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Creating a framework for a Single European Sky—The opportunity cost of reorganising European airspace

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The object of this article is to critically evaluate the legal framework for a European Single Sky project in light of the recent European Court of Justice decision in *International Air Transport Association v The Department of Transport*. The article will examine in detail the framework regulations outlining the major provisions from the recommendations of the Commission's High Level Group in 2000, to the implementation at a micro-level by national authorities of the legislation adopted in 2004. Furthermore, this article will examine whether the savings to air service providers from the Single European Sky project in the long term will be negated by the short term outgoings associated with compensating passengers in the event of delays, cancellations and denied boardings caused by non-systemic factors.

Introduction

One of the major objectives of the European project since its inception has been the liberalisation of markets, the free movement of peoples, goods and services, and the creation of transnational regulations aimed at harmonising diverse national interests; nowhere is this more evident in recent years than in the area of air transport, where the European Commission has taken the initiative in creating a framework for a Single European Sky as well as affording greater protection for passengers in the event of delayed and cancelled flights.

In the recent decision of *International Air Transport Association and others v The Department of Transport*,¹ the Court of Justice confirmed the validity of Community legislation on air passengers' rights following the introduction of Regulation 261/2004. The Regulation affords passengers greater protection in the event of denied boarding, flight cancellation or long delays.² During the course of the case, the IATA and ELFFA argued not unreasonably that airlines will be held responsible for delays over which they may

have no control, such as air traffic congestion, adverse weather and industrial action taken at different airports.

The inevitable cost burden to airlines will no doubt switch focus back to the Commission's attempts to reduce delay by creating a framework for a Single European Sky.³ The Single European Sky project is the much lauded Community initiative to streamline the management of European airspace and thus create a more efficient system for air navigation.⁴

Globalisation of markets, the availability of budget airlines and the greater mobility of migrant workers and tourists have placed enormous demands on European aviation infrastructure.⁵ Presently, European airspace is the most congested in the world; in the last seven years aviation traffic in Europe has grown by 15 per cent, and is set to grow further; this has an adverse effect on route traffic resulting in delayed flights.⁶

There are several reasons why European airspace is so congested; historically, individual States have been responsible for air traffic management, thus giving rise to a fragmented system based on national interest.⁷ In turn, this has had a knock-on effect on route management resulting in inefficient use of available airspace.⁸ Allied to this problem is the need to use airspace for military purposes, consequently air-routes have to be managed on an ongoing basis.⁹ This inefficient use of airspace has resulted in traffic convergence and occasionally gridlock on fixed route networks prolonging flight times and causing delay.¹⁰

In 2000, the Commission established a High Level Group to examine the possibility of creating a SES network.¹¹ The recommendations made in their report became a central plank in the Commission's White Paper on Transport.¹² The High Level Group made a number of recommendations under eight headings, principal among which was the establishment of a legal framework for bringing about a Single European Sky.¹³ In order to achieve this objective, the group recommended that the EU institutions should take the lead in defining high-level rules and ensuring compliance across the Member States.¹⁴ Furthermore, the group recommended improved co-operation between civil and military agencies for the development and enforcement of Community regulation and

increased co-operation with Eurocontrol with eventual accession to that organisation.¹⁵

Regulatory framework

Arising out of the recommendations of the High Level Group, a follow up communication was issued by the Commission in 2001.¹⁶ The purpose of this communication was to set out an action programme in response to the report of the High Level Group; defining the objectives and the working methods for the reform of air traffic management in Europe. This Communication was augmented by a further communication dealing with concrete proposals for the specific areas of the action programme.¹⁷ The proposals were put to the Parliament and the Member States reached agreement on them in December 2003.¹⁸

Four separate Regulations entered into force on April 20, 2004:

- • Regulation 549/2004 (“The Framework Regulation”)¹⁹ ;□
- . • Regulation 550/2004 (“The Service Provision Regulation”)²⁰ ;□
- . • Regulation 551/2004 (“The Airspace Regulation”)²¹ ; and□
- . • Regulation 552/2004 (“The Interoperability Regulation”).²² □

The Framework Regulation

The Framework Regulation as its name suggests, creates the structure for the Single European Sky project with its principal objectives being the creation of a more efficient integrated airspace, enhanced safety standards and the promotion of overall efficiency for general air traffic management.²³ One of the criticisms of the Framework Regulation, however, is that it proposes a bottom-up approach to air traffic management; rather than the creation of a pan-European system²⁴ . From a political perspective this would appear to be the most expedient method for bringing about the Single European Sky project, however on a practical level it is cumbersome and over dependent on its implementation by the various Member States.

Under the Regulation, Member States are required to either nominate or establish national supervisory authorities to assume tasks relating to the SES project.²⁵ Those designated national authorities shall in accordance with the Regulation be independent of air navigation service providers, and exercise their powers in an impartial and transparent manner.²⁶ Each Member State is required to nominate two representatives to join the Single European Sky Committee; the object of which is to assist the Commission in pursuing its objectives and to meet the needs and interests of all categories of users, both civil and military.²⁷ The committee will be consulted by the Commission on an ongoing basis regarding the implementation rules and on non-legislative initiatives, and will make decisions based on qualified majority voting.²⁸

To further assist the committee in reaching its decisions, the Regulation provides for the establishment of an “industry consultation body”.²⁹ The creation of this body was one of the central recommendations of the High Level Group, and its role is to advise the Commission on the technical aspects of the implementation of the Single European Sky.³⁰

Implementing rules

In order to implement the rules outlined under Art.3 which come within the remit of Eurocontrol, the Commission can issue mandates to that body setting out the tasks to be performed and the timetable for completion. Article 8(3) provides that if Eurocontrol is not in a position to accept a mandate, or the Commission concludes that the work pursuant to a mandate is unsatisfactory, untimely or inadequate then the Commission reserves for itself the power to adopt alternative measures to achieve those objectives.³¹

Inevitably because the Regulation relies on the designated national authorities to implement the SES project, the Regulation provides for sanctions against airspace users and service providers which can be taken at a domestic level, and those sanctions must be proportional and dissuasive.³² However, the implementation of the Regulation will be lessened by ongoing consultation at domestic level with stakeholders, in theory this should reduce the likelihood

of sanctions for non-compliance.

The Regulation would appear to provide two methods for communicating with interested stakeholders, one at Community level and another locally driven by national authorities; whether this development will prove satisfactory in the long term is another matter. It is fair to argue that if the object of the SES initiative is to create a more efficient use of airspace, the existence of parallel bodies is a cause for concern. Inevitably the creation of an additional level of bureaucracy may stymie the quick progression and implementation of the project. That said; the Regulation has provided a mechanism for reviewing performance, drawing upon the expertise of Eurocontrol in the examination and evaluation of air navigation.

Article 11(2) provides, *inter alia*:

“(A) Allowing the comparison and improvement of air navigation service provision;

(b) Assisting air navigation service providers to deliver the required services;

(c) Improving the consultation process between airspace users, air navigation service providers and airports;

(d) Allowing the identification and the promotion of best practice, including improved safety, efficiency and capacity.”

Article 12 requires national authorities to submit annual reports for the purpose of allowing the Commission to review the application of the Regulation and in turn report its findings to the Parliament and the Council.³³ Reports shall contain an evaluation of results achieved and provide detailed analysis of developments in the sector in light of the original objectives.

The Service Provision Regulation

The principal objective of the Service Provision Regulation (Regulation 550/2004) is to ensure that common standards for the provision of air navigation services are applied across the EU.³⁴ Traditionally, air navigation services have been looked after by individual Member States, giving rise to disparities in terms of organisation, training and equipment.³⁵ At the heart of the SES project is the creation of what are known as Functional Airspace Blocks (FABs).³⁶ A Functional Airspace Block is an area of which comes into being according to operational requirements, reflecting the need to ensure more integrated management of airspace regardless of existing boundaries.³⁷ Under the SES project, a FAB can cover the airspace of a number of Member States; the traditional method of operation according to national boundaries will no longer be an option, consequently air navigation providers will have to act in conjunction, according to common structures and procedures.

Given that the object of the SES project is not to create a pan-European organisation, the monitoring of safety and the provision of efficient air navigation services has been left to individual Member States providing their practices comply with the objectives of the Commission.³⁸

Parameters

The Service Provision Regulation is broken down into four chapters; dealing with general requirements, common requirements, charging schemes, and final provisions.

National authorities shall supervise the application of the Regulation, through inspection and survey to ensure compliance and maintenance of safe and efficient air navigation services. This supervisory capacity arises out of the Framework Regulation which provides for clear delineation between regulatory bodies on the one hand and air navigation services on the other.

Where FABs transcend national boundaries, national authorities shall conclude agreements between themselves as to how that particular block is supervised.³⁹

One of the principal aims of the Air Service Regulation is to create a system for certifying air navigation service providers, defining their rights and obligations to ensure overall compliance with the SES project.⁴⁰ This entails that all services provided to general air traffic, be it meteorological, communication, surveillance, navigation and aeronautical must be certified by respective national authorities.⁴¹ A certificate may be issued to an air navigation service provider in respect of a single service offered or a bundle of services depending on their individual requirements.

Certificates may only be issued to air navigation service providers on condition that certain common requirements, which are listed under Art.6 of the Regulation, are met.⁴²

In May 2004, the European Commission after some consultation produced a draft Regulation on common requirements. Following a further period of consultation, Regulation 2196/2005 came into force on December 20, 2005. This provision deals with the granting of certificates, derogations, and compliance.⁴³

The certification system is based on the premise of mutual recognition across Member States allowing for transnational provision of services and co-operation between service providers. The Regulation equips national authorities with the right to oversee and monitor compliance with common requirements; where there has been a failure to abide by the terms set out on the certificate, appropriate measures can be taken against the offending air navigation service provider including revocation of the certificate itself.

The onus of proving compliance lies with the air navigation service provider for the duration of the validity of the certificate. However, to ensure compliance it is proposed to establish a regular system of inspection by the national authority; inspection can be carried out by personnel from the national authority or by a recognised organisation acting on their behalf.⁴⁴ National authorities themselves will also be subject to ongoing peer review by a team comprising of experts from at least three different Member States, and the review shall cover all aspects of the common requirements listed in Regulation 550/2004.

In addition to certification, the Service Air Regulation provides for the establishment of a scheme of common air navigation charges that will contribute to the achievement of greater transparency with respect to the determination, imposition and enforcement of charges to airspace users, in order to improve the overall ATM system's efficiency.⁴⁵

Currently, users pay for the different air navigation services. This applies whether they are on the ground or in mid-flight. Such services have traditionally been controlled by local monopolies; consequently, different charging schemes are in force across the Member States. Given the purpose of the SES project is the harmonisation of services, it follows that charges should be applied in a consistent and non-discriminatory manner across the community.⁴⁶ Needless to say, the harmonisation of charges is dependent on system convergence envisaged within the meaning of the Interoperability Regulation; as to how quickly this takes place, is purely a matter of speculation.⁴⁷

The Airspace Regulation

Whereas the Framework Regulation takes a structural approach to creating the Single European Sky, and the Air Service Regulation provides for standardisation of air navigation services, the Airspace Regulation takes a systemic approach, dealing with the organisation and use of airspace. In that regard it is fair to say that the Airspace Regulation from a functional perspective is arguably the most important of the legislative provisions introduced by the Commission in 2004.⁴⁸

At the heart of the Airspace Regulation is the flexible use of existing airspace and the necessity to optimise it during peak periods to promote overall efficiency and reduce sub-optimal use. In order to achieve these efficiencies the Regulation provides for reconfiguration of airspace based on operational requirements.⁴⁹ The Regulation provides for the creation of the aforementioned FABs to be established by mutual agreement between Member States whose

airspace is included within the proposed area.⁵⁰ To date, however, none of these FABs have been created despite the fact the legislation was initiated almost two years ago.⁵¹ It is hoped that when the proposed FABs are up and running, this will result in the optimum use of air traffic routes, thus reducing delays and costs.⁵² However, airlines have been highly critical of the approach taken by the Commission in allowing Member States to create FABs, and would have preferred if a top-down approach had been taken instead.⁵³ Their criticisms centre on the belief that not all Member States are complying with the SES project.⁵⁴ Recently the Commission criticised Greece for non-compliance in failing to create a national authority and provide for certification of air navigation services.⁵⁵

The Interoperability Regulation

To create the systemic reorganisation of European airspace envisaged under the Airspace Regulation, it is necessary to develop and implement common technical specifications for the European Air Traffic Management Network (“EATMN”).⁵⁶ Regulation 552/2004 proposes the introduction of new systems and equipment that will enable interoperability, co-ordination and co-operation across the SES area.⁵⁷ The Regulation proposes the creation of Community-wide specifications to ensure compliance; systems will be subject to verification by an air navigation service provider who must submit a declaration of compliance with the national supervisory authority.⁵⁸

Passenger rights and the SES Project

The inevitable consequence of air traffic congestion results in delays, cancellations, and in some cases denied boardings where connections have not been met in a timely and efficient manner. The inefficiencies of the current system have impacted not only on air service providers, but more importantly on consumers. While it is not possible to blame all delays, cancellations and missed connections on air navigation service providers, the fragmented system in existence is a contributory factor.

The SES project should theoretically reduce some of the unnecessary delays caused to passengers and airlines arising out of inefficient use of airspace. However, critics of Regulation 261/2004 have a fair point when they say they will be penalised for delays over which they may have no control, such as air traffic congestion, adverse weather, industrial action, safety concerns, and the behaviour of passengers themselves.

Indeed, it is fair to say that a modified version of the Regulation could have been introduced pending the completion of the SES project. Nevertheless, the Regulation does not preclude operating air carriers from seeking compensation from any person or third party in situations where the delay or cancellation is caused by extraordinary circumstances beyond the airlines control.⁵⁹

In the case of *The I.A.T.A. and ors v The Department of Transport*, the High Court referred eight questions to the Court of Justice for a preliminary ruling.⁶⁰

Principal among the questions asked was whether Art.6 of Regulation 261/2004 conflicted with certain provisions under the Montreal Convention?⁶¹ The Court noted that a delay arising out of air carriage caused two kinds of damage:

“First, excessive delay will cause damage that is almost identical for every passenger, redress for which may take the form of standardised and immediate assistance or care for everybody concerned, through the provision, for example, of refreshments, meals and accommodation and of the opportunity to make telephone calls. Second, passengers are liable to suffer individual damage, inherent in the reason for travelling, redress for which requires a case-by-case assessment of the extent of the damage caused and can consequently only be the subject of compensation granted subsequently on an individual basis.”⁶²

The Court was of the view that the Convention merely governs conditions under which a flight is delayed, and where individual passengers may initiate proceedings for damages.⁶³ Furthermore, there was nothing within the Convention which could preclude any other form of intervention by public authorities for the purposes of redress for damages caused by delay. The Court emphasised that

Art.6 was not inconsistent with the provisions set out in the Montreal Convention.⁶⁴

“The Montreal Convention could not therefore prevent the action taken by the Community legislature to lay down, in exercise of the powers conferred on the Community in the fields of transport and consumer protection, the conditions under which damage linked to the abovementioned inconvenience should be redressed. Since the assistance and taking care of passengers envisaged by Article 6 of Regulation No 261/2004 in the event of a long delay to a flight constitute such standardised and immediate compensatory measures, they are not among those whose institution is regulated by the Convention. The system prescribed in Article 6 simply operates at an earlier stage than the system which results from the Montreal Convention.”

The Court concluded that the standardised measures provided for under Art.6 do not prevent passengers from bringing an action for damages arising out of delay under the provisions of the Montreal Convention.

This of course necessitates the criticism that whereas the SES project aims to reduce congestion and delay, any cost saving to the airline operators may be lost by the application of Art.6 where non-systemic delays such as meteorological conditions or industrial action cause delay.

Micro-managing the SES project in Ireland and the UK

The Irish Aviation Authority, which is the designated national authority in Ireland, controls one of the most important airspace blocks in the world, namely the European and North Atlantic interface.⁶⁵ The IAA and its UK counterpart, the National Air Traffic Service (“NATS”), are currently examining proposals for the creation of a joint UK and Irish FAB.⁶⁶ A high level study was initiated in 2005 and a report was published in June 2005.⁶⁷ The purpose of the study was to examine all areas associated with the establishment of a functional airspace block, from operational to regulatory. According to the report, the focus of the study was to

establish whether there was a prima facie case for establishing a FAB.⁶⁸ The report sought to address a number of key issues, principal among which is why the UK and Ireland should consider creating a joint FAB? The rationale for establishing a joint UK and Irish FAB is outlined in the report, in so far that:

- . 1. Both countries share a long common geographical boundary.□
- . 2. There is a long history of operational co-operation.□
- . 3. NATS and the IAA have a shared need to manage North Atlantic traffic.□
- . 4. There is a significant degree of overlap between customers.□
- . 5. There is a history of intergovernmental and regulatory co-operation.□
- . 6. There are strong institutional similarities between the two.□
- . 7. Both ANSPs have a similar commercial orientation.□
- . 8. Common language and shared cultural ties.□

Taking those factors into consideration, the report writers suggest that the UK and Ireland form the ideal partnership for the creation of the first of Europe's FABs.⁶⁹

Consultation process

In researching their report, civil and military airspace users were consulted. Various issues were raised by both groups. Civil operators were anxious that any benefits arising out of the joint UK/Ireland FAB are passed onto them; in particular they are hopeful that there will be fewer flight restrictions caused by military use of airspace. One of the particular concerns for civil airspace users are the restrictions imposed by virtue of the North Wales Military Training Area (MTA). The lack of availability of this area has traditionally placed restrictions on air traffic between the UK and Ireland resulting in route diversions. According to the report, the UK military authorities have proposed to make this area more freely available to civil aviation in the future, however it has been indicated that the airspace will be sequestered at short notice, thus negating any attempts to schedule traffic through this area on an ongoing basis.⁷⁰

From a practical perspective, the report notes that whereas the Airspace Regulation only provides for the creation of a FAB in upper airspace, the general consensus among ANSPs is that this should be broadened to include lower airspace as well. Furthermore, the report recommends including a sizeable area of airspace known as the Shanwick Oceanic Control Area (“OCA”) which is technically outside the European Flight Information Region (“FIR”).⁷¹ The report recommends that the proposed FAB should include the territorial airspace of both countries together with the Shanwick OCA, an area comprising of 3.4 million km.

Benefits of the proposed UK/Irish FAB

The report identified a number of areas where quantitative and qualitative benefits would accrue to service providers and users. The likely benefits considered are both short-term and long-term.⁷² A summary of the likely short and long term benefits listed in the report are reproduced below⁷³ :

- . • service quality improvements; □
- . • lower staff overheads; □
- . • joint procurement and maintenance; □
- . • reduced operating costs; and □
- . • greater access to military airspace. □

In terms of service quality benefits, the report notes that flight efficiencies are by no means guaranteed. This of course begs the question, if flight efficiencies are not guaranteed, then what is the purpose of creating a FAB? However the report estimates that approximately 2,000-4,000 flight hours would be saved annually in Irish airspace alone with an approximate cost saving somewhere in the region of €10-20 million per annum.⁷⁴

The cost of implementing a joint UK/Irish FAB is estimated in the region of €10-15 million, almost equivalent to the estimated flight hour savings listed above. The report doesn't calculate the annual operation costs associated with the proposed FAB.

Regulatory issues

The report concludes with the regulatory steps to be taken to make the proposed FAB a reality; this invariably requires further engagement between the governments, the regulatory agencies, and the service providers.⁷⁵ The major recommendations are summarised as follows⁷⁶ :

- . **1.** The British and Irish governments should notify the commission of their intention to create a FAB.⁷⁷ □
- . **2.** The UK government should review whether any legislative changes are necessary. □
- . **3.** The Irish government should introduce legislation to reform the structure of the IAA, so that there are no legal impediments to joint collaboration with NATs. □
- . **4.** The regulators should agree to jointly designate both service providers in their national airspace. □
- . **5.** They should agree a regulatory framework for the implementation of common regulatory principles and draw up a timetable for implementation. □
- . **6.** In terms of the Charging Directive, both national authorities should make joint proposals for economic regulation in a situation where each of the two ANSPs is responsible for providing services in the airspace covered by each regulator. □
- . **7.** Consideration should be given by both governments and regulators to the steps necessary for the development of joint safety or economic regulatory responsibility. □

Conclusion

This article has sought to critically evaluate the SES project from a macro and micro perspective, asking an important question, namely, what is the opportunity cost of the project to airlines, air service navigation providers, passengers and to the community at large? The

annual cost of European air traffic management is €7 billion per annum. Airlines hope that the creation of the SES project will reduce ATM operation costs by as much as 30 per cent. Skeptics point out that whereas the Commission has provided a framework for the SES, the bottom-up approach will only delay the project unnecessarily. In order to test this belief, this article has evaluated the advances made by the UK/Ireland in creating a FAB to cover their joint airspace. Whereas significant steps have been made in this particular area, advances have been slow in the Community in general with one Member State failing to create a national authority as requested under the legislative framework.

Furthermore, critics point out that the economic benefits of creating FABs will not be large initially, but will take time to generate major cost savings and efficiencies. Indeed, it has been demonstrated above, that the initial cost of creating the joint UK/Ireland FAB corresponds with the annual cost to Irish aviation of lost flying hours which is somewhere in the region of €10-20 million. However, what the report fails to address is the very real possibility that the restructuring process in the short to medium term may at least contribute to greater delay as different Member States attempt to converge incompatible systems and introduce new technologies.

Moreover, many of the elementary economic issues still need to be resolved, principal among which is the process of reaching agreement on single en-route charges for each FAB. It is in this area that most ANSPs generate a large proportion of their income, and is likely to prove the greatest bureaucratic hurdle to the expeditious completion of the SES project.

But where does this leave air service providers and more importantly the passengers, the very users who the SES project is ultimately designed to facilitate? From a passenger's perspective the SES project should theoretically reduce flight delays and cancellations caused by congestion, and systemic factors.⁷⁸ However, no amount of regulation can legislate for non-systemic factors such as adverse meteorological conditions, industrial action, passenger disturbance, and indeed acts of terrorism.

Although passengers are likely to be the long term beneficiaries from the SES project it is by no means certain that air service

providers will accrue the same. The introduction of the Delayed Flight Regulation is likely to adversely affect the airlines disproportionately in the short term, particularly budget carriers whose no frills service operates on the principle of slim profit margins.

In the meantime, airline operators are concerned that the cost burden of complying with Regulation 261/2004 will affect their profitability, and inevitably drive up the price of airfares for passengers. Perhaps there is some merit in the argument that the introduction of this later Regulation should have been delayed until such time as the SES project and FABs in particular become a reality.

Those arguments aside, the SES project is an ambitious attempt to streamline the European aviation network and reduce the inordinate and inexcusable delays associated with congested and fragmented airspace. As to whether it achieves its lauded objectives is purely a matter of speculation. What will be interesting to analyse is whether the development of the project from the ground up will succeed or whether at some later date the Commission will have to intervene and direct the implementation from the top down. Perhaps and only time will tell, whether the true opportunity cost of the SES project is that the Commission should have taken a top-down approach from the beginning.

** [The author would like to thank Ms Lilian Cassin, Communications Manager with the Irish Aviation Authority for her kind assistance.]*

¹ *[Case C—344/04 International Air Transport Association and others v The Department of Transport [2006] E.C.R. The International Air Transport Association (“IATA”) was founded in Havana in 1945 and represents 270 members from more than 140 Nations. The European Low Fares Airline Association (“ELFAA”) was founded in 2003 as an unincorporated association representing 10 airlines from nine countries.]*

² *[Despite reduced delays to European air traffic, in 2003 it was estimated that 14.8 million minutes were lost to ATM delays. The Single European Sky — Implementing Political Commitments (The*

European Commission, Directorate General for Energy and Transport, Brussels, 2004), p.1.]

³ *[The cost of delays to airlines often exceeds the price paid for en-route services.]*

⁴ *[Hereinafter referred to as the SES project.]*

⁵ *[The European Commission estimated that air transport demand grew by 5-7 per cent up to 2000, leading to a doubling of air traffic every 12 years. In 1999, the Commission estimated that approximately 21 per cent of all flights were delayed with an average delay of 25 minutes. European Commission Directorate-General for Energy and Transport, “Single European Sky” Report of the High Level Group, November 2000. Some 8.5 million civil flights were recorded in European Airspace during 2003 which amounted to 26,000 flights per day. The Single European Sky — Implementing Political Commitments. The European Commission, Directorate General for Energy and Transport (Brussels) 2004]*

⁶ *[Eurocontrol estimates that air traffic will continue to grow at approximately 3.7 per cent per annum for the whole of Europe between 2005-2011. “A vision for European Aviation” Eurocontrol and ACI Europe Press Conference. Aguado, Victor M. Director General of Eurocontrol]*

⁷ *[The European ATM network is operated by a multitude of National ATM centres that are responsible for controlling air traffic in their airspace.]*

⁸ *[In 1997, the EU introduced an open market for air transport services. Arising out of this, airlines lines licensed by the regulatory authorities of the Member States are free to operate between different points within the EU. However, despite the deregulation of the ATS Air Transport Control (“ATC”), services are still largely organised according to national boundaries.]*

⁹ *[Civilian aircraft in traveling from one destination to another often circumnavigate large areas of airspace which is reserved for military aircraft. Consequently, a flight from Rome to Amsterdam will have to change course on several occasions during the flight*

rather than fly in a straight line from point of departure to point of arrival.]

¹⁰ *[Inefficient use of airspace is by no means the only reason for delay. Operational difficulties often arise owing to incompatibility of control systems, and staff shortages. In its High Level Group Report the Commission noted in 2000, that there was a shortfall in the number of Air Traffic Controllers (ATCs) currently operating across the EC.]*

¹¹ *[Single European Sky; Report of the High-Level Group. European Commission (Brussels) November 2000. The High Level Group was established at the behest of EU Transport Commissioner, Loyola de Palacio, and comprised representatives from both civilian and military authorities of the Member States together with representatives from Switzerland and Norway. The Commission adopted a Communication in December 1999 on the creation of a Single European Sky (see Communication of the Commission to the Council and European Parliament on the creation of a Single European Sky, COM (1999) 614).]*

¹² *[European transport policy for 2010: time to decide (The European Commission, Brussels, September 12, 2001). The purpose of the White Paper is to bring about substantial improvements in the quality and efficiency of transport in Europe.]*

¹³ *[The recommendations are listed according to eight headings: regulation, airspace, safety, systems and operations, environment for air traffic control, social aspects, incentives and timing.]*

¹⁴ *[See n.10 above at 21. In terms of airspace management the report envisaged the creation of a Single European Sky, designed, regulated and strategically managed at a European level to facilitate both civil and military aviation. The report further envisaged non-discriminatory allocation of airspace resources to all users and the phased introduction of the Single European Sky with interim provision for no fixed areas of segregation. One of the principal recommendations was to organise the co-operation of the various military authorities on an ongoing basis. The method for achieving this objective is to use the mechanisms established under the Common Foreign and Security Policy (“CFSP”) (2nd Pillar).*

The CFSP was established as the second pillar of the EU in the 1993 Treaty on European Union signed at Maastricht. A number of important changes were introduced in the Amsterdam Treaty which came into force in 1999, and since then there have been numerous developments in CFSP. It has been agreed to embark on a Common Security and Defence Policy (“CSDP”) within the overall framework of the CFSP.]

¹⁵ *[Eurocontrol is an intergovernmental organisation for civil and military aviation and was established to provide and operate air traffic management system for the upper airspace of Europe. Eurocontrol came into being on November 13, 1960, when representatives from Belgium, France, the Federal Republic of Germany, Luxembourg, the Netherlands and the UK signed the EUROCONTROL International Convention relating to Co-operation for the Safety of Air Navigation in Brussels. The Convention entered into force on March 1, 1963. Currently there are 35 members. According to its website: “Eurocontrol develops, co-ordinates and plans for implementation of short, medium and long-term pan-European air traffic management strategies and their associated action plans in a collective effort involving national authorities, air navigation service providers, civil and military airspace users, airports, industry, professional organisations and relevant European institutions”. Ireland joined Eurocontrol on January 1, 1965, five years after the UK. The EU signed a protocol of accession to Eurocontrol on October 8, 2002, and the protocol is being provisionally applied pending its ratification by all the Member States. It was hoped that ratification would be concluded towards the end of 2005 when all Member States would lodge their instruments of ratification simultaneously. At the time of writing, the Irish Government has recently introduced the Air Navigation (Eurocontrol) Bill 2005 to implement the provisions of the revised Convention. Eurocontrol took the initiative during the 1980s and 1990s in trying to improve air traffic management; however, despite introducing a revised Convention in June 1997 enabling it to adopt some regulatory responsibilities, ultimately Eurocontrol was not able to act as a fully fledged regulator. See, http://www.eurocontrol.int/corporate/public/standard_page/org_our_organisation.html.]*

¹⁶ [COM (2001) 123 final/2. Action programme on the creation of the Single European Sky (The Commission, Brussels, November 30, 2001). The purpose of this communication was to set out an action programme in response to the report of the High Level Group.]

¹⁷ [COM (2001) 564 final/2.]

¹⁸ [The Single European Sky — Implementing Political Commitments (The Commission, Brussels, 2004).]

¹⁹ [March 10, 2004. Hereinafter referred to as “The Framework Regulation”.]

²⁰ [March 10, 2004. Hereinafter referred to as “The Service Provision Regulation”.]

²¹ [March 10, 2004. Hereinafter referred to as “The Airspace Regulation”.]

²² [March 10, 2004. Hereinafter referred to as “The Interoperability Regulation”.]

²³ [Air traffic management is defined under Art.2(10) which means the aggregation of the airborne and ground-based functions (air traffic services, airspace management and air traffic flow management) required to ensure the safe and efficient movement of aircraft during all phases of operations.]

²⁴ [Although the document provides the framework for the European Sky, the Commission envisaged that the actual reorganisation of European airspace would be driven by the Member States. Article 1(2) makes it clear that the application of the Framework Regulation is without prejudice to the sovereignty of each Member State over their airspace and the requirements of each to maintain public order, security and defence.]

²⁵ [In Ireland, the designated body is the Commission for Aviation Regulation, as opposed to the Irish Aviation Authority which is responsible for air navigation.]

²⁶ [Regulation 549/2004, Art.4(2).]

²⁷ [*ibid.*, Art.5(1).]

²⁸ [*See n.17 above at 2.*]

²⁹ [*The Industry Consultation Body shall comprise of air navigation service providers, associations of airspace users, airports, the manufacturing industry and professional staff representative bodies.*]

³⁰ [*See n.26 above, Art.6*]

³¹ [*See n.26 above, Art. 8(3)(a)-(b)*]

³² [*ibid.*, Art.8(4). *Airspace users are defined under Art.2(8) as all aircraft operated as general air traffic. Service providers are not defined under the Regulation.*]

³³ [*According to Art. 12(4), the Commission is due to lodge its first report to these bodies by April 20, 2007.*]

³⁴ [*See n. 17 above.*]

³⁵ [*An exception to this is the Maastricht Upper Area Control Centre which covers the Benelux States, and north west Germany.*]

³⁶ [*FABs are intended to serve a number of purposes, namely to enable air traffic control to operate efficiently; to ensure that each airspace block is designed to maximise the efficiency of European airspace as a whole; to minimise the number of times air traffic control has to be handed over when an aircraft passes from one area control centre to the next; and to ensure consistency between the configurations of upper and lower airspace.*]

³⁷ [*See n.18 above at 25.*]

³⁸ [*ibid.* at 6.]

³⁹ [*Regulation 550/2004, Art.(2)(3).*]

⁴⁰ [*ibid.*, Art.(7).]

⁴¹ [*There is an exception to this provision. Article 7(1) provides that Member States may allow provision of air navigation services in all*

or part of the airspace under their responsibility without certification in circumstances where the provider of such services offers them primarily to aircraft movements other than general air traffic. In those cases, the Member State concerned shall inform the Commission and the other Member States of its decision and of the measures taken to ensure compliance with common requirements.]

⁴² *[The common requirements listed under Art.6 are as follows: technical and operational competence and suitability, systems and processes for safety and quality management, reporting systems, quality of services, financial strength, liability and insurance cover, ownership and organisational structure, including the prevention of conflicts of interest, human resources, including adequate staffing plans and security.]*

⁴³ *[It should be noted that common requirements do not cover military operations and operations within the meaning of Art. 1(2) of Regulation 549/2004. For a detailed study of the general requirements for the provision of air navigation services, refer to Annex 1 of Regulation 2196/2005.]*

⁴⁴ *[Regulation 2096/2005, Art.(6) & Art.(9). Note, the authorised persons shall be empowered to perform the following acts: (a) to examine the relevant records, data, procedures and any other material relevant to the provision of air navigation services; (b) to take copies of or extracts from such records, data, procedures and other material; (c) to ask for an oral explanation on site; (d) to enter relevant premises, lands or means of transport. Such inspections and surveys shall be carried out in compliance with the legal provisions of the Member State in which they are undertaken.]*

⁴⁵ *[ibid., Art.14.]*

⁴⁶ *[It should be noted that Regulation 550/2004 provides for an exemption for certain users such as light aircraft and State aircraft provided that the cost is not passed onto other users.]*

⁴⁷ *[See n.53 below.]*

⁴⁸ *[See n.21 above, Art.1. The objective of this Regulation is to support the concept of a progressively more integrated operating*

airspace within the context of the common transport policy and to establish common procedures for design, planning and management, ensuring the efficient and safe performance of air traffic management.]

⁴⁹ *[Presently, airspace can be divided in two between upper and lower airspace; typically this division takes place at 8,700 metres or 28,500 feet, however, variations can occur. Consequently, aircraft sometimes must climb or descend as they cross the boundaries between two Member States.]*

⁵⁰ *[It has been suggested that all current national boundaries for upper airspace should be replaced by just six FABs. Aviation Week's Aviation Daily: Airline Groups criticize slow pace of Single Sky by Adrian Schofield, February 2, 2006.]*

⁵¹ *[Presently, five sets of negotiations are ongoing to introduce FABs. These talks are between Ireland and the UK, Bulgaria and Romania, Portugal and Spain, France and Switzerland, and Sweden and Denmark.]*

⁵² *[Eurocontrol has estimated that the European Single Sky would save airlines about €1 Billion (US\$1.2 billion) a year in fuel costs due to more efficient traffic flow. The cost of ATC services would likely drop by about the same amount, with this saving also passed on to airlines through lower user fees.]*

⁵³ *[The Commission has indicated that a top-down solution will be investigated and implemented if FAB development is not forthcoming within five years.]*

⁵⁴ *[Aviation Week's Aviation Daily: “‘Single Sky’ Package Doesn't go far enough, Airlines Say” by Adrian Schofield.]*

⁵⁵ *[European Information Service. December 21, 2005.]*

⁵⁶ *[Interoperability is defined under the Framework Regulation as “a set of functional, technical and operational properties required of the systems and constituents of the EATMN and of the procedures for its operation, in order to enable its safe, seamless and efficient operation. Interoperability is achieved by making the systems and*

constituents compliant with the essential requirements.” Interoperability is crucial because at the moment Eurocontrol contains 34 member countries that operate 68 ATCCs with 19 hardware systems running 30 programming languages.]

⁵⁷ *[The creation of interoperability will no doubt be enhanced by the creation of the Galileo Satellite navigation system.]*

⁵⁸ *[Regulation 552/2004, Art.6.]*

⁵⁹ *[Regulation 261/2004, Art.15. The Montreal Convention limits the obligations placed on operating air carriers in cases where an event has been caused by extraordinary circumstances which could not have been avoided even if all reasonable measures have been taken. Such circumstances occur in cases of political instability, meteorological conditions incompatible with the operation of the flight concerned, security risks, and unexpected flight safety shortcomings even though all reasonable measures have been taken by the air carrier concerned to avoid the delay or cancellation.]*

⁶⁰ *[See n.1 above. (1) Whether Article 6 of Regulation No 261/2004 is invalid on grounds that it is inconsistent with the ... Montreal Convention ..., and in particular Articles 19, 22 and 29 [thereof], and whether this (in conjunction with any other relevant factors) affects the validity of the Regulation as a whole?]*

⁶¹ *[The Montreal Convention, was signed by the EC on December 9, 1999, on the basis of Art.300(2) EC Treaty, and was approved by Council decision of April 5, 2001, entering into force on June 28, 2004. From that date, according to the Court of Justice, the provisions of the Convention have, in accordance with settled case law, been an integral part of the Community legal order (Case 181/73 Haegeman [1974] E.C.R. 449, para.5, and Case 12/86 Demirel [1987] E.C.R. 3719, para.7). It was after that date that, by decision of July 14, 2004, the High Court of Justice made the present order for reference in the judicial review proceedings before it. The provisions referred to were as follows: Article 19-Delay The carrier is liable for damage occasioned by delay in the carriage by air of passengers, baggage or cargo. Nevertheless, the carrier shall not be liable for damage occasioned by delay if it proves that it and its servants and agents took all measures that could reasonably be*

required to avoid the damage or that it was impossible for it or them to take such measures. Article 22 – Limits of Liability in Relation to Delay, Baggage and Cargo In the case of damage caused by delay as specified in Article 19 in the carriage of persons, the liability of the carrier for each passenger is limited to 4 150 Special Drawing Rights. Article 29 – Basis of Claims In the carriage of passengers, baggage and cargo, any action for damages, however founded, whether under this Convention or in contract or in tort or otherwise, can only be brought subject to the conditions and such limits of liability as are set out in this Convention without prejudice to the question as to who are the persons who have the right to bring suit and what are their respective rights. In any such action, punitive, exemplary or any other non-compensatory damages shall not be recoverable.]

⁶² [See n.1 above at 43.]

⁶³ [Article 6 provides, inter alia, that: “1. When an operating air carrier reasonably expects a flight to be delayed beyond its scheduled time of departure: (a) for two hours or more in the case of flights of 1,500 kilometres or less; or (b) for three hours or more in the case of all intra-Community flights of more than 1,500 kilometres and of all other flights between 1,500 and 3,500 kilometres; or (c) for four hours or more in the case of all flights not falling under (a) or (b), passengers shall be offered by the operating air carrier: (i) the assistance specified in Article 9(1)(a) and 9(2); and (ii) when the reasonably expected time of departure is at least the day after the time of departure previously announced, the assistance specified in Article 9(1)(b) and 9(1)(c); and (iii) when the delay is at least five hours, the assistance specified in Article 8(1)(a). 2. In any event, the assistance shall be offered within the time-limits set out above with respect to each distance bracket.”]

⁶⁴ [See n.1 above at 45.]

⁶⁵ [Irish Aviation Authority Press Release: November 1, 2004. In 2003, a major agreement on North Atlantic airspace was concluded between the Irish and UK Departments of Transport. Building on that agreement, the IAA entered into a significant co-operation pact with its counterpart, the UK National Air Traffic Services (NATS). From January 2005, the IAA will provide air traffic control services

in a new 95,000 sq. kms block of airspace — NOTA (Northern Oceanic Transition Area), off the north-west coast of Ireland. Control of NOTA extends the IAA's responsibilities to a total airspace block of some 450,000 sq. kms, the gateway for over 90 per cent of air traffic between Europe and North America.]

⁶⁶ *[NATS and the IAA control approximately 2.2 million flights, about 14 per cent of the European total.]*

⁶⁷ *[National Air Traffic Services Press Release, February 1, 2005. Helios Technology Ltd won a joint NATS/IAA contract to investigate the creation of a Functional Airspace Block for Ireland and the UK. Helios reported back to the IAA/NATs in June 2005. The author would like to thank Ms Lilian Cassin, Communications Manager with the IAA for her kind assistance in providing me with a copy of the report.]*

⁶⁸ *[Study into the issues and options associated with establishing a functional airspace block in UK and Irish airspace. Solar Alliance / Helios. Final Report, June 2005.]*

⁶⁹ *[ibid. at 4.]*

⁷⁰ *[ibid. at 15.]*

⁷¹ *[The report recommends that the proposed FAB should include the territorial airspace of both countries together with the Shanwick OCA.]*

⁷² *[ibid. at 19.]*

⁷³ *[ibid. at 20.]*

⁷⁴ *[These figures are based on an assumed deviation of approximately 1-2 per cent improvement in horizontal flight efficiency on Irish flight hours. The report notes that there was around 200,000 flight hours in Irish airspace for 2003 at a cost of €72 per minute.]*

⁷⁵ *[The report notes that many of the regulatory processes have already been initiated.]*

⁷⁶ [*ibid.* at 41.]

⁷⁷ [*This has already been done, see n.51 above.*]

⁷⁸ [*For a more detailed discussion of air passenger rights, see **Neligan** “Air passenger rights—A new departure in European aviation law” (2006) 13 C.L.P. 123.*]