p15

Alternative Fuels Infrastructure Directive

European Union Directive 2014/94/EU of 22 October 2014 on the deployment of alternative fuels infrastructure (the Alternative Fuels Infrastructure Directive, or AFID) introduces for the first time requirements around the provision, accessibility and design standards of infrastructure, such as EV charge points.

Compliance will require the publication of a National Policy Framework (NPF) detailing the measures the Government believes necessary to develop the market for alternatively fuelled vehicles in the UK and some new requirements to be brought into force across the UK. The Government indicated in an October 2016 consultation on the implementation of AFID that the majority of requirements "will be met through the adoption of the NPF. It is not intended for the NPF introduce any new measures or targets, but instead will summarise and present information on the UK's ambition and approach to supporting the introduction of alternative fuels infrastructure".[24]

As regards the impact of Brexit on the implementation of the Directive, the Government said that leaving the EU "is not expected to change substantially the direction of this policy" as:

> The development of wider standards on ULEV infrastructure creates a level playing field and encourages economies of scale, with potential benefits for both manufacturers of the infrastructure and vehicles, as well as consumers. This in turn supports the up-take of ULEVs, which is a key part of the UK's transport, environmental and industrial strategy.[25]

At time of publication of this paper the Government had yet to publish the outcome of the consultation.

Consultation on measures to include in Bill

In October 2016, the Government published a consultation on the proposed ULEV measures it planned to include in the Bill. The measures proposed would give Government powers to support the roll-out of charging and hydrogen refuelling infrastructure and improve consumer access to the network.[26] The Government published its response to the consultation on 9 February 2017. It stated that it would proceed with proposals to:

- allow regulation to require operators of public charge points to provide **openly available data on the geographic location and live availability of charge points**, in a standardised format; and

[24] DfT, *Proposed transposition of European Union Directive 2014/94/EU (Alternative Fuels Infrastructure Directive)*, 24 October 2016, p8

[25] Ibid., p11

[26] op cit., "Government gears up for zero emission future with plans for UK charging infrastructure"; and: *Proposed ULEV measures for inclusion in the Modern Transport Bill*, 24 October 2016

- enable time limited secondary legislation to be introduced, which may be subject to a sunset clause, to incentivise industry to come up with its own solution in the longer term.[27]

The Government acknowledged that "the market is developing quickly in this area so we intend that the primary powers proposed will be sufficiently broad to allow for future innovation and that the format of the data and how it should be provided is more suitably defined in secondary legislation".[28] It also pledged to explore the associated cost to business of back office infrastructure, operation and maintenances, in particular for dynamic data, which may not be technically feasible for all charge points, before laying any secondary legislation and to ensure that there is "potential to allow exemptions to be set in those regulations where appropriate".[29]

It said it would also take powers to require operators of publicly accessible charge points and hydrogen refuelling stations, and networks, to ensure consumers can use them **without the need for multiple memberships**. However the Government is not fixed on one particular approach – e.g. roaming or via a single minimum defined access method – and as a consequence took a view that a primary power should be sufficiently broad so as to enable either approach to be mandated, taking into account market and consumer developments, should secondary legislation be required.[30]

The Government said it would take powers to enable the introduction of regulations, as needed, to specific **minimum technical standards for charge point connectors or socket outlets** for future installations, to ensure they meet the needs of drivers. The Government intends that this regulatory approach will be significantly flexible to enable continued innovation and technological development.[31]

It said it would also take powers to allow for regulations on **smart technical standards for charge points**, including powers to require that any access requirements or protocols necessary to access smart functionality are made openly available to ensure interoperability. These requirements would apply to retailers and installers of charge points.[32] It also said it would ensure that the scope of the powers for smart charging allow for requirements relating to communication of geographic information.[33]

The Government would take powers to oblige **large fuel retailers and Motorway Service Area (MSA) operators** to have provision of electricity and/or hydrogen available in their forecourts to refuel ULEVs. It argued that, given the strategic location of many fuel retailers and

[27] DfT, *Proposed ultra low emission vehicles measures for inclusion in the Modern Transport Bill: government response*, 9 February 2017, p9
[28] Ibid., p9
[29] Ibid., p9
[30] Ibid., p13
[31] Ibid., p16; AFID will introduce a minimum level of standardised connectors for electric vehicle charge point connectors and socket outlets
[32] Ibid., p21
[33] Ibid., p21

their familiarity to motorists, "many may be attractive locations for EV infrastructure and the Government would welcome commercial arrangements which capitalise on this opportunity and might make regulation unnecessary".[34] However, it was also keen to emphasise that the measures in the Bill would "have no immediate effect" and would require secondary legislation to introduce any requirement for new mandatory provision.[35]

Finally, on the question of **enforcement**, the Government indicated its intention to deploy a civil, rather than criminal approach and that the level of penalty would be set in secondary legislation.[36]

Two further proposals in the paper will *not* be taken forward in the Bill. The first will be taken forward in separate secondary legislation sometime in 2017: requiring operators of publicly accessible charge points and hydrogen refuelling stations, and networks, to publish **transparent and comparable pricing information**.[37] The second, regarding a power to **franchise hydrogen refuelling**, met strong opposition from respondents to the consultation. With that in mind, the Government concluded that it would instead "actively monitor market developments in the hydrogen for transport sector and continue to engage with key stakeholders to ensure that any appropriate frameworks are in place to support its growth".[38]

3.2 The Bill

Summary

Part 2 of the Bill (clauses 8-15) introduces the enabling provisions that were subject of the Government's consultation at the end of 2016 (see above). The Government believes that these provisions are necessary to help deliver the aim in the Conservative Manifesto commitment "for almost every car and van to be a zero emission vehicle by 2050".[39]

Taken together, the proposed powers would allow Government to regulate if necessary in the coming years, to improve the consumer experience of charging infrastructure, to ensure provision at key strategic locations like Motorway Service Areas (MSAs), and to require that charge points have 'smart' capability.

Clause 8 defines various terms used in this part of the Bill.

Clauses 9-14 would all give powers to the Secretary of State to make regulations regarding various things. Under **Clause 15** the Secretary of State must consult "as he thinks fit" before issuing regulations. With two exceptions,[40] where they are the *first set of regulations* under a particular clause they must be approved by both Houses of Parliament

[34] Ibid., p27
[35] Ibid., p27
[36] Ibid., p33
[37] Ibid., p16
[38] Ibid., p30
[39] *Conservative Manifesto 2015*, p15
[40] clause 9(3) (prescribed requirements for connecting components) and clause 12 (prescribed requirements for charge points)

(the 'Affirmative Procedure'). Otherwise Regulations would be subject to the Negative Procedure.[41]

The substantive provisions in clauses 9-14 would give the Secretary of State the power to make regulations about the following:

- **Clause 9** – Access to and connections for public charging points (to require operators to provide an appropriate uniform method of accessing public charging points);
- **Clause 10** – Large fuel retailers etc.: provision of public charging points (to require large fuel retailers and service area operators to provide public charging points and to ensure that public charging points are maintained and easily accessible to the public);
- **Clause 11** – Information about public charging points (to address the lack of consistency in the content and format of publicly available information on public charging points);
- **Clause 12** – Smart charge points (to prohibit the sale or installation of charge points unless they can meet certain requirements, relating to the 'smart' functionality of the charge point);[42]
- **Clause 13** – Enforcement (to set out a civil penalty regime and the process for determining whether there has been a failure to comply with any of the requirements); and
- **Clause 14** – Exceptions (to allow the regulations to create exceptions from any of the requirements under this Part of the Bill).

The **impact assessment** to this Part of the Bill states that the full impact of the regulations, which could be made under these clauses, would be "entirely dependent on the detail of the regulations", which of course we do not know.[43] It further states that that the powers taken in the Bill would not create any regulation in itself, but that this would be a product of the relevant secondary legislation which would be preceded by consultation and impact assessments:

> The Government recognises that market-driven solutions would be preferable, and is encouraged by the progress being seen. However, it may prove necessary to introduce regulation to compel faster improvements for the benefit of consumers and keep sales growth on track. The proposed legislative provisions would enable the future creation of such regulation, and give a clear early signal to the market of Government's vision for electric vehicle infrastructure. Any secondary legislation would involve industry in developing the detailed provisions.[44]

[41] For more information on the affirmative and negative procedures for secondary legislation, see the Parliament website [accessed 23 February 2017]

[42] This power would enable to Government to require infrastructure installed for the purposes of charging EVs to have 'smart' functionality to receive, understand and respond to signals sent by energy system participants (e.g. National Grid); see: DfT, *New legislative powers for ULEV infrastructure*, IA No: DfT00376, 20 December 2016, p8

[43] Ibid., p2

[44] Ibid., p5

4. Civil aviation: air traffic services (clauses 16-17 and Schedules 1-5)

4.1 Background

NATS Holdings Ltd. (NATS, formerly National Air Traffic Services) is an air navigation service provider in the UK, responsible for providing air traffic services within UK and Eastern North Atlantic airspace.

About NATS

NATS provides air traffic navigation services to aircraft flying through UK controlled airspace and at several UK and international airports, moving over 6,000 flights daily.

UK airspace contains a network of corridors, or airways. These are usually ten miles wide and reach up to a height of 24,000 feet from a base of between 5,000 and 7,000 feet. They mainly link busy areas of airspace known as terminal control areas, which are normally above major airports. At a lower level, control zones are established around each airport. The area above 24,500 feet is known as upper airspace. All of these airways are designated "controlled airspace". Aircraft fly in them under the supervision of air traffic controllers and pilots are required to file a flight plan for each journey, containing details such as destination, route, timing and height.

NATS was part-privatised in 2001 by the Labour Government. NATS is a public private partnership between the Airline Group, a consortium of airlines and pension funds, which holds 42%, NATS staff who hold 5%, UK airport operator Heathrow Airport Holdings Ltd. with 4%, and the Government which holds 49%, and a golden share.

The successes of NATS under this structure led the Labour Government to look at whether to sell the Government's remaining shareholding in the company. These proposals were taken up by the Coalition Government after May 2010. However, after lengthy consideration the Government announced in July 2012 that it would not proceed with a sale of its shares at that time.[45]

NATS is split into two main business units which provide distinct services:

- NATS (En-Route) plc (NERL), provides en-route air traffic control services and a centralised approach service at the London airports; and
- NATS (Services) Limited (NSL), provides terminal air navigation services, comprising approach and aerodrome services.

NERL provides these services pursuant to a licence granted to it by the Secretary of State for Transport under the *Transport Act 2000*, as amended. It is economically regulated under that licence, by the Civil Aviation Authority (CAA). The CAA has been concerned about the functioning of these powers for several years. For example, in 2013 the Chief Executive of the CAA, Andrew Haines, said in evidence to the Transport Select Committee that the existing regulatory regime "does

[45] For more information, see HC Library briefing paper SN1309

not allow us to fine NATS. It does not allow us to take any enforcement action for a breach that is ongoing. The thresholds before we can take enforcement action are very high hurdles. It gives NATS immunity for economic loss to other parties. These are not tools that we would expect to use on a daily basis, but they are core tools of most regulatory regimes, which are not part of our current capability".[46]

In recent years, there have been two "serious system failures" that have prompted reviews of the regulatory framework for NERL:

> The first incident, a Voice Communications (VCS) failure on 7 December 2013, had a particularly disruptive effect on passengers, prompted a wide-ranging CAA review into the NERL licence and regulatory framework. Following a second system failure on 12th December 2014, the CAA and NATS established an independent enquiry into the cause of the failure. The independent enquiry into the 2014 system failure however made a number of recommendations to update and modernise the licensing framework. Given the need to ensure the NERL licence adequately ensures service continuity and operational resilience, the CAA's ability to make changes to the licence independently of the licence-holder, has become more important.[47]

Consultation on measures to include in Bill

In September 2016 the Government published a consultation on its proposals to modernise the regulatory framework for NERL in the interests of passengers. The proposed changes were concerned with the licence modification process; enforcement; and licence extension.[48]

The Government's main argument for making these changes was that the licensing framework is essentially in need of modernisation "to ensure that it remains fit for purpose and continues to improve on the UK's record on safety, satisfying demand, and resilience". Since the establishment of the economic regulatory regime for NERL in 2001, which followed NATS part-privatisation, there have been improvements to licensing regimes in other industries, which were "designed to ensure regulators are focused on and are best able to act in the interests of consumers". The Government's objectives in modernising the licensing framework were:

> … to ensure the framework encourages a high standard of safety and service continuity, supports economic growth, and promotes efficiency in the provision of air traffic services [and] ensure that the regulatory framework takes into consideration principles of better regulation and is able to accommodate the changing landscape of air traffic services.[49]

On **licence modification** the consultation proposed changing the way that the CAA goes about modifying the NERL licence to bring it in line with the changes made to the way the CAA economically regulates

[46] Transport Committee, *NATS: failure in air traffic management systems*, HC 89, 17 December 2014, Q72

[47] DfT, *Updating the licence modification process for the en-route air traffic licence*, IA No: DfT00368, 3 November 2016, pp3-4

[48] DfT, *Modernising the licensing framework for air traffic services: consultation*, 22 September 2016

[49] Ibid., p4

major airports under the *Civil Aviation Act 2012*.[50] In effect, this would mean that the CAA would consult relevant stakeholders about any changes it wished to make to the NERL licence and thereafter direct the change to the licence-holder without having to seek consent from the licence-holder. This would allow the CAA to maximise the benefits to consumers, without any unnecessary delay. [51]

Any relevant affected party, including the licence-holder, would have the right to appeal to the Competition and Markets Authority (CMA). The right to appeal may only be on three grounds: an error of fact; being wrong in law; and/or an error in the exercise of a discretion.[52]

These proposals differ in some ways from the existing regime for licence modification. The requirement for the CAA to consult on a proposed licence modification remains the same, but at the moment it must obtain agreement from the licence-holder before a modification can be made. Where there is disagreement the CAA has recourse to make a referral to the CMA which can make a determination on whether the proposed modification meets certain public interest considerations and can be imposed. The consultation document argued that the reference to the CMA and subsequent determination can be costly and time-consuming, which tends to lead to a compromise between the CAA and the licence-holder.[53]

On **enforcement**, the consultation proposed again aligning the CAA's powers over NERL with those over major airports in the 2012 Act. Specifically, the CAA would have "the maximum flexibility to enforce the licence as it considers appropriate in accordance with its statutory duties".[54] These power would specifically be to:

- give a contravention notice for continuing or past breaches;
- require the licence-holder to take the appropriate steps set out in an enforcement order to return to compliance and remedy the consequences of the breach;
- make an urgent enforcement order;
- impose fines of up to 10% turnover and/or a daily amount up to 0.1% of turnover for breaches of licence conditions and 'section 8 duties', including past breaches;[55] and
- replace criminal sanctions for a failure to provide information required for the purpose of taking enforcement action with civil sanctions.[56]

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[50] Ibid., p14; for information on the 2012 regime for airport licensing, see HC Library briefing paper SN5333
[51] Ibid., p14
[52] Ibid., p14
[53] Ibid., p14
[54] Ibid., p16
[55] 'section 8 duties' refer to those set out in that section of the 2000 Act, i.e. with regards to safety, efficiency and coordination, meeting demand, and providing, developing and maintaining the system
[56] Op cit., *Modernising the licensing framework for air traffic services: consultation*, p17

The licence holder would also have a right to appeal.[57]

These proposals were intended to address perceived deficiencies with the current enforcement regime under sections 20-25 of the 2000 Act (which allow essentially for two mechanisms – provisional and final enforcement orders). The deficiencies the changes were intended to address were: inflexibility, lack of retrospection, no financial penalties, and disproportionate criminal sanctions.[58]

Finally, on **licence extension**, the consultation proposed extending the minimum termination notice period for NERL, to a period of 15 or 20 years. It argued that this would:

> … provide NERL with additional flexibility to ensure efficient financing of its investment programme. Such flexibility may be welcome should NERL wish to finance a package of investments (spanning several years) with a single bond issue. However, this would need to be balanced against allowing future governments to change the licence-holder without unnecessary delay, should it wish to do so. A longer notice period than the current 10 years, would delay the point at which another more competitive entity could take over the licence, if one emerges.[59]

By way of background, the Secretary of State granted NERL the licence to provide en-route air traffic control services on 28 March 2001. The Secretary of State currently has the power to serve notice of termination of the licence no earlier than 20 years after the date on which the licence was granted (i.e. 2021), and with a notice period no shorter than 10 years. This means that the earliest date on which the licence can be terminated via this route is 2031.[60] The Government had previously issued a call for evidence on increasing the notice period from 10 to 25 years in 2011 but decided against it on that occasion.[61]

The Government published its response to the consultation on 9 February 2017, setting out how it intended to proceed on the three issues.[62] It said it would proceed with its plans for licence modification, despite concerns expressed by NERL, specifically:

> NERL indicated that they would prefer that the existing licence modification process is kept in place because it is part of a Private-Public-Partnership and different to other commercial companies. It also expressed concerns that the proposed changes may adversely affect its existing financing arrangements though it did not specify how this would impact its ability to finance its current activities.[63]

It also confirmed that it would carry forward its preferred appeals mechanism and that those bodies which would be given a statutory right of appeal would be the licence holder, and airlines and airports whose interests would be materially affected by the decision to

[57] Ibid., pp17-18
[58] Ibid., p16
[59] Ibid., p20
[60] Ibid., p19
[61] DfT, *NATS licence: extension of the licence period and term changes*, 1 September 2011
[62] DfT, *Modernising the licensing framework for air traffic services: response to consultation*, 9 February 2017
[63] Ibid., para 1.5

modify.[64] It also confirmed plans to proceed with changes to enforcement powers and to extending the licence termination notice period to 15 years.[65]

4.2 The Bill

Summary

Clauses 16 and 17 and Schedules 1 to 5 of the Bill introduce the provisions that were subject of the Government's consultation at the end of 2016 (see above). Taken together, the proposed powers would modernise the licensing framework for national en-route civilian air traffic control by updating the CAA's regulatory powers, giving the CAA access to a wider range enforcement tools when regulating NATS, and updating the Government's powers to extend the licence notice period, thereby promoting NATS' ability to arrange more efficient financing.

Clause 16 inserts new sections 11 to 11B into the *Transport Act 2000*. Taken together, they would enable the CAA to modify a licence condition and the Secretary of State to modify a term of a licence which relates to its duration. New section 11A sets out the licence modification procedure, including who must be consulted, giving reasons for making or not making a modification and the timeline governing the process. New section 11B would prohibit the CAA from making a modification if the Secretary of State directs it not to do so.

Provisions for appeals against licence modifications and the procedure for such appeals is contained in Schedules 1 and 2 respectively.

Schedule 1 inserts new sections 19A to 19F into the 2000 Act. These new sections make provisions for appeals in respect of a decision of the CAA to modify a licence condition. They include:

- provision for which persons may appeal and which person determines the appeal (new section 19A);
- the grounds on which an appeal may be allowed (new section 19B);
- what occurs on the determination of an appeal (new section 19C);
- the time by which such appeals must be determined (new section 19D); and
- requirements governing the publication of the determination (new section 19E).

The appeal may be brought by a licence holder and certain other persons (e.g. airlines and prescribed airport operators which are materially affected by the decision) and is determined by the Competition and Markets Authority (CMA).

[64] Ibid., para 1.19
[65] Ibid., paras 2.6-2.21 and 3.10-3.13

Schedule 2 inserts new Schedule A1 into the 2000 Act. This Schedule makes provision for the procedure governing appeals in respect of decisions by the CAA to modify a licence condition, including:

- an application to the CMA for permission to appeal must be made within six weeks of the day on which the CAA published the decision notice;
- a decision by the CMA on an application for permission to appeal must be taken within ten weeks beginning of the day on which the CAA published the decision notice;
- if the CAA wishes to make representations to the CMA in relation to an application they must do so within eight weeks of the day on which the CAA published the decision notice; and
- permission to appeal may be granted subject to conditions (e.g. limiting scope, expediting the appeal, grouping appeals together).

The CMA may hold oral hearings, take written evidence and use expert advice in the consideration of an appeal. The CMA may make rules governing the conduct and disposal of appeals and the Secretary of State may make regulations which modify any of the time limits prescribed in the Schedule.

Clause 17 amends Chapter 1 of Part 1 of the 2000 Act and introduces new Schedules B1 (enforcement) and C1 (power to obtain information).

Schedule 3 inserts new Schedule B1 into the 2000 Act to make provision governing the CAA's powers to enforce breaches of the licence holder's duties under section 8 of the 2000 Act or a licence condition. It also sets out the licence holder's appeal rights in respect of orders and penalties made or imposed by the CAA. The amount of penalty is set out in Paragraphs 13, 14 and 15. They provide that the amount of penalty can either be a fixed amount or a daily amount:

- *Fixed amount* – may not exceed 10% of the licence holder's qualifying turnover (i.e. the licence holder's turnover from its provision of air traffic services) for the qualifying period (i.e. the last regulatory year ending on or before the day on which the notice proposing the penalty is given).
- *Daily amount* – an amount payable where the contravention in respect of which the penalty is imposed continues after it is imposed. It must not exceed 0.1% of the licence holder's qualifying turnover for the qualifying period.

The Secretary of State may make regulations which amend the basis on which a penalty is to be calculated.

Schedule 4 inserts new Schedule C1 into the 2000 Act to make provision which would enable the CAA to give notice to a person requiring that person to provide the CAA with information for the purpose of exercising certain functions and to take enforcement steps if a person fails without reasonable excuse to comply with the notice. A penalty for failing to comply with an information notice may consist of a fixed amount not exceeding £2 million) and/or a daily amount not

exceeding £100,000. The amounts on the face of the Bill may be amended in the same way by the Secretary of State.

Schedule 5 makes a number of minor and consequential amendments to Part 1 of the 2000 Act (e.g. to insert new definitions or amend existing ones) and one provision in Schedule 4 to the *Enterprise and Regulatory Reform Act 2013*.

The **impact assessment** to this Part of the Bill explains how the new 'symmetric' appeals process which would be provided for under the Bill would work in practice:

> The process would involve the CAA consulting (as at present) relevant stakeholders about the changes it wants to make and thereafter directing the change to the licensee without having to seek consent from the licensee. This will allow the CAA to modify the licence in the way it feels best maximises the benefits to consumers, without any unnecessary delay.
>
> Any relevant affected party, including the licensee, would have the right to appeal to the CMA after the decision has been made. The right to appeal a licence modification would be on the grounds that the decision to modify the licence was wrong because:
>
> - The decision was based on an error of fact;
> - The decision was wrong in law; and/or
> - An error was made in the exercise of a discretion.
>
> The CMA, as the appellate body, would be able to quash the decision appealed against, refer the matter back to the CAA to reconsider, or substitute its own decision over that of the CAA.
>
> This approach would ensure there are appropriate checks on the CAA when it makes a licence modification, as the CMA would be able to consider significant economic and factual questions relevant to its determination. We believe allowing symmetric appeal rights (i.e. rights for both the licence-holder and other relevant adversely affected parties) would ensure the CAA retains an appropriate consumer focus.[66]

[66] Op cit., *Updating the licence modification process for the en-route air traffic licence*, IA No: DfT00368, p4

5. Civil aviation: flight providers (clauses 18-20)

5.1 Background

The Air Travel Organisers Licence (ATOL) is a statutory financial protection scheme managed by the Civil Aviation Authority (CAA) on behalf of the Secretary of State for Transport. The scheme is funded by financial contributions made to the Air Travel Trust Fund (ATTF). At present, the scheme applies only to flight accommodation sold in the UK (see **Box 1** below).

Box 1: Statutory requirement for an ATOL licence

An ATOL licence is required by law when a travel company sells a flight package that it has organised itself; a flight from the UK plus overseas accommodation and/or overseas car hire (Flight-Plus); or flights where the seller is not acting as the appointed agent of an airline (flight only).

The ATOL scheme is broadly based around the following three functions:

- licencing by the CAA to sell travel arrangement that include a flight;
- an ATOL levy and reserve fund to finance the scheme; and
- the management of refunds and repatriation in the event of a failure.

These obligations are defined in secondary legislation made under the *Civil Aviation Act 1982*.

Holding an ATOL licence under the *Civil Aviation (Air Travel Organisers' Licensing) Regulations 2012*[67] is recognised as evidence that the tour operator meets the insolvency protection requirements of the Package Travel Directive (90/314/EEC).

There are three important points to note:

- At present, ATOL only applies to sales made in the UK.
- Airlines are excluded by law from the ATOL scheme when they sell "flights only".
- The ATOL scheme predates and is broader than the Package Travel Directive (90/314/EEC) (PTD 1990).

The ATOL scheme is a consumer protection measure. It was set up in the early 1970s to protect UK consumers buying package holidays that include a flight (or more recently, 'flight only' sales by third parties)[68] in the event of insolvency. If an ATOL-licensed firm goes out of business, the CAA can refund protected customers or (if they are already on holiday) ensure their repatriation home. It has been estimated that the ATOL scheme protects over 20 million holiday-makers each year (see **Appendix**). [69] Detailed information on the operation of the ATOL scheme (including its funding arrangements) is provided below.

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[67] SI 2012/1017

[68] In respect of 'flight-only' sales by third parties, ATOL applies in circumstances where the consumer does not get a valid ticket straight after paying for one. The aim being to protect consumers from so-called 'bucket shop' operators, where there may be lengthy periods between payment for and receipt of an air ticket, so exposing consumers to risk

[69] *Explanatory Notes*, para 57

It is important to note that airlines are excluded by law from the ATOL scheme when they sell "flights only". Airlines are subject to a separate EU Regulation and licensing arrangements, which include financial fitness requirements. That said they are still required by the Package Travel Directive (90/314/EEC) (the PTD 1990)[70] to provide financial security for any package holidays they sell. In practice, a number of UK airlines have established subsidiary companies with an ATOL licence to sell package holidays.

Airlines are legally excluded from the ATOL scheme

Current operation of ATOL

The current ATOL scheme is the key mechanism by which the UK implements the EU Package Travel Directive 1990 in respect of holiday packages that include a flight, and also takes into account the 2012 ATOL reforms.

An outline of how the ATOL scheme currently operates is provided below.

ATOL objectives

In 2011, the Office for National Statistics (ONS) found each household spent on average £17.10 a week on package holidays abroad and £1.70 on package holidays in the UK.[71] The potential for consumer detriment from the insolvency of a business selling air holiday packages is significant. It arises from a number of characteristics of the travel market, notably:

- The time lapse between payment and delivery of the holiday - payment for holidays and flights is often made many months in advance of travel and before suppliers have to be paid.
- The lack of consumer awareness of the financial stability of holiday providers - barriers to entry can be low with little capital required.[72]

For the consumer, the risk is two-fold:

- First, there is a risk that a business will become insolvent after payment has been made but before the holiday is taken. Consumers may face a financial loss from not receiving a refund.
- Second, there is the risk of a tour operator becoming insolvent while a holiday is in progress, leaving consumers stranded abroad without accommodation or a flight home. The situation may be compounded where large numbers of other holiday makers are in the same position with limited airline capacity to repatriate them, leading to large calls on the consular service of the Foreign and Commonwealth Office (FCO).

The ATOL scheme is a consumer protection measure. Businesses selling air holiday packages (and some third party sellers of flights) in the UK

[70] Council Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours, Official Journal of the European Communities, L158/59, 23.06.1990
[71] ONS, *The Headlines: Household Expenditure at a Glance* (Part of Family Spending), 4 December 2012
[72] DfT, *Primary legislation to strengthen the ATOL scheme in order to partially implement the new Package Travel Directive (2015)*, IA No. DfT00375 (Final), 16 January 2017

are required by law to hold an ATOL licence. Should an ATOL-licensed firm become insolvent, the CAA can refund protected customers or (if they are already on holiday) ensure they are safely repatriated home.

ATOL licensing by the CAA

The ATOL scheme is defined in law and contributions to pay for it are provided for under the *Civil Aviation Act 1982*, as amended. Those contributions are classified by the ONS as a tax (see **Box 1** above).

An ATOL licence is only granted after the company has met CAA's licensing requirements, including financial fitness checks. New ATOL licence holders, regardless of size, are also required to provide a bond (or other security) as a condition of their ATOL licence in the first four years.

There are different types of ATOL licence, which allow different ways of entering the scheme.[73] An overview of the different licences can be found on the CAA website.[74] However, the vast majority of ATOL protected bookings (around 95%) are arranged under a Standard ATOL or a Small Business ATOL.[75] The aim of the Small Business ATOL is to ensure adequate monitoring of small businesses but with a minimal administrative burden. In contrast, for very large businesses, the CAA can adopt more detailed financial monitoring. For example, if there is concern about a particular risk, the CAA can impose requirements (such as fresh capital or a bond).

Funding arrangements for ATOL

The payment of refunds and repatriation expenditure due under ATOL is met by the Air Travel Trust Fund (ATTF). Since April 2008, the ATTF is principally funded by ATOL Protection Contributions (APC). In respect of some business failures, the ATTF may also receive recoveries such as bond monies. According to the CAA, an insurance policy and a credit facility have also been arranged to provide additional liquidity.

Under the *Civil Aviation (Contributions to the Air Travel Trust) Regulations 2007* (SI 2007/2999), for each passenger booked on an ATOL-protected holiday or 'flight only' seat, an ATOL-licensed company has to pay an APC into the ATTF (currently charged at £2.50 per booking).[76] The ATTF is administered on behalf of the Air Travel Trust by the CAA.[77] As at 31 March 2016 the ATTF had a surplus of £139 million.[78]

[73] The Standard ATOL and Small Business ATOL are both managed by the CAA, and Accredited Bodies, Franchises and Joint Administration Agreements, where some responsibilities are devolved to third parties

[74] CAA, *Overview of ATOL licences* [accessed 27 February 2017]

[75] A Small Business ATOL is available to businesses selling fewer than 500 flights or holidays a year

[76] The APC was initially introduced at £1 per booking but, following the failure of XL Leisure Group in September 2008 and an unprecedented large call on the ATTF, it was increased to £2.50 per booking as of October 2009

[77] Expenditure paid from the ATTF is not a cost on business; payments to the fund through APC contributions are a cost to business

[78] Op cit., *Primary legislation to strengthen the ATOL scheme in order to partially implement the new Package Travel Directive (2015)*, IA No. DfT00375 (Final)

For historic reasons, the ATTF operated at a deficit for many years from the mid-1990s. Until the APC was introduced in April 2008, the fund had had no source of income. It operated as a reserve fund under the previous ATOL universal bonding model, to be called on only in the event that the bonds held by businesses (as a condition of getting a licence) proved inadequate to repay or repatriate their customers. As it turned out, some bonds were insufficient to meet the full costs of a number of tour operator failures resulting in the ATTF operating at a deficit from the 1990s. The ATTF was only able to meet its obligations through commercial credit facilities, supported by a Government guarantee.

In April 2008 the APC levy (at £1 per booking) was introduced to replace the bonding model (except for businesses where a perceived risk justified additional measures). The intention was to pay off the ATTF deficit (which was then then £21m) and so allow the Government guarantee (of up to £30m) to be phased out over 3 years. This was consistent with the policy of the then Labour Government that, "insolvency protection should be funded by the travel industry and its customers, rather than general taxpayers".[79] However, the failure of XL Leisure Group in September 2008 led to a call on the ATTF in the region of £27m. Business failures in the summer of 2010 placed further unanticipated costs on the Fund.[80] With the realisation that the ATTF would remain in deficit for far longer than previously anticipated, the APC was increased to £2.50 per booking from October 2009. The Government's guarantee was also increased and extended.

Interaction of ATOL with Package Travel Directives

The PTD 1990 was implemented in the UK by the *Package Travel, Package Holidays and Package Tours Regulations 1992* (known as the "Package Travel Regulations 1992").[81] The Regulations require businesses selling package holidays to provide evidence of protection for consumer prepayments and repatriations in the event of its insolvency. Air package travel organisers must *by law* use the ATOL licensing scheme. An ATOL licence is evidence that the travel organiser meets the insolvency protection requirements of the PTD 1990.[82] In contrast, non-air package travel organisers have a number of compliance options available to them including: bonding, insurance and trust accounts.

The potential for consumer detriment

There have been major changes in the way holidays are bought and sold since ATOL and the PTD 1990 were implemented. In particular, the Internet has enabled consumers to 'mix and match' or 'dynamically package'[83] the components of their holiday in a way that often falls

[79] Ibid.

[80] The CAA estimate that the failure of Goldtrail Travel Ltd and Flight Options Ltd, combined, cost the ATTF approximately £43m, see: DfT, DfT, *ATOL reform consultation: Government response*, 8 February 2017

[81] SI 1992/3288

[82] In contrast, non-air package travel organisers have a number of compliance options available to them including: bonding, insurance and trust accounts

[83] Dynamic packaging is generally considered to be a method of selling holidays, whereby a consumer is able to build their own package holiday from a combination

outside the scope of ATOL and PTD 1990. This has led to a fall in ATOL sales as a share of all leisure flights, from over 90% in 1998 to just under 50% in 2009.[84]

According to the DfT, consumers and businesses are left confused as to whether these types of bookings are 'package holidays', or are sales of separate holiday components falling outside the requirements for statutory insolvency protection:

> This has led to an inconsistent approach to insolvency protection, where some holidays are required to be covered by the ATOL scheme and the PTD, while other similar bookings have been sold without these protections. Even where an ATOL licence is held, not all bookings by that ATOL holder will be ''licensable transactions'' covered by an ATOL.
>
> This gap in protection has led to consumer detriment as consumers buying a non-ATOL protected holiday often face the same risks from the insolvency of their travel company as those who have purchased an ATOL protected holiday. It has also led to confusion for the consumer in trying to understand whether a particular holiday has ATOL protection, both when booking and in the unlikely event of the failure of their travel company."[85]

In April 2012, reforms to the ATOL scheme were made under the *Civil Aviation (Air Travel Organisers' Licensing) Regulations 2012*.[86] The reforms included:

- The creation of a new "Flight-Plus" category in the ATOL scheme, to make clear that "mix and match" as well as traditional package holidays were protected.[87]
- The requirement for flight providers to issue an ATOL certificate to passengers when they book an ATOL protected holiday or flight.
- A "Post Implementation Review" of the ATOL reforms must take place before the 30 April 2017.[88]

Revised Package Travel Directive (EU 2015/2302 to be implemented into UK law by 1 January 2018

The European Commission believes that intervention by way of a revised Package Travel Directive is necessary to reduce consumer detriment in the holiday travel market. On 25 November 2015, a revised Directive on package travel and linked travel arrangements (2015/2302/EU) was adopted (PTD 2015).[89] Member States have until 1 January 2018 to implement this new Directive. It will apply from 1 July 2018.

of travel components (e.g. flights, accommodation, and car rental) instead of purchasing a pre-defined package

[84] Op cit., *Primary legislation to strengthen the ATOL scheme in order to partially implement the new Package Travel Directive (2015)*, IA No. DfT00375 (Final)

[85] Ibid.

[86] SI 2012/1017

[87] Flight-plus is a form of "dynamic packaging" where a business sells 1) a flight and 2) either accommodation or car hire, where 2) is within 24 hours of 1)

[88] It should be noted that responses to the DfT's 2016 consultation paper, regarding the impact of the ATOL 2012 reforms, will also inform this Review

[89] Directive 2015/2302/EU amends Regulation (EC) 2006/2004 and Directive 2011/83/EU and repeals *PTD 90/314/EEC*

An important aim of the new Directive is to bring greater clarity on what constitutes a package holiday and to harmonise protection within the EU. It includes the following key elements:

- An enhanced definition of a "package" holiday as being a combination of at least two different types of travel service for the same holiday or trip. Extending consumer protection beyond traditional package holidays organised by tour operators to other forms of travel combinations, such as: pre-arranged packages,[90] and customised packages.[91] In effect, this broad definition would catch traditional flight packages, Flight-Plus and click-through sales.
- A new concept of "package lite" known as "linked travel arrangements"[92] (LTAs) apply to looser combinations of travel services, which will ensure some payments are protected in the event of the insolvency of the trader.
- Clearer information to be given to travellers, before and after booking, on the travel product they are buying and the level of protection that applies.

A single market approach to insolvency protection

Importantly, PTD 2015 introduces a single market approach to insolvency protection. It expressly requires all Member States to recognise the insolvency protection regimes of others and avoid imposing additional burdens upon travel companies in their territories. The revised Directive requires EU-established companies to comply solely with the insolvency protection rules of the State in which they are 'established' as opposed to the 'place of sale'. Businesses outside of the EU will be required to comply with the different rules of each Member State in which they sell. (At present, the ATOL scheme only applies to sales made in the UK.)

Consultation on measures to include in Bill

A call for evidence in 2013-14, indicated that the DfT would consider further ATOL reforms in light of PTD 2015.[93] A commitment to reform ATOL was made in the DfT's Single Departmental Plan 2015 to 2020.[94] A BEIS consultation is expected to consider changes to the UK's *Package Travel Regulations 1992*.

[90] Pre-arranged packages: ready-made holidays from a tour operator made up of at least 2 elements: transport, accommodation or other services, e.g. car rental

[91] A customised package: where components of the same trip or holiday are selected by the traveller from a single business online or offline

[92] Linked travel arrangements: where a consumer is guided, once they after have booked one travel service on one website (such as a flight), to book another service (such as accommodation or car rental) through a targeted online link. New rules will offer some protection – provided that the second booking is made within 24 hours

[93] DfT, *Review of Package Travel Directive and ATOL Implementation and Funding Arrangements: Call for Evidence*, May 2013

[94] DfT, *Modernising Consumer Protection in the Package Travel Sector – Consultation on ATOL Changes – Moving Britain Ahead*, October 2016, para 18

On 28 October 2016, the DfT published a consultation paper seeking views on proposals to strengthen the ATOL scheme and align it with PTD 2015. It supported the rationale for updating the Directive on the basis that it was broadly consistent with its own ambitions for ATOL reform:

> Overall, the new Directive has the potential to provide a greater level of protection to UK consumers, whether they purchase from a company established in the UK or overseas. It is the Government's view that the amendments in PTD 2015 will also help to bring a level playing field for companies, whether they operate on the high street or online.[95]

"Modernising Consumer Protection in the Package Travel Sector – Consultation on ATOL Changes"

The DfT stated that its overarching aim is to reduce burdens on British businesses and increase the flexibility of the ATOL scheme:

> […] to get the regulatory framework right so that the market works better for business and consumers, while minimising the risk for the Government and taxpayer. This is particularly relevant as we consider the options and opportunities that arise from exiting the EU.[96]

The Government published its response on 8 February 2017 and confirmed its intention to bring forward its proposals.[97]

Changes to the ATOL scheme, which would be introduced by **Part 3** of the Bill, would make sure that it keeps pace with innovation in the travel market and ensure that ATOL is harmonised with PTD 2015 when it comes into force. Primary legislation is required due to the ATOL levy tax classification, and the amendment the Government is seeking to make to current legislation that would provide greater legal clarity to the existing powers of the Secretary of State.

[95] Ibid., para 4
[96] Ibid., para 10
[97] Op cit., *ATOL reform consultation: Government response*

5.2 The Bill

Summary

Part 3, clauses 18, 19 and 20, amend the Secretary of State's existing powers to regulate the provision of flight accommodation. These powers are the basis of the ATOL scheme.

The Government has stated that the policy objectives of Part 3 are to strengthen the ATOL scheme in response to innovation in the travel market, and align it with the new PTD 2015 in a way that ensures it is compliant with EU legislation (but with no "gold plating"). Primary legislation is required due to the ATOL levy tax classification, and the amendment the Government is seeking to make to current legislation will provide greater legal clarity to the existing powers of the Secretary of State.

Taken together, the effect of the clauses would be to:

- Expand the geographical scope of ATOL so that businesses established in the UK could protect their sales across the EEA through ATOL. According to the DfT, this would enable the UK to comply with the revised PTD 2015 in the short term, while retaining an ability to adapt the scheme as appropriate when the UK leaves the EU.[98]
- Update existing powers to enable separate trust arrangements to be set up for different classes of business model or risk (for example "linked travel arrangements").
- Ensure that the CAA's information powers are aligned with the evolving ATOL scheme, to enable the CAA to continue to manage and enforce the scheme effectively.

Clause 18 of the Bill would enable the Secretary of State to make regulations to broaden the scope of an ATOL in line with PTD 2015.

At present, ATOL protection and the levy generally only apply to relevant flight bookings where the first leg departs from a UK airport. PTD 2015 introduces a single market approach to insolvency protection. Under its provisions, EU-established companies will be required to comply solely with the insolvency protection rules of the State in which they are 'established' as opposed to the 'place of sale'. However, businesses outside of the EU will be required to comply with the different rules of each Member State in which they sell.

Clause 18 amends section 71 of the 1982 Act to enable regulations to be made covering the sale of flight accommodation by UK-established organisers elsewhere in the EEA. This clause also inserts new subsection (1E) into section 71 of the 1982 Act to clarify that the Secretary of State may make regulations to exempt any form of 'flight only' arrangement from the ATOL licensing arrangements.

This would allow travel companies established in the UK (and selling flight-inclusive packages) to use their ATOL to cover all EU-wide sales, without needing to comply with the insolvency protection rules of any other Member State. The DfT sees this as a positive step for UK businesses, which would make cross-border trade easier:

> We believe that place of establishment rules brought in by the PTD 2015 could allow business, currently established elsewhere in

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[98] Ibid.

> the EU, to establish themselves in the UK and protect their sale through the ATOL scheme. Likewise, businesses currently established in the UK will be able to trade across the EEA and protect their sale through ATOL.
>
> As a result the Air Travel Trust may need to react quickly to changing risk profiles and exposures if large businesses join the scheme, or existing ATOL holders expand the number of consumers they wish to protect through their licence. This may require the CAA to make more use of their ability to request additional security if it considers that the increased risk, or exposure, is too high for the Air travel Trust to bear.[99]

It is important to note that clause 18 has tax implications. A explained above, the ATO scheme is currently funded by a levy (APCs) provided for under section 71(1) of the 1982 Act. This tax-raising power would need to be amended to cover businesses "established in" the UK, as opposed to businesses "directing sales in" the UK. This would ensure that the tax-raising powers of ATOL would also apply when UK companies were selling to consumers in Europe. According to the Explanatory Memorandum, the Exchequer Secretary to the Treasury approved the ATOL proposals.

Clause 19 of the Bill deals with the creation of new forms of qualifying trust into the ATOL trust arrangement.

The funding arrangements of ATOL are outlined in detail above. The Air Travel Trust is the trust arrangement, first established by deed dated 5 January 2004 ("the 2004 deed"), under which ATOL Protection Contributions (APCs) from ATOL holders are held and CAA trustees are given powers to compensate consumers. The 2004 deed permits amendment of its provisions by the Secretary of State.

As already mentioned, since 2004 there has been significant developments in the travel sector. In consequence, according to the DfT, in future it may be necessary to enter into separate trust arrangements for different classes of business model, for example "linked travel arrangements". This would give greater transparency for business and consumers, particularly if there were significant differences between the trust arrangements for different classes of consumer or contributor.

Clause 19(1) of the Bill would amend section 71A of the 1982 Act to distinguish the existing and continuing flexibility of the current Air Travel Trust from wholly new qualifying trusts that may be established by sub-clause (2). Specifically, **clause 19(2)** would enable the Secretary of State to incorporate, by way of regulations, new forms of qualifying trust into the ATOL trust arrangement. The primary purpose of any new trust would still be consumer protection in relation to the sale of flight accommodation, as provided for by **clause 19(2)(b)**:

> b) the primary purpose of the trust is the assistance of persons who suffer losses or incur costs as a result of failure by contributors to the trust to fulfil obligations with regard to the

[99] Op cit., *Modernising Consumer Protection in the Package Travel Sector – Consultation on ATOL Changes – Moving Britain Ahead*, paras 63 & 64

> provision of flight accommodation in connection with those persons' trips or holidays.

Subsections (3) and **(4)** provide that the Affirmative Procedure (i.e. approval by both Houses of Parliament) would apply should the Secretary of State propose to make regulations under clause 19(2).

Finally, **Clause 20** of the Bill deals with the provision of information. This clause would amend section 84(1) of the 1982 Act, which sets out the powers under which CAA are currently able to request information from persons.

The purpose of clause 20 sub-clause (2) is simply to extend the scope of the power to request information to ensure it matches the new scope of the power to make regulations introduced by clause 18. Specifically, sub-clause (3) would ensure that the information power applied to any airlines selling ATOL licensable holidays in the UK (and airlines established in the UK selling such holidays in the EEA), that are not covered by section 84(1)(a) of the CAA 1982.

By way of example, the DfT suggests that new clause 20(3) would apply to European airlines that have an air service operator's licence from another EU Member State and therefore do not need any of the licenses granted by the CAA mentioned in section 84.[100]

5.3 Views of interested groups

As indicated above, in February 2017, the Government published its response to its 2016 consultation paper on ATOL reform.

Speaking about regulation in general, ABTA (The Travel Association)[101] said that the ATOL and the Package Travel Regulations 1992, played a vital role in underpinning consumer confidence in the travel industry. However, the industry needed the Government to maintain a cost effective, compliant and sustainable regime for implementing the EU package travel regime:

> There is currently a need for stability and continuity within the industry, given global geopolitical and economic uncertainties and the impact of the 'Brexit' process throughout the 2015 PTD implementation timeline. Reform is important and necessary, but significant changes must be carefully planned and phased in to avoid shocks to the system.[102]

In respect of opportunities arising from Brexit, ABTA said:

> ABTA's membership had shown a strong degree of support for the existing schemes of consumer financial protection within the UK. However, the once the UK has left the EU, should UK businesses no longer be subject to the rules of the EU internal market, or a specific or sector-led exemption be agreed, it could

[100] Explanatory Notes

[101] For the Department for Business, Energy and Industrial Strategy (BEIS), ABTA is an "approved body" under the Package Travel Regulations 1992 which, along with the ATOL Regulations, implement the Package Travel Directive 1990

[102] ABTA, *ABTA response to the Department for Transport Consultation*, 24 November 2016, p2

> be possible to revise the UK's current system of financial and other protection for holidays. "We call on the DfT to include a review provision in the new legislative arrangements that would allow Government to act independently of any wider review process for EU related or originated legislation.[103]

ABTA supported the Government's strategy of making the PTD (2015) implementation process a priority, given the requirement for Regulations by 1 January 2018. However, it thought that many issues were too important and complex for effective consultation in a four week period. (For example, questions around the inclusion of flight-only sales and linked travel arrangements within ATOL; reform of the APC regime; the retention and function of ATOL certificates.)

Aligning ATOL with PTD 2015

According to the DfT, there was broad support from the majority of respondents to the October 2016 consultation to proposals to align ATOL with the scope and definitions of PTD 2015.[104] This would mean that any UK-established business that sells a package which includes a flight would need to meet their insolvency protection obligations by holding an ATOL. The DfT said:

> It was widely agreed that this would bring greater clarity and protection for consumers and help to level the playing field for businesses selling similar holidays.[105]

It was ABTA's view that the existing ATOL licensing regime, through the resources of the CAA as a statutory regulator, was best placed, at this stage, to deliver the necessary protection for consumers.

Elsewhere, respondents showed a clear preference for including flight-related linked travel arrangements (LTAs) within the ATOL scheme, to ensure a consistent approach to the protection of holidays. ABTA said that from a regulator's perspective, "when seeking to effectively licence and monitor a business, it would appear to be a very strange concept that regulated sales of flights in one category (LTAs) should be separated and taken out of sight of the ATOL package regulator".[106]

However, there were differing views on how LTAs should be implemented within ATOL. Some respondents raised concerns about diluting the ATOL brand with a 'lighter' version of it for LTAs; increasing regulatory and administrative burdens on business; as well as potentially causing confusion for UK consumers. Others suggested a need for clear guidance to be issued so that businesses and consumers could be fully aware of the package protections offered and what would not be covered under a new LTA category.

The DfT said that it would continue to work with the CAA and the Department for Business, Energy & Industrial Strategy (BEIS). In the meantime, it would ensure that there was sufficient flexibility in the Bill

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[103] Ibid., p4
[104] Op cit., *ATOL reform consultation: Government response*
[105] Ibid., para 1.8
[106] Op cit., *ABTA response to the Department for Transport Consultation*, p7

to be able to introduce a separate levy and trust arrangements for flight-led LTAs, should the DfT decide to implement in that way.[107]

Similarly, there were differing views on whether to retain the Flight-Plus and agent-for-consumer models or bring them into line with ATOL flight-inclusive packages in the longer term.

Place of establishment model

The majority of respondents accepted the need to change the scope of ATOL protection from "place of sale" to "place of establishment". The DfT highlighted the fact that several respondents had reasoned that this would help to promote cross-border trade and minimise burdens for UK companies. There was also broad support for the proposal to maintain the requirement for businesses established outside the EEA to obtain ATOLs when selling to UK consumers.[108]

However, several respondents identified risks in the "place of establishment" model. ABTA thought there were issues with this approach in an EU where the consistency of implementation of the PTD 1990 and its enforcement, along with Commission infraction arrangements, were weak. ABTA asked if a mechanism might be established (compatible with PTD 2015) whereby mutual recognition could be denied in relation to a trader or scheme that was not compliant with the new Directive:

> A Member State should not have to give recognition to a trader or scheme that is clearly non-compliant and, as a result, knowingly give recognition to a trader which poses a risk to its own consumers.[109]

Other respondents felt that it might be difficult to determine whether a company is established in the UK or another Member State. It was suggested that there would need to be effective monitoring and enforcement across borders, to determine where a company is based and ensure that protection is correctly applied.

There were differing views as to whether the place of establishment model would have a positive or negative impact on the ATOL scheme. Some respondents suggested that this change of scope could see an increase in the amount of business covered by ATOL, which could bring more funding in to the ATTF. Others felt that this could place undue risk or exposure upon the ATTF, and potentially hamper CAA's ability to respond to a failure. It was also suggested that UK businesses might consider moving their place of establishment, having "shopped around" for a cheaper insolvency protection regime.[110] To counter this, the ATOL scheme would need to remain cost-competitive to minimise the likelihood of this happening.

CAA's powers to request information

Some respondents to the consultation raised concerns relating to effective cross-border implementation, enforcement and

[107] Op cit., *ATOL reform consultation: Government response*, para 1.10
[108] Ibid., para 2.19-2.23
[109] Op cit., *ABTA response to the Department for Transport Consultation*, p9
[110] Op cit., *ATOL reform consultation: Government response*, para 2.23

communication of protection. To address these concerns, the DfT made a commitment to strengthen the CAA's powers to request information from UK established businesses on the products they make available across Europe.[111] This would enable the CAA to monitor and provide effective enforcement of the ATOL scheme across borders.

The DfT said that it thought concerns relating to other Member States' schemes, including issues around strength of protection and communication, would be addressed through the harmonisation of the consumer protection set out in the PTD 2015.[112]

[111] Ibid., para 2.25
[112] Ibid., para 2.25

6. Vehicle testing and fees (clause 21 and Schedule 5)

6.1 Background

The Driver and Vehicle Standards Agency (DVSA) is an executive agency of the Department for Transport. One of its responsibilities is vehicle testing.[113]

In its 2016 *Motoring Services Strategy* the Government said that DVSA had been "at the forefront of transforming services", as part of the Civil Service Reform (CSR) agenda. One of the examples it citied was vehicle testing, which can now be carried out privately-owned Authorised Testing Facilities (ATFs) for HGVs and public service vehicles (i.e. lorries, buses and coaches). The first of these opened in 2010, but industry appetite and capability has led to a burgeoning in the sector; now there are more than 500 ATFs nationwide.[114] DfT argues that the benefits of ATFs are that they have:

- brought services closer to the customer;
- lead to a reduction in vehicle, driver and technician downtime and contributing to some £330m in savings for industry over ten years; and
- reduced the overall government estate by 14,000 square feet in accommodation and at least 28 acres through disposal of vehicle testing sites and on-going rationalisation of the wider agency estate.[115]

The Strategy stated that it was looking at whether some of the vehicle testing currently conducted by DVSA examiners could be performed by suitably qualified examiners in the private sector.[116]

ATFs can have DVSA staff test their own vehicles and offer a testing service to third parties using DVSA staff so that customers can test their vehicles at an ATF instead of at a DVSA test station.[117] ATFs that offer third party or open access testing must charge fees at the rates published by DVSA: test fees and 'pit fees'. Pit fees are capped by DVSA. The current maximum pit fees (excluding VAT) are:

- £55 for testing HGVs
- £70 for testing PSVs
- £40 for testing trailers[118]

Current legislation does not provide any authority for the pit fee to be charged by the private sector premises. The DVSA has allowed a charge

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[113] DVSA was formed from the merger of the Driving Standards Agency (DSA) and the Vehicle and Operator Services Agency (VOSA) in 2013
[114] DfT, *Motoring services strategy: a strategic direction 2016 to 2020*, 12 May 2016, para 1.7
[115] Ibid., para 1.7
[116] Ibid., para 3.12
[117] Gov.uk, *Set up an Authorised Testing Facility (ATF)* [accessed 28 February 2017]
[118] Ibid.

for the use of the facility to be made administratively, by way of a contract, in which it is capped to keep the cost low for the user.

6.2 The Bill

Summary

Clause 21 of the Bill introduces a power for the Secretary of State to designate premises for vehicle testing and cap testing station fees.

The Government believes that these changes are necessary to plug the gap in the law and allow authorised testing facilities to charge a pit fee on a statutory footing rather than on a contractual basis.

Clause 21 inserts new sections 65B and 65C into the *Road Traffic Act 1988*.

New section 65B would confer power on the Secretary of State to designate (by notice, in writing) any premises as an 'authorised premises' where DVSA examiners can perform specialist kinds of vehicle tests referred to as 'listed procedures' (i.e. statutory tests performed on lorries, buses and coaches). The regulation-making power under the Affirmative Procedure (sub-section 65B(3)) only applies for amending the listed procedures in the Bill, i.e. the list of the different types of tests that can be delivered from private sector premises.

New section 65C would give the Secretary of State a regulation-making power to cap any fees charged by designated premises payable by the vehicle owner for use of the designated premises to carry out the test (i.e. pit fees). Different amounts can be set for different tests and different circumstances. The regulation-making power for the fee cap would be via the Negative Procedure.

Part 3 of **Schedule 5** makes minor and consequential amendments to other pieces of legislation.

The impact assessment states that that clause 21 would:

> … allow the DVSA to fully dispose of its estate to meet a Key Ministerial commitment and make public sector savings. For all vehicle testing services to be delivered from private sector sites thereby bringing the schemes together so that there will be a clear and consistent set of powers across all the relevant testing schemes…[119]

The statutory capped pit fee could help provide economic security for the private sector testing facilities marketplace. The fee, if statutory, is VAT-free and providing a cap could ensure that the cost for third parties of using private sector premises is kept at a reasonable level. This is not dissimilar to the long-standing system operated for the MOT test.

[119] DfT, *The Vehicle Technology and Aviation Bill 2017: Impact Assessment*, 31 January 2017, para 8

7. Offence of shining or directing a laser at a vehicle (clause 22)

7.1 Background

There are around 1,500 laser attacks on aircraft every year in the UK and there have been similar attacks on trains and buses.[120] The Secretary of State for Transport, Chris Grayling, has said:

> Shining a laser pointer at pilots or drivers is incredibly dangerous and could have fatal consequences. Whilst we know laser pens can be fun and many users have good intentions, some are not aware of the risks of dazzling drivers or pilots putting public safety at risk.[121]

At present the use of laser pens from the ground to attack or disrupt aircraft can currently be charged as an offence under the *Air Navigation Order (ANO) 2016* (SI 2016/765). Under Article 225 a person "must not in the United Kingdom direct or shine any light at any aircraft in flight so as to dazzle or distract the pilot of the aircraft" and, more seriously, under Article 240 a person "must not recklessly or negligently act in a manner likely to endanger an aircraft, or any person in an aircraft".

Under Article 265 and Schedule 13 to the ANO the maximum penalty for an offence under Article 225 is a fine not exceeding £2,500. For an offence under Article 240, the maximum penalty on summary conviction is a fine in England and Wales or a fine (not exceeding the statutory maximum in Scotland and Northern Ireland), or on conviction on indictment a fine or imprisonment for a term not exceeding five years, or to both.

Airlines and pilots groups have called for lasers to be classed as 'offensive weapons'.[122] In the 2015-16 session of Parliament the Conservative MP Rehman Chishti put forward a Private Members Bill to "make the sale, ownership and use of portable laser emitting devices with output power of more than 1 milliwatt unlawful in certain circumstances; and for connected purposes". The Bill did not progress. However, when asked about Mr Chishti's Bill in March 2016 the Secretary of State pledged to discuss the matter further across Government.[123]

In February 2017 the Government announced its intention to make shining lasers at any transport operator an offence. It argued that the police do not have the powers to effectively tackle and investigate the

[120] DfT press notice, "New powers to crack down on laser attacks", 5 February 2017; see, e.g. "Laser attacks on aircraft more than double within a decade", *The Independent*, 20 February 2016; and "33 laser attacks on Scots planes in a week: Police say 'they could bring down a jet'", *Daily Record*, 28 February 2016

[121] Ibid., "New powers to crack down on laser attacks"; about 10% of these attacks are around Heathrow, see: "Laser attacks on Heathrow aircraft increase 25%", *The Guardian*, 27 February 2017

[122] See, e.g. BALPA press notice, "Laser incident shows more action is needed", 15 February 2016

[123] HC Deb 10 March 2016, c414

inappropriate use of laser devices against aircraft, trains, buses and other forms of transport.[124] It did not speak to the issue of reclassifying lasers.

7.2 The Bill

Summary

Clause 22 of the Bill would change the law so that an offence is committed when the actions of an offender result in a pilot, driver, or captain being dazzled or distracted by a laser.

Clause 22 would make it an offence to direct or shine a laser beam at a vehicle in such a way as to dazzle or distract the person driving, piloting, or navigating that vehicle.

'Vehicle' is defined in sub-clause (8) as any thing used for travel by land, water or air.

Sub-clauses (2) and (3) provide essentially for a statutory defence – a person charged would have to show that they did not intend to commit the offence, and that they exercised all due diligence and took all reasonable precautions to avoid committing the offence. To this end, a person would be taken to have shown the facts mentioned above if:

- sufficient evidence of each fact is adduced to raise an issue with respect to it; and
- the contrary in each case is not proved beyond reasonable doubt.

The Explanatory Notes state that the intention is to "provide a defence which can be relied on by persons who accidentally dazzle or distract a person with control of a vehicle when using a laser for a legitimate reason".[125]

The offence would be subject to a maximum penalty of a fine on summary conviction in England and Wale, a fine (not exceeding the statutory maximum in Scotland and Northern Ireland), or on conviction on indictment, a fine or imprisonment for a term not exceeding five years, or both.

[124] Op cit., "New powers to crack down on laser attacks"
[125] *Explanatory Notes*, para 79

8. Courses offered as alternative to prosecution: fees etc. (clause 23)

8.1 Background

In March 2016 the Transport Select Committee published a report into road traffic law enforcement. As part of this inquiry they looked at the issue of diversionary courses.

Diversionary courses are the Department's preferred method for dealing with certain offences. Offering a place on a course in lieu of prosecution is at the discretion of the police. A course cannot be offered where an offender has already taken one in the previous three years. The use of these courses has grown rapidly since their introduction in 2004.[126]

Several different courses are available through the National Driver Offender Retraining Schemes (NDORS). The most prominent of these is the National Speed Awareness Course (NSAC). In 2016 NSAC accounted for 1.19 million of the 1.39 million courses attended and completed under the NDORS banner. The number of total courses delivered in 2016 is almost three times the number delivered in 2010.[127]

The Transport Committee observed that police forces can decide which diversionary courses to offer and therefore not all courses are available in all areas. The same offence committed in different force areas can be dealt with in different ways.[128] Nobody is required to accept the offer of a course. They can always accept a fixed penalty, or contest the allegation in court.

The Committee went on to express concerns about how diversionary courses are funded. Diversionary courses are funded by a course fee paid by the offender. Some of this fee goes towards running the course, and some is held by the police to cover the cost of referring the offender to the course. These costs vary from one police force area to another. The Committee related the views of a number of witnesses that some police forces were profiting from the arrangements.[129]

With this in mind, the Committee recommended that the costs for diversionary courses "should be standardised nationwide unless there is a clear and convincing reason not to do so, and that the Government consider legislating to ensure that this is the case, so that the public can be confident in the transparency of these courses".[130]

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[126] Transport Committee, *Road traffic law enforcement* (Second Report of Session 2015–16), HC 518, 15 March 2016, paras 71-72
[127] Data from NDORS, *Trends and Statistics* [accessed 28 February 2017]
[128] Op cit., *Road traffic law enforcement*, para 73
[129] Ibid., para 76
[130] Ibid., para 80

In its response to the Committee, published in May 2016, the Government made no comment on the fee proposal.[131] Further, in a debate on the Committee's report in February 2017 the Minister, Andrew Jones, said that he had:

> … some sympathy with drivers faced with a range of different costs for the same course, without any explanation for the variation. However, I can also see that the cost of delivery will vary from place to place. Where courses are delivered by an external provider, contractual commitments may need to be taken into account. For the time being, therefore, we do not intend to mandate a single national charge for each type of course.[132]

8.2 The Bill

Summary

Clause 23 of the Bill provides a specific legal basis for charging for diversionary courses.

The Government's view is that road traffic offenders would not notice any difference as the same range of courses would be offered as before, on the same conditions, for the same fee. The change is a purely technical one, to remove any doubt as to the legal basis for charging.

Clause 23 would insert new Part 3B (comprising new sections 90G to 90I) into the *Road Traffic Offenders Act 1988*.[133]

New section 90G would provide the specific legal basis for policing bodies to charge a fee to a person who enrols on a course offered in England and Wales in relation to a specified fixed penalty offence, to be specified by the Secretary of State in regulations.

Policing bodies may charge a fee. A fee may be set at a level that exceeds the cost of an approved course and related administrative expenses, but any excess must be used for the purpose of promoting road safety. The Secretary of State may specify in regulations the level of fees, use of fee income, and how fees should be calculated.

New section 90H would allow the Secretary of State, in regulations, to prevent courses being offered to repeat offenders.

Under new section 90I all regulations made under new Part 3B would be subject to the Negative Resolution procedure.

Clause 23(3) would give the Secretary of State the power to make further amendments to the 1988 Act to make corresponding or similar provision in relation to courses offered in Scotland. The operation of diversionary courses in Scotland is currently under review, which is why

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[131] *Road traffic law enforcement: Government Response to the Committee's Second Report of Session 2015–16* (First Special Report of Session 2016–17), HC 132, 27 May 2016

[132] HC Deb 23 February 2017, cc493-4WH

[133] and equivalent provisions into the *Road Traffic Offenders (Northern Ireland) Order 1996* (SI 1996/1320), as amended

changes are not made to the system in Scotland on the face of this Bill.[134]

[134] The courts system in Scotland is also different: while police forces in England and Wales take decisions about whether to offer a diversionary course, in Scotland the decision is taken by the Procurator Fiscal

9. Other provisions (clauses 24-27)

Clause 24 would confer on the Secretary of State a general power to make consequential provision in relation to any provision of the Bill. This includes power to amend primary legislation passed before the end of the Session in which the Bill is passed. This power is subject to the Affirmative Procedure in cases in which the power is exercised in relation to primary legislation and the Negative resolution Procedure in all other cases.

Clause 25 provides for commencement of the provisions in the Bill. Clauses 18 and 19 (ATOL); and clauses 24, 25 26 and 27 would come into force at Royal Assent. All other provisions must be commenced by regulations.

Clause 26 covers extent. Different parts of the Bill extend to the various nations of the UK:

- Parts 2 (electric vehicles) and 3 (civil aviation) and clause 22 (laser offence) extend to the whole of the UK;
- Part 1 (automated vehicles), clause 21 (vehicle testing and fees) and clause 23(1), (3) and (6) (alternative courses for road traffic penalties) extend to the whole of Great Britain; and
- Clause 23(2) (alternative courses for road traffic penalties) extends to Northern Ireland.

Clause 27 gives the short title.

Appendix: ATOL numbers

According to CAA statistics, ATOL protection was provided to approximately 18.5 million passengers in the year ending March 2011.[135]

Some 2,500 businesses are ATOL-licensed, ranging from major publicly quoted companies to a large number of very small enterprises selling less than 500 ATOL holidays per year.

Table 1 shows the numbers of consumers who have benefited from ATOL protection over the period 2005 to 2011.

Table 1: ATOL Protected Passenger Bookings

Table 1 ATOL Protected Passenger Bookings Year to end March	Total ATOL bookings	ATOL company failures	Passengers repatriated	Passengers refunded	Total Expenditure £000
2005	28.3m	14	11,634	21,960	10,294
2006	26.7m	25	1,754	21,858	8,792
2007	26.7m	27	4,706	54,116	14,251
2008	25.7m	12	1,650	20,771	5,321
2009	20.3m	46	47,482	236,691	84,215
2010	20.9m	29	2,445	45,114	18,86**6**
2011	18.5m	29	47,013	145,809	49,739

135 DfT, *Reforming the Air Travel Organisers' Licensing (ATOL) Scheme*, IA No: DfT 00092, 3 February 2012

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