Study on the SES2+ Proposal of the European Commission (2020)

Carried out for FABEC

Authors: Dr Pablo Mendes de Leon and Niall Buissing, LLM/Lexavia

Date: 10 December 2020

EXECUTIVE SUMMARY

As in other fields of aviation, the EU policymakers and legislators are ahead of the global evolution of aviation-related tasks and activities, creating a dynamic environment, also in the field of Air Traffic Management (ATM). The environment, which is created by the Single European Sky (SES) regimes, including regulations, policy documents and studies made in the context of this regime, has given rise to innovative exercises. These have been implemented in some, but not in all cases.

This report analyses the SES initiatives, especially selected provisions of the draft regulation designed to establish the SES 2+ regime, hereinafter also referred to as the Proposed Regulation (2020), in light of principles and binding provisions of public air law, with special reference to those laid down in the Chicago Convention on international civil aviation (1944), hereinafter referred to as the Chicago Convention, and the safety Annexes which are attached to this convention.

These public air law instruments proceed from State sovereignty in national airspace, leading to international State responsibility for the provision of services and infrastructure on national territory, in the area of Air Traffic Management (ATM). This conceptual starting point implies that the lines of responsibility for the provision of ATM-related services and infrastructure converge into the State. The State may *delegate*, but *not attribute* ATM-related functions to other bodies, including regional organisations such as the EU, and other stakeholders, but the State cannot transfer responsibilities as it remains ultimately responsible for the provision of these functions, services and infrastructure. As a corollary, the State must, realistically, be capable of conducting oversight of these ATM related activities. ICAO Annexes accommodate the existence of bodies which are not directly linked with the State, and governmental bodies, and identifies those as 'suitable agencies', which may play a role in the performance of ATM-related tasks. These 'suitable agencies', and bodies which are performing ATM-related tasks in, mostly adjacent States, still fall under the ultimate responsibility of the State in whose national airspace such tasks are carried out.

Back in 1937, the Permanent Court of International Justice (PCIJ) has stated that sovereignty should not be stretched to such an extent that it obscures the realities of a new regime. The question is whether the EU States are still capable of exercising that sovereignty under that regime in the context of the SES 2+ regime, from a regulatory perspective and realistically. The COVID-19 pandemic has also re-articulated the principal role of the State in international civil aviation, and in other areas. In times of 'peace', trade, and the implementation of new ideas moving forward ATM, can flourish, in light of the above concepts.

It is signalled that the SES regimes continue to expand the functions of the EU Commission and EASA, and to set up bodies, such as the Network Manager, the Performance Review Body, the SESAR Joint Undertaking, the SESAR Deployment Manager, including undertakings engaged in market-oriented activities. Obviously, those bodies are, in the first place, subject to the SES, or SES 2+ regime, which transparently identifies their roles and responsibilities. At the same time, the Proposed Regulation (2020) acknowledges the responsibility of States, which are represented by Civil Aviation Authorities (CAAs), National Supervisory Authorities (NSAs) and National Competent Authorities (NCAs). NSAs and NCAs must be strengthened by adequate resources.

In the instances indicated below, the question is raised whether the more 'horizontal' organisation of the SES/SES2+ environment, initiating cross-border ventures and cooperation between the above-mentioned bodies and undertakings, which are established in different EU Member States, match, both legally and practically, with the 'vertical lines of responsibility' set out in the Chicago/ICAO regime. The position of the Network Manager (NM) under the Proposed Regulation (2020) is legally slightly equivocal, because it must serve two masters: ICAO and the EU under an "appropriate governance" regime which is not as clearly defined as may be needed, considering the different goals of these two regimes. Speaking of market-oriented conditions in the context of unbundling of ATM-related services, attention should be paid to the coherence of the safety, and other public policy arguments, with competition-related concerns, which may arise, when such conditions are implemented.

The present report is geared to create awareness of the role of public air law. In times of war, emergency, and – serious – accidents, history, including the recent history, demonstrate that, at the end of the day, the State is held responsible, and possibly liable, for the consequences of an accident caused by an ATM-related factor.

TABLE OF CONTENTS

LIST OF ABBREVIATIONS

AIA	Accident Investigation Authority
ANSP	Air Navigation Service Providers
ASA	Air Services Agreements
ATC	Air Traffic Control
ATM	Air Traffic Management
ATS	Air Traffic Service
ATSP	Air Traffic Service Providers
CAA	Civil Aviation Authority
EASA	European Aviation Safety Agency
EC	EU Commission
ECHR	European Court of Human Rights
ECJ	European Court of Justice
EDA	European Defence Agency
EU	European Union
FAA	Federal Aviation Agency
ICAO	International Civil Aviation Organization
MUAC	Maastricht Upper Area Control Centre
NCA	National Competent Authorities
NM	Network Manager
NSA	National Supervisory Authorities
PRB	Performance Review Body
RSOO	Regional Safety Oversight Organisation
SARPs	Standards and Recommended Practices
SES	Single European Sky
SESAR	Single European Sky ATM Research
SSP	State Safety Programme

BACKGROUND

The EU Commission (EC) has launched a proposal designed to revise the basic SES regulations which were drawn up in 2004 and amended in 2009. Meanwhile, the EC has implemented the basic SES regulations of 2004 and 2009 in many Commission Regulations.

The European aviation landscape has changed in the decade after the adoption of the SES 2 regime in 2009, and so have the perceptions of the Air Navigation Service Providers (ANSPs), and the European States,[1] who license, designate and oversee them with respect to the provision of air navigation services.[2] The Proposed Regulation (2020) also provides for the governance regarding the performance of ATM-related tasks by, in particular, National Supervisory Authorities (NSAs), National Competent Authorities (NCAs) and the Performance Review Body (PRB). NSAs must supervise the economically efficient operation of Air Navigation Service Providers (ANSPs) for terminal services, whereas NCAs will supervise safety. The EC will be mandated to set performance targets on environment, capacity and cost-efficiency of air navigation. The new PRB will be tasked under the new proposal to assess and adopt the performance plans for *en-route* of the Air Traffic Service Providers (ATSPs).

PRINCIPAL LEGAL QUESTIONS

The FABEC wishes to obtain a legal assessment of the SES 2+ Draft Legislative proposal as released by the EC, hereinafter referred to as '*the Proposed Regulation* (2020)', thus supporting the SES 2+ deliberations. Principal legal questions pertain to the following:

1. Which elements of the Proposed Regulation (2020) can be related to the sovereignty principle laid down in Article 1 of the Chicago Convention (1944), to be read in conjunction with Articles 2, on the scope of sovereign airspace, and Article 28, providing for international State responsibility for the provision of air navigation services and infrastructure in national territory including airspace, and possibly other provisions of this convention, as well as Standards and Recommended Practices (SARPs) of ICAO Annex 11, specifying such responsibilities in more concrete measures and opening the door for cross-border service provision?

2. Do these elements of the Proposed Regulation (2020) comply with the above provisions of international air law (Articles 1, 2, 28 and other provisions of the Chicago Convention), and relevant SARPs established by ICAO?
   In analysing these elements, special attention will be paid to:
   a) the position of the Network Manager,
   b) the charging scheme,
   c) the new Performance Review Body (PRB),
   d) the certification, designation and oversight of ANSPs, including ATSPs, and:
   e) the unbundling of Air Navigation Services, and;

3. If not, what are the implications of such inconsistencies?

A summary of the answers is provided in the Executive summary, as to which see above.

[1] Those States are the EU States, Norway, Iceland and Switzerland, as well as the States who apply the SES regime in the context of the agreements concerning the creation of the European Common Aviation Area (ECAA).
[2] As explained in, among others, EC's Staff Working Document SWD(2020) 187 final, and resulted in a Proposal for an EU Regulation on *the implementation of the Single European Sky*, as to which see Working Paper dated 7 October 2020 (Interinstitutional files 2013/0186(COD).

1. THE SES REGIME IN LIGHT OF THE SOVEREIGNTY AND RELATED PRINCIPLES OF INTERNATIONAL AIR LAW

1.1 The SES regime in light of the sovereignty principle

1.1.1 Like its predecessors, the SES 2+ regime confirms that EU States enjoy sovereignty over their airspace. The SES 2+ regime is not designed to affect the competencies of such States relating to "public order, public security and defence matters" as explained in Article 35 of the Proposed Regulation (2020). The Proposed Regulation seeks to assist the EU States

> "in fulfilling their obligations under the Chicago Convention, by providing a basis for a common interpretation and uniform implementation of its provisions, and by ensuring that those provisions are duly taken into account in this Regulation and in the rules drawn up for its implementation."

Practice must show whether the European States still possess the tools to fulfil the ATM-related tasks which are assigned to them in the SES 2+ regime, and by, and under the Chicago Convention (1944), as explained below. As it will be variously confirmed in the next sections, such States bear the final responsibility for the execution of these tasks.

1.1.2 The European States[3] are parties to the Chicago Convention, whereas the EU is not. As acknowledged in the SES regime, the EU institutions are obliged to permit the EU States to perform their duties under this convention. As a corollary, the EU does not see itself as being bound by such duties.[4]

1.1.3 However, the EU institutions and the EU States would find themselves in a precarious position from the perspective of international law, if their rights and obligations would not be aligned. This alignment is what the Proposed Regulation (2020) attempts to achieve.

1.1.4 The following sections will shed a light on the interpretation of the sovereignty concept, and other principal provisions of the Chicago Convention which may be affected by provisions of the SES 2+ regime. The compatibility between more concrete matters governed by the SES 2+ regime and provisions of the Chicago Convention, as well as Standards and Recommended Practices (SARPs) drawn up and updated from time to time by the International Civil Aviation Organization (ICAO) in the Annexes to this convention, will be discussed in section 2.

---

[3] As identified in footnote 1, above.

[4] See, Par. 61 of Case C-366/10, *Air Transport Association of America, American Airlines Inc., Continental Airlines Inc., United Airlines Inc.* v *the UK Secretary of State for Energy and Climate Change*: "Although the first paragraph of Article 351 TFEU implies a duty on the part of the institutions of the European Union not to impede the performance of the obligations of Member States which stem from an agreement prior to 1 January 1958, such as the Chicago Convention, it is, however, to be noted that that *duty of the institutions is designed to permit the Member States concerned to perform their obligations under a prior agreement and does not bind the European Union as regards the third States party to that agreemen*t (see, to this effect, Case 812/79 *Burgoa,* [1980] ECR 2787, paragraphs 8 and 9)." (*italics added*)

1.2 Brief explanation of the sovereignty principle of the Chicago Convention (1944)

1.2.1 The Chicago Convention refers to, but does not define the term "sovereignty". Its opening article (1) confirms that each State has "complete and exclusive sovereignty over the airspace above its territory."

1.2.2 This provision must be seen as a starting point, because the other provisions of the Chicago Convention, its Annexes, and other provisions of international or regional aviation arrangements, would be redundant, if States continue to rely on "complete and exclusive sovereignty." Should always sovereignty be "complete and exclusive", States could any time take measures pertaining to the management of their airspace, air navigation and air traffic, irrespective of subsequent arrangements, which States have made in the exercise of their sovereign powers. Hence, sovereignty includes the competence to enter into agreements with other States, in order to achieve a specified objective, for instance, the promotion of safety and efficiency in Air Traffic Management.

1.2.3 EU States have *exercised such sovereign powers* by setting up the SES regime. As demonstrated by the measures which practically all States in the world have adopted in the context of the COVID-19 pandemic, States tend to fall back on their "complete and exclusive sovereignty" in times of war and emergency conditions, for the protection of public order, which is also guaranteed by Article 35 of the Proposed Regulation (2020). However, in 'normal' times of peace, the subsequent provisions of the Chicago Convention, SARPs, and agreements and arrangements between States, apply, one of those arrangements being the SES regime.

1.2.4 That said, the question remains whether the provisions of the Proposed Regulation (2020) comply with international law, in particular international air law, because, as stated by the European Court of Justice (ECJ): "The European Union must respect international law in the exercise of its powers," which means that the Proposed Regulation "must be interpreted, and its scope delimited, in the light of the relevant rules of the … international law of the air …. ."[5]

1.2.5 Again, States promote safety and efficiency by the establishment of ATM systems, *in the exercise of their sovereign powers*. The basic principle on sovereignty laid down in Article 1 of the Chicago Convention does not prevent them from doing so. On the contrary, it enables them to engage into mutual relations for the achievement of the mentioned goals, as exemplified by the SES regimes, in which context they have attributed functions to European bodies.

1.2.6 It follows from the development of international relations, including the sharing of national competencies with international organisations and the conclusion of

[5] See, Par. 123 of Case C-366/10, *Air Transport Association of America*, *American Airlines Inc*., *Continental Airlines Inc*., *United Airlines Inc*. *v the UK Secretary of State for Energy and Climate Change*: 123 The European Union *must respect international law in the exercise of its powers*, and therefore Directive 2008/101 must be interpreted, and its scope delimited, *in the light of the relevant rules of the international law of the sea and international law of the air* (see, to this effect, *Poulsen and Diva Navigation*, paragraph 9). (*italics added*)

international agreements and arrangements, that the concept of sovereignty must be seen, and may be re-qualified, in light of these developments.

1.2.7 Back in 1944, the sovereignty concept was written in stone. That said, States realised as early as in 1944 that international civil aviation was optimally served by the implementation and application of globally harmonised standards. The provisions of the Chicago Convention (1944) have been made subject to subsequent developments, and to various provisions of the Chicago Convention. One of those is Article 28, as to which see the next section.

1.3 International State responsibility for air traffic management in national airspace

1.3.1 Article 28 of the Chicago Convention vests its contracting States, including the EU States, with *international State responsibility* for the management of air traffic in their national airspace.[6] This provision is an expression of the duty of States to enhance, and protect, the integrity of national airspace by the provision of infrastructure and related services there.[7] That duty can be considered as a corollary of the above sovereignty principle. Moreover, the responsibilities laid down in this provision are vital for enhancing the safety of air navigation which is the core objective of the Chicago Convention.[8]

1.3.2 The words '*so far as it may find practicable*' have been italicised, because they convey the impression that States do not have a duty, but *may* provide

---

[6] Article 28 - *Air navigation facilities and standard systems*
"Each contracting State undertakes, *so far as it may find practicable,* to:

a) Provide, in its territory, airports, radio services, meteorological services and other air navigation facilities to facilitate international air navigation, in accordance with the standards and practices recommended or established from time to time, pursuant to this Convention;
b) Adopt and put into operation the appropriate standard systems of communications procedure, codes, markings, signals, lighting and other operational practices and rules which may be recommended or established from time to time, pursuant to this Convention;
c) Collaborate in international measures to secure the publication of aeronautical maps and charts in accordance with standards which may be recommended or established from time to time, pursuant to this Convention." (*italics added*)

[7] See, *Safety Oversight Manuel*; ICAO Doc 9724 (2011); Part B - *The Establishment and Management of a Regional Safety Oversight Organization*
Par. 2.1.8 "Under the Chicago Convention, only the State has responsibility for safety oversight, and this responsibility may not be transferred to a regional body. Thus, although the State may delegate specific safety oversight tasks and functions to an RSOO, such as inspections for the certification of an operator, the State must still retain the minimum capability required to carry out its responsibilities under the Chicago Convention. States must always be able to properly and effectively monitor the safety oversight functions delegated to the RSOO."
Par. 3.1.2 "Execution, by an RSOO, of certain tasks and functions on behalf of its member States requires delegation of authority to the RSOO. Delegation of authority by a member State to its RSOO does not legally require the RSOO to be structured in a specific way and involves *only the delegation of functions, not responsibilities*. Under the Chicago Convention, *safety oversight remains the responsibility of the State even if the associated tasks and functions are delegated to another entity*." (*italics added)*

[8] See, *Safety Oversight Manuel*; ICAO Doc 9724 (2011); Part B - *The Establishment and Management of a Regional Safety Oversight Organization*
Par. 2.1.1 "The Convention on International Civil Aviation (Chicago Convention) and its Annexes allocate responsibility for aviation safety to individual Contracting States. *Each State* bears responsibility for the continuing airworthiness of aircraft; safe and efficient aircraft operations; the licensing and/or certification of personnel; and safe air traffic flow within its airspace, *including the provision of air traffic services and an adequate aerodrome infrastructure*. (*italics added)*

infrastructure and related services, if they deem that opportune. However, State practice as expressed in regional air navigation agreements,[9] ICAO documents,[10] national aviation acts, the SES and SES2+ regimes and court cases, proceed from a *duty* of States to provide ATM-related infrastructure and services.

1.3.3 Another term which requires emphasis in this report concerns "undertakes." Practice shows that States *undertake* to either provide ATM-related infrastructure and services themselves, or to *delegate* that provision to corporatized or privatised entities, whether or established in their territory.[11] The previous section identified the legal basis for the delegation of safety and manage related tasks to providers who execute these tasks under the "authority" of the State delegating these - tasks - to such providers. Hence, delegation is perfectly permissible.

1.3.4 Another legal basis for delegation of ATM-related tasks can be found in ICAO Annex 11 on *Air Traffic Services*. Standard 2.1 of Annex 11 to the Chicago Convention stipulates the following:

> "a State may *delegate to another State* the responsibility for establishing and providing air traffic services in flight information regions, control areas or control zones extending over the territories of the former." (*italics added*)

Hence, ICAO allows not only delegation of ATM tasks to corporatized and privatised entities, but also to another State, or entities coming under the authority of another State. States may delegate those functions also to joint operating agencies[12] and international organisations such as Eurocontrol.

1.3.5 Delegation is different from attribution. If a State *attributes* functions to another body, the latter body becomes responsible for its performance. In case of *delegation*, the delegating body remains responsible for the execution of the delegated tasks.

1.3.6 While the Chicago Convention (1944) does not use the term 'delegation', because it proceeds from the central role of the State in international civil aviation, ICAO documents use this term variously. Such documents allow for delegation of ATM functions to other bodies, including regional organisations, while emphasising that the State remains overall responsible for the execution such functions.[13] If so, that State must possess enough resources in order to support interface with the body

[9] See, ICAO Doc 7754, *Air Navigation Plan – European Region*, 23rd Edition (1985, as variously updated), Introduction, Section 3.

[10] See, ICAO Safety Manuals, and ICAO Safety Management Manuel, ICAO Doc 9859 (2018), at 1.1.4: "A State shall require that an SMS is developed and maintained *by those service providers under its authority*, as identified in Annex 19." (*italics added*)

[11] See section 2.5 below

[12] Under Chapter XVI of the Chicago Convention

[13] See, ICAO Annex 19 *Safety Management* (2016), Introduction

"Certain State safety management functions required in Annex 19 may be delegated to a regional safety oversight organization or a regional accident and incident investigation organization on behalf of the State." *Note 1.— States retain responsibility for safety management-related functions and activities delegated to another State, RSOO or RAIO.*

to whom these functions are delegated.[14] Transparency with respect to the transfer of such functions is another requirement.[15] Relations with ICAO, which are not mentioned in the Proposed Regulation (2020), must also be observed in 'suitable arrangements'.[16]

1.3.7 Crucially, the applicability of such cross-border arrangements, including those which are made in the context of the SES regimes, is confined to the States parties to such arrangements. They do not bind third States, who will have recourse to the State in whose airspace the ATM-related problems causing an accident to occur.[17] The Chicago Convention does not include a multilateral provision on the recognition of the transfer of responsibility for safety supervision as it does in case of leasing of aircraft.[18]

1.3.8 The above domestic and cross border-transactions on the delegation of ATM-related tasks do not affect the sovereignty of the delegating State.[19] The delegating State retains *final international State responsibility* for the execution of those tasks under the Chicago Convention.

1.3.9 Article 28 of the Chicago Convention does not only refer to the performance of operational tasks, but also to a regulatory tasks, that is, the duty to implement ICAO SARPs. While the legal force of those SARPs has been often debated in publications, a discussion hereof falls outside the scope of this study.

---

[14] See, *Safety Oversight Manuel* (2018), ICAO Doc 9859
Par. 8.2.3.2: "A State may choose *to delegate* some specific *functions or tasks* under the SSP to another State, *regional safety oversight organization* (RSOO) or *other competent organization*, such as a trade association, industry representative organization or private body. Although a State may delegate specific functions, it will still need enough personnel *to interface with the delegated entity* and to process the information provided by the delegated entity." (*italics added*)

[15] See, *Safety Oversight Manuel* (2018), ICAO Doc 9859
Par. 8.3.6.2 "State's safety management responsibilities can be discharged by multiple aviation authorities within the State, for example, the CAA and an independent AIA. States should clarify which authority within the State is responsible for coordinating the maintenance and implementation of the SSP. Many States assign this role to the CAA, given that the CAA is normally responsible for most of the SSP responsibilities. The roles and responsibilities of all the authorities involved should be *identified and documented*." (*italics added*)

[16] See, Resolution A37-21 on *cooperation with regional organizations and regional civil aviation bodies*, also adopted by the 37th Session of the ICAO Assembly, endorsed the ICAO Policy on Regional Cooperation and its Framework for Regional Cooperation and urged States, inter alia, to support their regional organizations and regional civil aviation bodies in entering *into suitable arrangements* with ICAO. (*italics added*)

[17] See section 3 below

[18] Art. 83 bis: a. "Notwithstanding the provisions of Articles 12, 30, 31 and 32a, when an aircraft registered in a contracting State is operated pursuant to an agreement for the lease, charter or interchange of the aircraft or any similar arrangement by an operator who has his principal place of business or, if he has no such place of business, his permanent residence in another contracting State, the State of registry may, by agreement with such other State, transfer to it all or part of its functions and duties as State of registry in respect of that aircraft under Articles 12, 30, 31 and 32a. The State of registry shall be relieved of responsibility in respect of the functions and duties transferred."

[19] See, the note to Standard 2.1: "If one State delegates to another State the responsibility for the provision of air traffic services over its territory, *it does so without derogation of its national sovereignty*. Similarly, the providing State's responsibility is limited to technical and operational considerations and does not extend beyond those pertaining to the safety and expedition of aircraft using the concerned airspace." (*italics added*)

We proceed from the implementation of such SARPs, especially those which are drawn up in ICAO Annex 11, by EU Member States in their national aviation regulations, and EASA regulations, in a harmonised manner, as confirmed in Article 1(3) of the Proposed Regulation (2020).

1.4 Concluding remarks

1.4.1 The SES 2+ regime acknowledges its adherence to the sovereignty concept which is the corner stone of the Chicago Convention (1944). Sovereignty goes hand in hand with ultimate, and international State responsibility for the execution of ATM-related functions, including the provision of services.

1.4.2 Such functions and services may be delegated - in a '*vertical*' direction, that is, from the State to corporatized or privatise entities, under the Chicago Convention/ICAO regime. The same is true for cross-border ventures in a '*horizontal*' direction, that is, from one State to another State, or to an international organisation such as Eurocontrol, as is the case for the Maastricht Upper Area Control Centre (MUAC). Both types of delegation are foreseen in the SES 2+ regime.

1.4.3 Delegation to RSOOs is subject to compliance with conditions which are established under the Chicago Convention/ICAO regime. These include:

- The State remains *ultimately responsible* for the performance of ATM-related functions and services;
- The transfer of such functions and services between the State and the delegated RSOO must be accomplished *transparently*;
- The RSOO must make 'suitable arrangements' with ICAO on the delegation of these functions and services;
- Implementation and application of the minimum Standards of ICAO.[20]

1.4.4 Mindful of the words of the Permanent Court of International Justice (PCIJ), back in 1937,[21] the question is whether EU States are still capable of exercising that sovereignty under that regime in the context of the SES 2+ regime, from a regulatory perspective and realistically. As stated in the mentioned decision of the PCIJ, sovereignty should not be stretched to such an extent that it obscures the realities of a new regime.

1.4.5 The next section will focus on the regulatory perspective by analysing whether the lines of responsibility drawn by the Proposed Regulation (2020) comply with the findings of the above section. In other words, it will be investigated whether EU States are still capable of performing the tasks mandated to them by international air law in the context of the SES 2+ regime.

[20] A39-14: *Regional cooperation and assistance to resolve safety deficiencies, establishing priorities and setting measurable targets* (October 2016), Par. 7

[21] PCIJ, Judgment No. 22, dated 8 October 1937, France v. Greece, *Case Lighthouses in Crete and Samos*, Paragraph 121: "A juristic conception must not be stretched to the breaking-point, and a ghost of a hollow sovereignty cannot be permitted to obscure the realities of this situation." The 'juristic conception' the PCIJ has in mind is the concept of sovereignty.

2. COMPLIANCE OF SELECTED ELEMENTS OF THE PROPOSED REGULATION (2020) WITH PRINCIPAL PROVISIONS OF INTERNATIONAL AIR LAW

2.1 Attribution and delegation of ATM functions by the State

2.1.1 Section 1 of this report confirmed the final responsibility of States for the performance of ATM-related functions. 'The State' is, in the first place, represented by its government, and, after that, by public bodies such as Civil Aviation Authorities (CAA), Departments of Transport and Air Transport in the concerned Ministry and National Supervisory Authorities (NSAs). All these bodies are identified with 'the State' whom they represent when exercising public functions. Such public functions are not 'delegated', but 'attributed' to them pursuant to domestic law and policy.

2.1.2 While keeping such final responsibility under international law, States are permitted to delegate such functions to other bodies, including private or corporatized undertakings, international organisations and agencies, and to other States in cross-border ventures.[22] Such permissions are regulated in ICAO Annexes, in particular ICAO Annex 3 on *Meteorological Service for International Air Navigation*, in Annex 10 on *Aeronautical Telecommunications*; in the aforementioned Annex 11 on *Air Traffic Services*, in Annex 15 on *Aeronautical Information Services*.

2.1.3 These Annexes allow States to "designate the authority responsible for" the provision of air traffic and other ATM-related services which authority may be "a suitable agency." The term "agency" is not defined in said Annexes, and might suggest that it must be a public entity. However, practices, as exemplified by the UK NATS and the Swiss Skyguide ANSP show that private or corporatized undertakings also fall under this term.

2.1.4 While European States are bound by European regulations, which they have established, this is not the case for non-European States and stakeholders, in particular non-European airlines. European and non-European States[23] and their respective stakeholders are linked through the Chicago/ICAO regime.[24]

2.1.5 The 'European regulations' mentioned in the previous section are, among others, the regulations of the SES regime, and the secondary regulation made under it. This report targets the Proposed Regulation (2020) which identifies bodies which are tasked with ATM related responsibilities and functions under the SES 2+ regime. They are:

- The European Member States;[25]
- The NSAs – as 'State bodies', see above;
- The EU Commission;
- Eurocontrol;

[22] As explained in section 1.3.4, above.
[23] Non-European States are mentioned in Art. 30 of the Proposed Regulation (2020), in the sense that they may be involved with the SES regime.
[24] See, sections 1.2 and 1.3
[25] See footnote 1

- EASA;
- The Performance Review Body (PRB);
- The Network Manager;
- 'Military authorities', and the European Defence Agency (EDA).

All of these institutions play a role in the fulfilment of ATM-related objectives as defined by the SES 2+ regime.

2.1.6 The next sections will concisely analyse:

- the position of the Network Manager, in section 2.2,
- the charging scheme, in 2.3,
- the executive powers, roles and responsibilities of the new PRB, in 2.4,
- the unbundling of Air Navigation Services, in 2.5, and:
- the certification, designation and oversight of ANSPs, in 2.6,

The present section (2) will only very briefly indicate the main tasks and functions of the above bodies (Network Manager, PRB, ANSPs), as these are accurately detailed in various EU and Eurocontrol documents, which are, in part, quoted.

2.1.7 This section will be completed with concluding remarks in 2.8, and take into account the mantra of international air law. It will be tested whether the lines of responsibility for ATM-related tasks converge into the final responsibility of the State in whose airspace they are carried out.

2.2 The position of the Network Manager

2.2.1 The Network Manager's (NM) main function is to deliver added performance at network level through the tools, which have been made at its disposal.[26] These tools include, but are not limited to, enhancing network performance and operations, including traffic flows, planning of airport performance, the management of communications, navigation and surveillance, as well as of disruption and crisis situations.[27] The Eurocontrol Organisation has been appointed as the NM for the SES till 31 December 2029.[28]

2.2.2 Network Management is legally firmly embedded in the Proposed Regulation (2020).[29] The Network Manager must work with European States States/NSAs and ANSPs, *on whose behalf* it executes those, in order to achieve its objectives.[30] The question is how that regulatory scheme fits in the Chicago/ICAO regime, which is based on *international State responsibility* for ATM-related tasks and functions.

2.2.3 'Network Management' is not an activity which is regulated by the Chicago Convention/ICAO regime. Certain ICAO documents refer to it but they do not give a legal status to this task. Closest to the identification of this body comes the term 'suitable agency.'[31] ICAO Annex 11 on *Air Traffic Services* mentions this term, in

[26] See, Eurocontrol, *Network Cooperative Decision Making Processes* (Network CDM) (2016)
[27] See, https://www.eurocontrol.int/network-manager
[28] On the basis of EU Commission Implementing Decision 2019/709
[29] See, Art. 17
[30] See, Art. 17 (4)(h), in conjunction with Art. 17(2)
[31] As noticed in section 2.1.3

connection with the 'hardcore' provision of air traffic services,[32] but not to the *management* of ATM-related services via, in this case, a European network.

2.2.4 From the perspective of the Chicago Convention/ICAO regime, the challenge is to integrate the 'Network Manager' into this regime. The only way in achieving that is through the 'traditional' lines of responsibility laid down in Article 28 of the Chicago Convention, as confirmed, and fine-tuned, in ICAO Annex 11. The Network Manager's work is performed "on behalf of" the European States.

2.2.5 The tasks and responsibilities of the States parties to the Chicago/ICAO regime are detailed in the SARPs Air Traffic Flow Management (ATFM) of ICAO Annex 11. ATFM should be implemented on the basis of regional air navigation agreements or, if appropriate, through multilateral agreements, concluded between States.[33] Hence, the NM is bound by these arrangements.

2.2.6 Consequently, should non-European stakeholders be negatively affected, and damaged by the activities of the Network Manager, for instance, by delays, detours, and/or accidents, which cannot be justified on reasonable grounds, they ought to follow the above lines of responsibility and address their complaints, and, as the case may be, claims to the State in whose airspace the damaging activities occur. These instances are exemplified by a - limited - number of 'case studies', which are alluded to in section 3.

2.2.7 The NM is part of Eurocontrol and the employees working in the NM division are employees of Eurocontrol. Eurocontrol an international *governmental* organisation whose members are parties to the Chicago Convention (1944) and, therefore, members of ICAO. Hence, the NM in its capacity as being part of the Eurocontrol Organisation, is committed to adhere to the Chicago/ICAO regime.

2.2.8 The Proposed Regulation (2020) prescribes that the tasks of the NM "shall be subject to appropriate governance."[34] It does not explain what "appropriate governance" means, neither in law, nor in practice.

2.2.9 The same provision also lists the tasks of the NM, and mandates the EU Commission to specify the tasks of the NM, and adopt implementing rules the coordination and harmonisation of processes and procedures to enhance the efficiency of aeronautical frequency management additional network functions and services as defined in the ATM Master Plan.[35]

[32] See, Standard 2.1.3: "When it has been determined that air traffic services will be provided, the States concerned shall designate the authority responsible for providing such services. Note 1.— The authority responsible for establishing and providing the services may be a State or a *suitable Agency*. (*italics added*)
[33] See, Recommended Practice 3.7.5.2 of ICAO Annex 11
[34] See, Art. 17(2)
[35] Pursuant to Art. 17(3) and (4)

2.2.10 *Concluding remarks*:

The position of the NM under the Proposed Regulation (2020) is legally somewhat unstable, because it, - the Eurocontrol Organisation – must serve two masters: ICAO and the EU. Pursuant to the Proposed Regulation (2020), it is subject to "appropriate governance", which probably refers to responsibility for safety oversight. However, it is unclear who is responsible for safety oversight considering two regimes which are not aligned. Also, attention may have to be paid to the coherence between the two regimes in terms of the achievement of objectives, as well as the application of substantive standards and procedures.

2.3 The charging scheme

2.3.1 The 'umbrella' provision of the Proposed Regulation (2020) on the charging scheme[36] accurately relies on the international framework. It pledges consistency with "Article 15 of the Chicago Convention on International Civil Aviation and with Eurocontrol's charging system for *en-route* charges."

2.3.2 Again, the expression of respect for the international regime, as evidenced by the last quoted provision, will, if also applied in practice, facilitate relations with non-European States and stakeholders, who are bound by the same parameters for the charging scheme, namely,

- non-discriminatory treatment of aircraft operators using air navigation, *en route*, infrastructure and related services, as well as airport terminal services,
- the cost-basis of the charges, and
- the transparency of the decision-making process.[37]

2.3.3 These provisions receive 'extra' legal force through their implementation in Air Services Agreements (ASAs) concluded between European and non-European States,[38] or between the EU and its Member States and non-European States.[39] Moreover, such ASAs provide for consultations and a dispute settlement regime in case parties do not agree on the level of charges. Such mechanisms exist in the Chicago Convention (1944), but are less relied upon because of their multilateral, and political implications.

---

[36] See, Art. 12

[37] See, Art. 15 of the Chicago Convention, in conjunction with Doc 9082 ICAO's Policies on *Charges for Airports and Air Navigation Services*, as updated from time to time

[38] A typical clause would read as follows: Article … on *User Charges*

1. User Charges that may be imposed by the competent charging authorities or bodies of each Contracting Party on the Airlines of the other Contracting Party shall be just, reasonable, not unjustly discriminatory, and equitably appointed among categories of users. In any event, any such Users Charges shall be assessed on the Airlines of the other Contracting Party on terms not less favorable than the most favorable terms available to any other Airline at the time the charges are assessed.
2. User Charges imposed on the Airlines of the other Contracting Party may reflect, but shall not exceed, the full cost to the competent charging authorities or bodies of providing the appropriate airport, airport environmental, air navigation, and aviation security facilities and services at the airport or within the airport system. Such full cost may include a reasonable return on assets, after depreciation. Facilities and services for which charges are made shall be provided on an efficient and economic basis."

[39] See, the EU-US agreement on air transport (2007/2010); the EU-Canada agreement on air transport (2009) and the EU-Qatar Agreement on air transport (2019).

2.3.4 In the Proposed Regulation (2020), no reference is made to other EU regulations, including but not limited to EU Commission's Implementation Regulation 391/2013 and EU Directive 2009/12 on airport charges. The first mentioned regulation (391/2013) provides for, among others, the modulation of charges, but we do not notice a reference to that term in the Proposed Regulation (2020).

2.3.5 The Proposed Regulation (2020) requires alignment of the charges with the criteria adopted for the calculation of costs drawn up in the ICAO Regional Air Navigation Plan, European Region.[40] EU States are responsible for compliance of criteria for setting charges with international standards.[41]

2.3.6 The establishment of user charges is a complex subject, which has been, and is, subject to a good number of regulations on EU, national, bilateral and global levels. Studies have researched avenues for modulation of charges in accordance with predetermined criteria.

2.3.7 Concluding remarks

The Proposed Regulation (2020) appears to reflect the substantive conditions for the establishment of charges under the Chicago Convention/ICAO regime. European States are responsible for making sure that such conditions are applied, which fits in this regime.

2.4 Performance under the auspices of the new Performance Review Body (PRB)

2.4.1 The tasks and envisaged targets of the PRB are well documented and laid down in an EU regulation.[42] The targets pertain to

- the promotion of safety, which is deemed to be at a high level, whereas additional improvements may be manifested in the safety culture and risk management;
- the further reduction of environmental damages, among others, by avoidance of detours and delays;
- the enlarging the capacity of the European airspace, in order to avoid delays, and in which context civil-military coordination is an important factor;
- economies, including reduction of costs: by the end of 2024 the average unit cost for the provisions of air navigation services should be substantially reduced.[43]

[40] See, Art. 13(4)

[41] As listed in Art. 13(9).

[42] EU Regulation 691/2010 - Performance Scheme for Air Navigation Services and Network Functions in Europe, and EU Commission Implementing Decision 2016/2296 setting up the independent group of experts designated as Performance Review Body of the Single European Sky. Rights and obligations of the PRB are also defined in Art. 3 of EU Regulation 20219/317.

[43] See, among others: https://ec.europa.eu/transport/modes/air/news/2018-10-04-prb-report_en, and https://www.skybrary.aero/index.php/Regulation_691/2010_-_Performance_Scheme_for_Air_Navigation_Services_and_Network_Functions_in_Europe

2.4.2 An ICAO document deals with the establishment of Performance targets.[44] Its primary goal concerns the protection of safety in the context of a 'safety system approach', which must be secured by ICAO, State regulatory authorities and "other appropriate parties."[45]

2.4.3 Neither the PRB nor any similar economic regulator is mentioned in the Chicago Convention/ICAO regime. If needed, it could be identified as another "appropriate party", but it does not receive legal status on the basis of this document. It is hard to see how the work of the PRB could be subject of international repercussions, but if so, it may be made subject to the responsibility of the State for whose territory the forecasts are made.

2.4.4 In so far as the tasks of the PRB are safety-related,[46] they fall under the lines of responsibility drawn up by the Chicago Convention/ICAO regime. However, as they concern approval of performance plans and monitoring, the question is whether they relate to 'the provision' of 'hardcore' ATM-related services, which are regulated under that regime. However as the en-route Performance Plans are approved by the PRB, implying that they carry the responsibility for the monitoring activities, also in relation to third States, should they have any questions. Such Performance Plans for en-route are designed by the ATSPs, whereas the PRB as envisaged by the Proposed Regulation (2020) will assess their consistency with EU wide targets and approve those.

2.4.5 *Concluding remark*:
The responsibilities of the PRB under the Chicago/ICAO regime are limited. This regime focusses on the safety of air navigation, whereas the PRB has a typical monitoring role with respect to the capacity of the network. Thus, a discussion on the coherence between the SES 2+ regime on the one hand, and the Chicago/ICAO regime on the other hand, is less relevant.

[44] See, the text reproduced in footnote 7 above, pursuant to which delegation of specific safety oversight tasks and functions to an RSOO, must be accompanied a State's minimum capability required to carry out its responsibilities under the Chicago Convention. States must always be able to properly and effectively monitor the safety oversight functions delegated to the RSOO.
[45] See, ICAO, Doc. 9854, *Global Air Traffic Management Operational Concept*, Appendix F, Par. 2.2.3.
[46] RP3 defines only targets of the Effectiveness of Safety Management of ANSPs.

2.5 The certification, designation and oversight of Air Navigation Service Providers (ANSPs), including Air Traffic Service Providers (ATSPs)

2.5.1 ANSPs and ATSPs are subject to different provisions of the Proposed Regulation (2020).

2.5.2 ANSPs may be certified by either NSAs or by EASA. The SES regime lays down the common requirements for such certification.[47] ANSPs may offer their services "to Member States, other air navigation service providers, airspace users and airports within the Union."[48]

2.5.3 Conversely, ATSPs are designated to carry out functions in a specified block of airspace. This provision is not subject to competition,[49] as opposed to other, 'ancillary' services which may be unbundled from ANSP (see section 2.6).

2.5.4 Annex 1 names a "Contracting State" as the licensing authority.[50] States must "issue", "validate" and supervise the performance of the license holder, including those held by Air Traffic Controllers. It does not refer to a "suitable agency", to whom this task could be assigned. Chapter 4.4 of ICAO Annex 1 encompasses SARPs for licensing of ANSP/ATC. [51]

2.5.5 From that perspective, certification by EASA as foreseen in Article 8(1) does not meet the 'State' standard. However, EASA may be said to have been attributed competencies of EU States by virtue of EASA Regulation 216/2008.

2.5.6 Safety oversight[52] cannot be transferred from one State to another. The delegating State is still obliged to perform safety oversight with respect to activities executed by a foreign ANSP, also in an SES context.[53]

---

[47] These are based on Art. 7 of EU Regulation 550/2004 on the provision of air navigation services in the Single European Sky (the *Service Provision Regulation*), as amended by EU Regulation 1070/2009 postulating that "The provision of all air navigation services within the Community shall be subject to certification by Member States." ANSPs must be certified by National Supervisory Authorities (NSAs) in accordance with common requirements for service provision in specified areas which are detailed in EU Commission Implementing Regulation 1035/2011 laying down *common requirements for the provision of air navigation services*.

[48] See, Art. 8(4); see also: Article 7(6) of the above Service Provision Regulation

[49] See, Preamble (5) of EU Regulation 550/2004 on *the provision of air navigation services in the single European sky* (the 'service provision' Regulation): "The *provision of air traffic services*, as envisaged by this Regulation, is connected with the exercise of the powers of a public authority, which *are not of an economic nature justifying the application of the Treaty rules of competition*." (*italics added*)

[50] See, Standards 1.2.2 and 1.2.5 of ICAO Annex 1

[51] See, Standard 4.4.1 of ICAO Annex 1: 'Air traffic controller licence' - *Requirements for the issue of the licence* "Before issuing an air traffic controller licence, a Contracting State shall require the applicant to meet the requirements of 4.4.1 and the requirements of at least one of the ratings set out in 4.5. Unlicensed State employees may operate as air traffic controllers on condition that they meet the same requirements."

[52] In Annex 19, Safety Management, defined by ICAO as: "A function performed by a State to ensure that individuals and organizations performing an aviation activity."
comply with safety-related national laws and regulations.

[53] See, the Note to Standard 2.1.1 of ICAO Annex 11: "*Furthermore, the providing State in providing air traffic services within the territory of the delegating State will do so in accordance with the requirements of the latter which is expected to establish such facilities and services for the use of the providing State as are jointly agreed to be necessary.*

2.5.7 Considering the need if not a necessity to know the local environment, it would be appropriate to appoint the State in whose airspace air traffic must be controlled as the designating State. However, the State where the said services have to be performed may impose a profound knowledge of the local circumstances from the provider of these services as a condition for designation, should he/she be licensed in another State, in order to facilitate cross-border service provision in this area.

2.5.8 European States must designate ATS providers for the provision of their services "within the airspace under their responsibility." Hence, the traditional model pursuant to which States the "airspace under their responsibility" coincides with 'national airspace' as defined by Article 1 in conjunction with Article 2 of the Chicago Convention, has been abandoned to the benefit of cross-border ventures, as illustrated by the formation of Functional Airspace Blocks.

2.5.9 Not only the SES regime, but also ICAO Annex 11 supplies a legal basis for cross-border cooperation in the area of ATM.[54] Clearly, the State who delegates the provision of air traffic services to the provider of another State remains 'master' in its own airspace. The foreign provider is a 'guest' in the national airspace of the grantor State, which relationship is underpinned by conditions laid down in Annex 11,[55] and the agreement between the two States. Not only in Europe, but also in third States, States have made use of these provisions in order to engage in such cross-border transactions.

2.5.10 Other conditions, such as those pertaining to access to cross-border service provision without regard to the ownership of the service provider, the location of its principal place of business and the use of facilities, attempt to support such cross-border provision.[56] The same is true for the joint designation of one or more ATS providers in Functional Airspace Blocks. Such conditions are not regulated in the Chicago Convention/ICAO regime, which proceeds from a more traditional model as alluded to in sections 1.2 and 1.3, above.

[54] See also, section 1.3.4

[55] 2.1.1 Contracting States shall determine, in accordance with the provisions of this Annex and for the territories over which they have jurisdiction, those portions of the airspace and those aerodromes where air traffic services will be provided. They shall thereafter arrange for such services to be established and provided in accordance with the provisions of this Annex, except that, by mutual agreement, a State may delegate to another State the responsibility for establishing and providing air traffic services in flight information regions, control areas or control zones extending over the territories of the former.
Note.— If one State delegates to another State the responsibility for the provision of air traffic services over its territory, it does so without derogation of its national sovereignty. Similarly, the providing State's responsibility is limited to technical and operational considerations and does not extend beyond those pertaining to the safety and expedition of aircraft using the concerned airspace. Furthermore, the providing State in providing air traffic services within the territory of the delegating State will do so in accordance with the requirements of the latter which is expected to establish such facilities and services for the use of the providing State as are jointly agreed to be necessary. It is further expected that the delegating State would not withdraw or modify such facilities and services without prior consultation with the providing State. Both the delegating and providing States may terminate the agreement between them at any time.

[56] See, Art. 9(2) and 9(5)

2.5.11 Concluding remark

Subject to the remarks above, the lines of responsibility of the Chicago Convention/ICAO regime appear to have been followed in the Proposed Regulation (2020). The SES 2+ regime makes a step forward, while State responsibilities are, and should be maintained in light of the mentioned regime.

2.6 The unbundling of Air Navigation Services

2.6.1 It follows from the Proposed Regulation (2020) that the provision of certain services, that is, meteorological services and 'support services' may be dissociated, or 'unbundled' from the 'hardcore' ATM service provision made by ANSPs. 'Support services', which are not defined in the Proposed Regulation (2020) may be understood to include aeronautical data service provisions, and the provision of specified communication services.

2.6.2 Such dissociation is aimed at creating a more market-oriented environment. Hence, it should - also - be governed by competition law regimes, laid down in the TFEU[57] and secondary competition regulations.

2.6.3 In this context, legal questions arise as to:

a) The compatibility of the 'unbundling' of ATM-related services with the Chicago Convention/ICAO regime;
b) The pricing regime of data provision which must also be controlled by the competition law regime, pursuant to which concerted between service providers, abuses of dominant positions in case there is only one service provider in a specified airspace block, and possibly State aid constructions;
c) The military status of meteorological and other services providers, if applicable;
d) The interoperability of data systems;
e) In the absence of a European framework, the identification of a liability regime in case damage is caused by the provision of these services;
f) The safeguarding of property rights and storage of data;
g) The protection against cyber security.

In light of the objective of this study, the focus will be placed on the first item (a).

2.6.4 The provision of unbundled services is not excluded under the Chicago Convention/ICAO regime. While the drafters of the Chicago Convention (1944) had ANSP by the State or its 'own' bodies in mind when formulating Article 28, ICAO has accommodated the 'unbundling' of the ANSP by inserting the term that 'suitable agency' – without defining it – in its Annexes, including but not limited to Annex 3 on *Meteorological Service for International Navigation*.[58]

2.6.5 The SES regime is slightly ambiguous as to its lending support to the instrument of 'unbundling': on the one hand, it confirms its support for the Chicago/ICAO regime, and appears to shield service provision from competition-related market

[57] Treaty on the Functioning of the European Union
[58] See, sections 1.3.3, 2.1.2 and 2.1.3

forces,[59] on the other hand it also refers to the promotion of market conditions for ATM-related service provision.

2.6.6 Concluding remarks

While ICAO adopts flexibility as to the introduction of new schemes in the sphere of air navigation service provision, it cannot go around the 'mantra' of the Chicago Convention (1944), proceeding from sovereignty in national airspace. With those sovereign powers come responsibilities for safeguarding international air navigation. These culminate in *ultimate State responsibility* in relations with other States for, for instance, ATM in national airspace, irrespective of horizontal – that is, with other States, in cross border ventures – or vertical movements in the provision of services and infrastructure.

While unbundling of services is permitted under the Chicago/ICAO regime, the 'mantra' of the Chicago Convention concerning ultimate State responsibility for the provision of ATM-related services stays, for the time being, in place. However, it has yet to be determined, if and to what extent the introduction of market conditions for the provision of such unbundled services will cause the application of the EU competition law regime to the provision of such services. If such a situation materialises, the delicate relationship between the regime governing the 'public service' oriented ATS provision may have to be aligned with the market-oriented goals of the competition law regime. As shown in other areas of air transport, compliance between these two regimes is not always evident.

The next and final section of this report will illustrate how such ultimate State responsibility has been dealt with in practical cases on the basis of case law. It will show that, with responsibility, liability questions may arise.

[59] See, section 2.5.3

3.1 The scope and implications of international State responsibility

3.1.1 This section briefly presents cases in which State responsibility for ANSP has been made subject to courts. Most of these cases are based on the performance of air navigation on an international flight.

3.1.2 As variously stated in section 2, cross-border arrangements, including those which are made in the context of the SES regimes, is confined to the States parties to such arrangements. They do not bind third States, who will have recourse to the State in whose airspace the ATM-related problems causing an accident to occur.

3.1.3 State responsibility may lead to the obligation of that State to compensate damages caused by ATM-related factors. In exceptional cases, public officers have been made subject to criminal proceedings.

3.1.4 Irrespective of the horizontal cross-border arrangements that are made between States, or vertically with service providers, such as in the context of the SES regimes, States should be cautious of the fact that a State's responsibility over its own airspace remains, ultimately, with the State itself, and can subsequently lead to civil and criminal liability vis-à-vis third parties, as is illustrated by the below cases and events.

3.2 The Überlingen mid-air collision above southern Germany (2002)

3.2.1 The Überlingen mid-air collision above southern Germany in 2002, involving a third-country airline and killing 71 people, occurred in airspace controlled by the Swiss SkyGuide, to which Germany had delegated the provision of air services certain parts of Southern Germany in a cross border transaction.

3.2.2 The District Court of Konstanz, Germany, found that the provision of air services is a sovereign competency of a State and that the responsibility for its execution in relation to third-parties cannot be transferred nor delegated. As such, the Swiss air traffic controllers were found to act as organs of the German State.

3.2.3 The German Court decided that the German State had to pay compensation for the damages incurred and claimed for by the airline. Also, one of the air traffic controllers has been put in jail.[60]

3.2.4 While the parties involved, including the Swiss and German governments, agreed on a compensation scheme for the victim's relatives, there are no international rules that judicially hedge such liability risks amongst the parties. Moreover, agreements between States only binds the States party thereto and not individuals or other, third States.

[60] See, District Court of Konstanz, Case No.4 O 234/05 H (Fourth Chamber)

3.3 The MH17 crash in the airspace of East Ukraine (2014)

3.3.1 In the downing of MH 17 above the conflict zone in Eastern Ukraine in 2014, killing all 298 people on board, Ukrainian authorities had closed the airspace up to 32.000 feet. At the time, Ukraine was *de iure* responsible for providing air navigation services above its territory on the basis of Articles 1 and 2, in conjunction with Article 28, of the Chicago Convention (1944).

3.3.2 However, it was questioned whether it sufficiently and *de facto* controlled the airspace in which the shooting down of flight MH17 had occurred. The Ukrainian ANSP was required to provide air navigation services in that area, which was affected by the turmoil around the attempted creation of the Donetsk Republic in the East of the Ukraine, which was allegedly supported by people and equipment coming from the Russian Federation.

3.3.3 Relatives of the victims have sued the Russian Federation before the European Court of Human Rights (ECHR), claiming compensation for the damages caused by this tragedy.[61] The State of Ukraine has also been mentioned as a potential defendant in these procedures under the doctrine of international State responsibility, possibly leading to liability for the compensation of damages incurred by the victims/claimants.[62]

3.4 The Linate airport – Criminal liability

3.4.1 On 8 October 2001, a SAS MD-87 and a Cessna collided at Linate airport (Milan), provoking the loss of 118 lives. The accident had happened as a consequence of misunderstandings and miscommunications at the different levels of failure that gave rise to the disaster: individuals, that is, pilots and air-traffic controllers, as well as the management of Linate Airport, and the government, that is, the Italian CAA (ENAV).

3.4.2 Criminal proceedings against those who were involved with this accident followed in the subsequent years. One of the arguments which the public prosecutor had put forward concerned the implementation and application of SARPs laid down in ICAO Annex 14 on Aerodromes.

---

[61] Press Release by the Registrar of the Court, ECHR 213 (2020), dated 15.07.2020, New inter-State application brought by the Netherlands against Russia concerning downing of Malaysia Airlines flight MH17, available at the website of the ECHR

[62] Public International Law & Policy Group and VU University Amsterdam, *Legal Remedies for Downing Flight MH17*, White Paper dated 2009 (*Note*: this must be an error) "Under the doctrine of state responsibility, the Netherlands and/or Malaysia may be able to bring a case before the ICJ for violations of international law and internationally wrongful acts attributable to Russia and/or Ukraine. While it is in general very difficult to meet the criteria for jurisdiction before the ICJ, *the civil aviation conventions may allow for such proceedings regarding the MH17 situation*. There are strong arguments supporting the position that Russia and Ukraine may have *violated their obligations under the civil aviation conventions* to communicate information, to investigate the situation and allegations against potential perpetrators, and to prosecute or extradite those that may be responsible." (*italics added*) (ICJ: International Court of Justice of the UN), available at: https://www.vu.nl/nl/Images/Legal_Remedies_for_Downing_Flight_MH17_tcm289-747125.pdf

3.4.3 On 20 February 2008, the Supreme Court of Italy (*Corte di Cassazione*) upheld the Milan Court of Appeal's judgment. Several persons, including air traffic controllers, the head of air traffic controllers, and civil servants of ENAV, were convicted to sanctions in terms of imprisonment.[63]

3.4.4 While this case was, in legal terms, very much a domestic, that is, an Italian, case, it also exemplifies the 'mantra' of State responsibility for ATM, and the observation for the implementation and application of agreed international rules and procedures established by ICAO. In this case, that responsibility was, rightly or wrongly, translated into criminal liability.

3.5 Concluding remarks

3.5.1 The above cases demonstrate that State responsibility may lead to the civil liability. States have also given evidence of paying *ex gratia*, that is, without acknowledging guilt, fault or any other legal ground, in respect of the compensation of damages incurred by the victims of the accident.

3.5.2 In exceptional cases, criminal liability of the public officers, and other persons involved with the accident, has been sentenced by courts, not only in Europe. However, several legal hurdles, which are not discussed in this report, must be taken in order to successfully arrive at such convictions.

3.5.3 In yet other jurisdictions, including but not limited to the United States, the State and public officers enjoy a large decree of 'sovereign immunity' under the *Federal Tort Claims Act* enacted in 1946. Along this line of arguments, the government, including the Federal Aviation Agency (FAA), whose role in the investigations after the Boeing Max accidents was highlighted, possess relatively large powers of discretion as to decisions on what is right and what is wrong. In short, suing government and/or its bodies in the US may be more cumbersome than suing the government and its public bodies in other jurisdictions.

The Executive summary presents a summary of the findings of this study.

[63] See, G. Bricchi and E. Carpanelli, *Just culture and the Italian approach towards aircraft accident investigation*, 62(1) Zeitschrift für Luft und Weltraumrecht 19 (2013)