

# Gate One Position on the Network Functions Implementing Rule

---

## Background:

Work on the revision of the Commission Regulation (EU) No 677/2011 started back in 2016, therefore, since then, several evaluations of the network functions, consultations during SSC meetings and also a workshop (ad-hoc workshop organized on 13<sup>th</sup> of November 2017) took place.

During the SSC 66 meeting on 24/25 October 2017 the proposed amendments to the text of the NF IR were presented. This was the occasion for the Member States to note the desirable direction of the regulatory changes as presented by the European Commission and express their position on several issues that were included into the presented amendment (e.g. NM as a separated legal entity, the NM unit rate as a mean of financing, the SLA concept etc.).

On 25<sup>th</sup> of April 2018 an Ad-hoc Single Sky Committee was organized with the single objective: Presentation of the ***“Draft Commission Implementing Regulation laying down detailed rules for the implementation of air traffic management (ATM) network functions and repealing Commission Regulation (EU) No 677/2011”***.

For this purpose the Commission prepared for the SSC members a new albeit ‘unofficial’ text proposal of the NF IR and also a table presenting the Summary of comments received from Member States on NF IR – after SSC64/SSC66.

During this Ad-hoc SSC meeting the members of the SSC were invited to provide their feedback on the principles of the revision rather than on the detailed drafting. Each Gate One member submitted to its State representative to the SSC the opinion on the principles of the new NFIR proposal, for communication during the SSC Ad-hoc meeting.

A relevant subject that was discussed between the Gate One members was the nomination of the Network Manager. In this regard, the European Commission has already announced its intention to re-designate EUROCONTROL to be the Network Manger as from 01 January 2020 for the duration of at least 2 Reference Periods.

## Gate One Views on the new legal text proposal for the NF IR

### ***I. Role of the Single Sky Committee***

The proposed new NFIR would not give any decision-making role to the SSC in respect of the NM. Its current powers would be replaced by a simple obligation on the Commission to consult Member States. Furthermore, Member States would not be represented in the decision making process of the NMB either. As a result, on the basis of the new NFIR, Member States would in effect not be able to exercise their responsibilities stemming from the obligation under international public law to provide air navigation services in their airspace in respect of the NM.

With the reinforced NMB governance and the withdrawal of the relevant powers of the Single Sky Committee, Member States would have close to no influence on how the network is managed and developed.

## ***II. ATFCM – a new Network Function***

Reading the proposed legal text, ATFCM would be falling under EU competence as a new network function, partially based on the ATFM function. This seems to contradict Article 6 of the Airspace Regulation and the EUROCONTROL Convention, which consider ATFM a function falling within the scope of the national competence of the Member States.

While it would of course be possible to transfer competence in this respect to the EU, it would be appropriate to clarify who is responsible for the provision of the ATFCM functions in questions and entitled to decide about the way they are carried out. This is not simply a question of legal theory of course; there are important consequences such as structuring governance and liability aspects.

At the same time, GO supports the EC's efforts towards the clarification of the issues related to ATFM function from the operational point of view, i.e. including the role of the local ATFM units in the regulation, stressing the role of the CDM process, or recognising that effective flow management requires involvement of all the operational stakeholders.

## ***III. Consultation with the Member States, Remedial Measures***

Art. 20 "Information and ***Consultation of the Member States***" foresees that the Commission will merely consult States on key decisions to be taken by the NMB. The EC should define the consultation timeframe meant by the term "regularly" (Art. 20 p.1) and to clarify the consultation process as per (Art. 20 p. 2) without excluding the SSC role.

This new proposal is not acceptable since States responsibilities for ATFM and in other areas such as ensuring military and security considerations do exist.

The NM is proposed to have a new power to “lay down **remedial measures**” which operational stakeholders are obliged to follow. However, such measures would become obligatory upon approval by the NMB. This represents a significant increase in the involvement of the NMB in defining how operational stakeholders should act.

The proposed remedial measures by the NM will be approved by the NMB, and the affected stakeholders shall implement them and Network Manager shall only **inform** the competent national supervisory authority. From the description of this process it seems that the NM will first consult the Director Operations working group, before raising the issue with the responsible ANSP, which in our opinion should be vice versa, first consult the responsible ANSP and only after to raise the issue to the DO WG.

While we agree that the NM does need certain powers to ensure the effective functioning of the network, we consider that any measures constituting an obligation should be stemming from the powers of the EU or the Member States. In any case, it should be clear on whose behalf such an authority is acting and, what the legal basis and the potential remedies are.

#### **IV. Governance – Air Navigation Service Providers limitation to attend the NMB meetings (Art.17 p.3 a))**

The votes of the ANSPs within the NMB is reduced from 4 (Reg. 677/2011 stated: **„one representative of air navigation service providers per functional airspace block, established or under establishment, with a total number of four votes for all air navigation service providers”**) to 3 in the present proposal. Furthermore, ANSP representation would not be FAB based, but the representative organisations (at present CANSO in all probability) would be able to propose members to the board.

We consider that a procedure for appointment of ANSPs to the NMB similar to the current Regulation is needed, and the FAB principle (Art. 17 p.3) needs to be kept since it allows better, balanced and fair representation of the ANSPs. The proposed mechanism for the selection of the ANSP voting members upon proposals from European representative bodies is ambiguous and cannot guarantee balanced geographical, proportional and fair representation. There is a risk that the intermediary “European representative body” will not be capable of ensuring the acceptance of the decisions of the NMB toward the addressed FABs/ANSPs. There will be significant risk that the NMB and its powers remain concentrated in the hands of a few stakeholders only. FABs on the other

hand have robust administrative mechanisms and their involvement in the work of the NMB will result in better follow-up of decisions toward their ANSPs and ACCs.

The operation of the network is an essential part of executing the Member States' obligations under the Chicago Convention, thus the Member States need to retain decision-making powers over the network.

Abandoning the principle of a FAB-based ANSP representation in the NMB would result in a less balanced representation. FAB-based ANSP representation should be maintained, or at least alternative proposals need to be developed and considered, together with guarantees for a balanced ANSP representation.

**V. *Withdrawal of the appointment of the Network Manager without a formal process (Art. 27 Conditions of withdrawal)***

The proposed provisions concerning withdrawal of the nomination decision, particularly the process leading to a potential decision on the withdrawal, is too vague, leaving too much space for interpretation.

It is not clear what constitutes a "major" failure, it is not understood how the compliance with Terms and Conditions will be monitored, or how the NF execution assessment will be conducted. At the same time it is not specified who would take the decision on the withdrawal.

Lack of clarity concerning the process leading to such a significant decision potentially impacting the operation of both the network as well as of the nominated body creates a major risk and uncertainty.

**VI. *Separation of Network Functions from the NM***

It is not entirely clear why the NM would not execute the Network Functions any longer. The original intention of the Airspace Regulation was that Network Functions are carried out by the NM. We consider that this principle should be maintained.

In the new proposal Member States and operational stakeholders would be responsible for executing the Network Functions on the basis of the NFIR. NM would only support the execution of the Network Functions as a service provider. The proposed new arrangement also implies that no nomination is needed for carrying out the Network Functions themselves. Nomination would only be necessary for the Network Manager, who is only 'supporting' the execution of the Network functions

and carries out the Common Network Support Services. This in our view may not be in line with the fundamental structure of the Single European Sky defined by the basic regulations.