



# Gate One Position on Future Economic Regulation and the New Performance Review Body

## General ambition

Gate One members welcome the European Commission's ambition to improve the functioning of the Single European Sky (SES) and support its efforts to revamp some of the SES core policies, including the economic regulation of the monopolistic provision of air navigation services in Europe. Gate One members believe that the current performance and charging schemes, including the quality of their implementation and the associated regulatory governance, are some of the important sources limiting the system from performing at its full potential, consequently leading to a permanent misalignment between what the political expectations are and what behaviours and results the regulation actually drives. Gate One members therefore see the current efforts to reform the SES as an ideal opportunity to address the quality and functioning of the existing framework with a view of designing an improved future economic regulation and its governance that would effectively enable a highly performing ATM system.

## Future Economic Regulation

### 1. Current shortcomings

When it comes to the current economic regulation, Gate One members consider its general complexity, rigidity and prescriptiveness to be some of its key shortcomings, along with its mostly uniform one-size-fits-all approach, underlying focus on cost-efficiency often at the expense of other key performance areas (with limited recognition of their interdependencies), together with inappropriate metrics to capture individual providers' performance, and further exacerbated by ambiguous interpretation of certain provisions.

Gate One members recognize that the SES2++ proposal demonstrates that the Commission has an ambition to improve the performance and that it recognizes some of the inherent issues with the current schemes. Like the Commission, we can see the necessity of, for instance, the proposal to make the air traffic service providers (ATSPs) responsible for their own performance plans. We also note that the Commission aims to deal with the insufficient responsiveness of the performance system to changing circumstances (by proposed shortening of the reference period to 2 to 5 years together with a binding Network Operations Plan) or the lack of capacity of the regulators, though the Gate One members' views on how these are to be achieved diverge from the Commission's proposals.

### 2. Removal of safety KPA

Similarly, we positively note that safety is proposed to no longer be a key performance area (KPA), which acknowledges the paramount importance of safety in air traffic management. However, the institutional decoupling of safety oversight from performance regulation may make it more difficult, in Gate One members' opinion, to take into account the costs of safety-related measures or the interplay between the safety and capacity requirements.



### 3. Different rationale for revision and increased complexity

Despite extensive changes and very detailed provisions on the performance and charging schemes in the SES2++ proposal, there is a general disappointment among Gate One members that improvement of the schemes as such and addressing their key deficiencies are in fact not at the centre of the proposed changes. Instead, it rather reads as if the key rationale for the proposed changes is merely to enable provision of air navigation services under market conditions and only further strengthen the regulation and oversight of the air navigation service providers (ANSPs).

As a result, the regulation is further complicated as new and additional processes, steps and obligations are introduced into the schemes, while competences and tasks are introduced or re-shuffled among the regulatory bodies. Gate One members believe the exact opposite approach is needed.

The performance and charging schemes should instead become less complex and more flexible. For instance, the performance regulation processes should be simplified and streamlined in all key phases. The performance planning phase should allow more flexibility with regards to the traffic planning and for local circumstances to be better taken into account. The assessment phase should be significantly streamlined and made more transparent to reduce the “window of uncertainty” for the ANSPs, together with improving the consistency assessment criteria. To enable greater responsiveness to significantly changing circumstances, instead of unrealistic shortening of the reference period and making the Network Operations Plan (NOP) a binding document, more flexible mechanisms allowing adequate revision of the planning need to be identified.

### 4. Binding Network Operations Plan

The particular idea to make the provisions of the Network Operations Plan (NOP) binding (Art. 26.3b) is an example of the draft SES2++ proposing an inadequate solution for achieving an otherwise laudable objective of stimulating better delivery of capacity and increasing responsiveness of the ATM system to the changing operational circumstances, which in the end only adds further complexity to the regulation. Gate One members are in fact significantly concerned about apparent incompatibility of the proposal with the existing principles and mechanisms of the performance and charging schemes, and believe it would lead to a dual regulatory regime with possibly irreconcilable capacity performance requirements from the ANSPs.

### 5. One-size-fits-all approach

Instead of allowing more room for recognizing different local circumstances, the one-size-fits-all and top-down approach of the regulation is only further solidified in the SES2++ proposal, mainly by the shift of all key regulatory competences from National Supervisory Authorities (NSAs) to the new centralised Performance Review Body (PRB), including setting of the EU-wide terminal performance targets (Art. 15.1), unilaterally prescribing the local performance targets for en route (in case of a repeated revision of a draft plan, Art. 13.9), a direct imposition of corrective measures (Art. 13.11), or deciding on methodology for cost allocation (Art. 13.4). While Gate One members recognize the need for a more network-centric approach also to the performance planning, we disagree with such an extensive empowerment of the central PRB at the expense of local regulatory units, the NSAs.



## 6. Interdependencies

Besides removal of the safety as a KPA, the proposal does not address the issue of interdependencies between the KPAs (and interplay of the remaining KPAs with safety), and misses the opportunity to open up a much needed discussion on the adequacy of the existing KPAs and how the performance of individual providers, recognizing their contribution to the network performance as well as impact of external factors on their own performance is measured.

## 7. Common Unit Rate

Additionally, the SES2++ also introduces some concepts that are, to say the least, problematic – both in their practicability and expected outcomes. This is evident not only with regards to the binding NOP, as discussed above, but also notably in relation to the concept of the common unit rate. Gate One members are not only unconvinced about the ability of the common unit rate to incentivise the desired outcome (i. e. airspace users flying environmentally optimal routes when congestion levels cause significant network performance problems), but are also concerned about its feasibility and potential unintended impacts. For instance, issues such as the revenue neutrality, general compatibility with the key principles and mechanisms of the performance and charging schemes, or the very way of operation of the concept in practice, remain to be clarified and should be part of more detailed impact assessment.

Instead of such a self-standing mechanism, Gate One members reiterate their call to the Commission to create a universal framework truly enabling voluntary cross-border service provision and cooperation of ANSPs where operational and performance benefits can be achieved, aiming at well-known barriers to cooperation, such as different legal, taxation or liability regimes.

## 8. Modulation of charges

Gate One members are also concerned about the proposal for introduction of a mandatory modulation of charges. Such a mandatory nature might limit the flexibility in deciding on any such modulation when and where it is needed. Although the declared intention to ensure its revenue neutrality is welcome, further understanding of how it is foreseen to be achieved in practice is necessary. Gate One also further notes that the modulation may bring additional complexity to the system, while the full extent of its ability to drive both the intended behaviour as well as any possible unintended consequences is not known today. It is also to be further clarified whether the mechanism is also designed to reward ANSPs for early deployment, as repeatedly suggested by not only the operational stakeholders, but all the studies that the SES2++ proposal is based on as well.

## New Performance Review Body

The quality of its implementation and the associated governance arrangements are an integral part of the economic regulation, and Gate One members acknowledge the need for their improvement. Besides competency issues indicated in the previous section, the Gate One members, however, are also concerned about the proposal to establish a permanent Performance Review Body (PRB) function within the European Union Aviation Safety Agency (EASA), feeling it risks aggravating the identified shortcomings.

Gate One members would like to express their views on some key points that should be addressed in the process of revising the current SES framework regarding performance and charging:



- We believe there is a need to simplify the current framework in order to allow more flexibility for a sector prone to volatility and also to have a better reflection of local conditions and circumstances.
- The current proposal on the establishment of a permanent PRB function within EASA cannot be accepted without a detailed cost-benefit analysis and a functional checks and balances system that minimises risks of arbitrary decisions that do not take into consideration local circumstances. It is also self-contradictory that the Commission emphasises the need for strict organisational separation of performance and safety on national level, while introducing a model of “functional” integration, within a single entity, on the European level.
- In regard to the funding of the new PRB, we believe that additional costs to be included in the cost-base of ANSPs are underestimated in the proposal and will have an impact on the value of the unit rate, to be passed on to airspace users (AUs).

Furthermore, Gate One members consider the following key areas need to be reassessed:

#### 1. Acknowledging national roles and responsibilities

Although the role of NSAs should be strengthened through the proposed regulation, the shift of regulatory powers in the area of en-route services from local NSAs to the new PRB, with very limited role foreseen for the NSAs or the Member States in the process, contradicts this.

The possibility for the new PRB to impose corrective measures directly on ATSPs and to “require” delegation or transfer of services from one provider to another (Art. 13.11) would interfere with Member State accountabilities for safety, national security and defence issues and provisions of the Chicago Convention, and as such is strongly opposed by Gate One members.

Investigative powers given to the new PRB also seem far-reaching, without recognizing the role, responsibilities and experience of the NSAs. It is the case also for the power given to the new PRB to access accounts of the ANSPs, overpassing the NSAs.

Moreover, the proposed ex ante verification of the unit rates by the PRB, together with the investigative powers, not only generates additional costs to be borne by the AUs and extends the whole charges approval process, but it also interferes with the process under the existing EUROCONTROL Multilateral Agreement relating to Route Charges (enlarged Commission).

#### 2. Financing of the new PRB

Gate One members ask the Commission to provide a full cost estimation for the operation of the new PRB, considering the internal structure with the four bodies proposed to be established as well as the new tasks currently not carried out by the existing PRB, together with the impact analysis on individual ATSPs / navigation charges. All solutions increasing the financial burden for ATSP that is to be passed on to AUs, are inappropriate.

The financial mechanism proposed raises serious concerns from several perspectives. First, there seems to be a duplication of income from the annual contributions and from fees and charges that cover the same functions. Secondly, the fees and charges system is inappropriate because it might discourage



legitimate actions from an ANSP with regard to their en route performance regulation (such as an appeal, revision of performance targets, etc.) and it will be reflected also in the unit rate, increasing costs for AUs. The efficiency of the system is also questionable as the PRB revenues will be based on the number of tasks rather than effectiveness of their operations. Thirdly, it leads to a situation in which the PRB as a regulator for determined costs and with a role in verifying unit rates, that include PRB costs, decides on their own income.

Given this difficult economic period, from which the aviation sector will not recover before 2024, as indicated both by EUROCONTROL and IATA, the Gate One members are not convinced that adding further costs to the system for the AUs to eventually bear is appropriate. Instead, we believe that the current funding model for the PRB, using the Commission budget as the main source, as it is the case also for EASA, should be maintained – at least until the economic situation of the aviation sector stabilizes enough.

Nevertheless, shall the principle of PRB funding through user charges be maintained, Gate One members call on the Commission to ensure that all PRB-related costs are, firstly, fully financed through user charges and, secondly, proportionally fixed for each ATSP just like the NSA costs.

### 3. Relation with EUROCONTROL/Network Manager

The role of EUROCONTROL and the Network Manager (NM) for the European aviation ecosystem is paramount, however the proposal for the new PRB needs to better take into consideration the potential conflicts of interest and guarantee independence for an EU body.

Consulting EUROCONTROL for the Regulatory body selection, use of Performance Review Unit and Performance Review Commission technical knowledge and experts, the relation between NM and PRB, where the NM has an advisory role but is also a subject to performance regulation, need to be further revised.

### 4. Appeal Mechanism

The appeal mechanism needs to be independent and objective, for all decisions of the new PRB affecting ANSPs or other stakeholders. The proposed set-up raises concern in this regard and different options should be taken into consideration for institutional or organisational separation of the Appeal Board from the new PRB.

## Conclusion

Gate One members regret to conclude that, despite the extensive revision, the SES2++ proposal comes up short of addressing some of the most prominent issues with the performance and charging regulation and instead, reinforces some of the existing ones. Without due retrospection and consideration of lessons learned from the previous reference periods, we are afraid that the reform of the SES with regards to the economic regulation will be a lost opportunity.

Furthermore, despite the need for improvement of the quality of implementation of the economic regulation and of the associated governance arrangements, Gate One members regrettably cannot accept the establishment of PRB under EASA without proper assessment of all possible options, given the importance and sensitivity of its function. Such an assessment shall not be based solely on the



administrative and cost of operations points of view, but must take into account impartiality, independence and a need for clear division of regulatory and oversight roles. Beside this fundamental concern, Gate One members would also like to see more clarity on the financing mechanisms and relationships with national authorities and other ATM stakeholders.

\*\*\*