



## Gate One position on SES 2++

### General comments

Gate One welcomes the ambition of the European Commission to address the necessary update of the Single European Sky framework legislation to reflect the changing needs of the ATM, its stakeholders and ultimately the travelling public and also to resolve the identified shortcomings of the current legislation.

The Commission's proposal introduces fundamental changes to the future functioning of the European air traffic management system. In a number of elements the changes go far beyond the 2013 draft regulation and are proposed in a different environment. Gate One members therefore note with a concern that a comprehensive impact and risk assessment of the new SES2+ proposal have not been undertaken and would welcome such steps.

Main objectives of the proposal are centred around decarbonisation and digitalization, both of which are directions fully supported by Gate One members. Unfortunately, it is not clear how the new proposal will achieve these objectives, let alone making the ATM system more scalable, resilient and efficient and able to respond to current and future needs. It should be acknowledged that the ATM modernisation has at best very modest, indirect potential to reduce the environmental footprint of aviation.

The proposal increases legal uncertainty with respect to EU and national competences, national sovereignty, decision-making powers and the allocation of roles, responsibilities and liability. Uncertainty is also reflected in relation to the execution of Network Functions and the role of the Network Manager (NM) and EUROCONTROL.

The scope of sovereign state functions is aimed to be narrowed through economic regulation, which is inappropriate, since ATM is closely related to the exercise of public powers and entails the execution of international law obligations under the scope of the Chicago Convention.

The Proposal would give broad legislative powers to the European Commission. Several of these have an impact on the balance of competences between the Union and the Member States and include legislative domains that currently fall under the scope of national competence. At the same time, the transfer of competences has not been discussed and clarified in the Proposal or the accompanying staff working document.

Gate One members believe that it would be inappropriate to regulate some of the proposed subjects at the level of delegated acts. Most importantly, these include the definition of new network functions and conditions attached to the certificates. Yet the members also find it worrisome to have some proposed subjects regulated in Implementing Acts, for example the subjects of traffic risk allocation, the establishment of detailed rules for the execution of Network Functions, the execution of the tasks of the NM, governance mechanisms including decision-making processes (CDM), the modalities of the consultation and of the involvement of airspace users in approving investment plans and the application of the Flexible Use of Airspace (FUA) concept within the Single European Sky. Since such changes may explicitly or implicitly narrow the scope of national competences, we consider, that such arrangements need to be discussed with the Member States in a transparent manner and regulated at the appropriate



level. If, following further negotiations on the draft, it is confirmed that some of those would be regulated in Implementing Acts, Gate One members consider that due involvement of states in their adoption, preferably through examination procedure, is required.

While the allocation of liability is a fundamental aspect of aviation considering its safety-critical nature, ATM liability has been an overlooked aspect of cross-border arrangements. The proposal introduces the concept of ADSPs and a strong drive for digitalisation, but the safety aspect, driven by a clear definition of responsibilities and liabilities of these changes is again not properly addressed. Nevertheless, this is especially critical if we really want to make any flexible and scalable cross-border system a reality.

The proposed new sectoral data legislation has the potential to change the legal standing of service providers carrying out state functions. It is not clear whether in their role of data providers these entities would fall under the scope of competition law. Therefore, it should be clarified whether they execute state functions when providing data on the basis of the sectoral data rules or would become undertakings carrying out economic activities on a market. Furthermore, with regards to data legislation, details on liability and ownership remain unknown.

The intended scope of the influence of stakeholders on the decisions of Air Traffic Service Providers involving 'major issues' is unclear, as well as the potential consequences of neglecting the proposed consultation duty. The proposal states that airspace users shall be involved in the process of approving strategic investment plans and shall be involved in consultations related to ATS service provision (Art. 29). The provision of any kind of decision-making power to airspace users and airport operators over the decisions in question would be inappropriate. Airspace users and airport operators do not bear any responsibility for management decisions of ATSPs. While it is important to ensure that the European ATM infrastructure is developed in an orderly and efficient manner, the Member States should be able to define their own national infrastructure and their development in a sovereign manner.

Flexible Use of Airspace is a matter falling under the scope of national competence since decisions relating to the content, scope or carrying out of military operations and training do not fall within the sphere of competence of the Union under Article 100(2) of the Treaty on the Functioning of the European Union.

With regard to the Functional Airspace Blocks, giving the possibility to the Member States to maintain these partnerships or to create other forms of partnerships going beyond the FAB's borders is supported.

### Changes regarding the NSAs

While we welcome the aspiration to strengthen local supervision over air navigation services, it is our conviction that separation of safety and economic supervision might impose unnecessary administrative burden not only for NSAs, but on ANSPs as well and risk losing overall and coherent picture of ANS provision.

However, it is somewhat problematic that NSAs and PRB would have the possibility to negatively influence the economic situation of ANSPs through penalties and disincentives. At the same time, ANSPs would be required to ensure economic strength to be able to keep their economic certificates. In certain cases, measures imposed by the authorities could lead to non-compliance with performance plans further deteriorating the situation of the service provider, or the loss of the economic certificate. Such eventualities could prevent Member States from keeping critical aviation infrastructure operational and from fulfilling international law obligations under the scope of the Chicago Convention.



We appreciate the decision to remove the safety KPA acknowledging that safety is paramount and the current KPA, as defined, could not contribute to increase of the parameter. However, the requirement of safety and economic certifications to be performed by two independent institutions, thus likely to miss the underlying interdependencies, is a step towards further complexity.

We call on the European Commission to reconsider creation of another layer of bureaucratic burden in this area stemming from the abovementioned creation of a new institution. In case of some states the attempt to fit the NSA in the existing institutional landscape might result in a conflict of competences. In addition, when it comes to cross border provision of ANS, positions of respective NSAs should be clarified in more detail. There are also constitutional concerns, since the exercise of ATS is a sovereign task over which a supreme administrative body (ministry) must be able to exert decisive influence.

#### CNS, AIS, ADS, MET and terminal ATS

Gate One members have published a separate position paper on the creation of the market for ATM Data Services Providers (ADSPs). In addition to that paper, it is important to note that the SES2++ proposal expects ATSPs to voluntarily decide about provision of CNS, AIS, ADS and MET services under market conditions, which is appreciated, however, at the same time, it must be acknowledged that such decisions may involve considerations, including safety and security, falling under the scope of the sovereign powers of the Member States.

On the other hand, arguments for such steps should not be based on cost-efficiency premise only. It should take broader variety of factors impacting overall efficiency into account. Same applies to the provision of terminal ATS. Therefore the procurement for terminal air traffic services for aerodrome control under market conditions by the airport operators should be left on Member States discretion. Urging to change the provision model should not be used as a leverage to merely pursue cost-efficiency. Same logic should apply to all the services currently provided by the ANSPs. It should also be noted that the proposed approach carries risks of creating a supranational monopoly environment and concentration of business in several large providers, which is contrary to the principles of free and fair competition.

Gate One members consider it vital to emphasize that the prerogative of Member States to renew designation of an ATSP must not be conditioned in any way or driven by other than Member States' own consideration.

#### Performance and charging

Gate One members published a self-standing position paper on the future economic regulation and the new economic regulator, which will reflect on the respective SES2++ provisions. On the positive side, Gate One members were pleased with the decision to task ATSPs with preparation and submission of performance plans, which will certainly contribute to reducing the complexity of the process. However, we believe that the proposed text includes a number of provisions, which would benefit from further discussion. To name just a few, institutional and competences complexity, incentive scheme, unclear modulation mechanism, unclear financing mechanism and excessive competences of the new PRB rank among the most important ones.



## Network Management

It would be crucial to clarify the scope of the new EU competences and the dividing line between EU and national competences with respect to airspace design, airspace management, network functions, network management, capacity management and infrastructure development, as well as the role of EUROCONTROL.

With regard to Network Functions and the Network Manager, the most important functions of the European ATM network which include airspace, infrastructure and capacity management are built on an unclear legal framework, which obscures roles, responsibilities and decision-making powers. Gate One members suggest that the entity responsible for executing each Network Function should be clarified.

Furthermore, the role of the Network Manager is ambiguous and the proposal employs different descriptions of what the NM does (*'contributes' to the execution of Network Functions, 'delivers' Network Functions, 'implements' Network Functions through individual measures*). This needs further clarification including the legal nature and the scope of the 'measures' (Article 27.4 'support measures', Article 27.4 - 'measures', Article 27.6 - 'individual measures')

This situation is further complicated by the fact that the Network Manager shall take decisions through a cooperative decision-making process, the modalities of which remain unclear.

While the use of the CDM process may be justified in some cases, in order to achieve legal certainty and clarity on who does what, the following aspects of the CDM process needs to be clarified: the exact scope, legal basis of the decision-making power involved, if the entities involved bear any type of actual decision-making power and responsibility or their role is merely advisory, the legal nature (obligatory or advisory, regulatory, etc.) of the decisions resulting from the CDM process, and the possibility to appeal.

The role and responsibilities of participants of the CDM process are somewhat unclear, since the proposal does not clarify if they are expected to carry out an advisory role or they exercise decision-making powers to some extent. It is suggested that in each instance, the legal basis and the scope of the decision-making power involved needs to be clearly defined to the extent practicable for the framework regulation. Furthermore, in each instance, the entity responsible and liable for the decision needs to be clearly identified. If the legal basis, legal nature, scope of the CDM process and the fact that the participants act in an advisory role is clarified in the SES Regulation itself, no further legislative powers are needed in this respect.

Gate One members concur that turning certain current NM tasks into Network Functions is questionable, thus it is crucial to further elaborate the following topics: responsibility for executing (implementing, delivering) each Network Function, the exact role and responsibility of the NM with respect to Network Functions, decisions remaining in national competence including those within the EUROCONTROL framework, decisions falling under the decision making power of the Network Manager, the legal nature and exact intended scope, the decisions that are exercised within the scope of the powers of the Network Manager, decisions falling within the scope of the CDM process, the binding nature of NM decisions, the possibility to appeal and its forum, consequences of non-compliance with NM measures. In addition, it would be useful to see to what extent does the NM remain within the legal context of the EUROCONTROL intergovernmental organization with respect to decision-making powers and processes.



Gate One members agree that there is a need that operational tasks should be clearly separated from the regulatory ones.

The new Network Functions may only be defined in a delegated act as long as they remain within the scope of already existing EU competences and do not have an impact on the scope of the functions carried out by the Member States within the context of the requirements of the Chicago Convention. Delegated acts shall be used strictly for technical, non-controversial issues and should not aim at expanding the mandate of the Network Manager.

The tasks of the Network Manager should remain closely connected to exercise of public powers and the execution of state functions in a joint and centralised manner. Therefore, the Gate One members urge the Commission to provide at least some basic assumptions on the content of the future implementing regulation in the SES Regulation itself.

The governance mechanisms including decision-making processes involve existing decision-making powers based on existing EU or national competences. It is therefore unclear what the detailed rules of 'governance mechanisms including decision-making processes' may entail.

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