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### WORKING PAPER

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#### **CONTRIBUTION**

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From:	General Secretariat of the Council
To:	Working Party on Aviation
Subject:	Amended proposal on the Single European Sky - Chapter II - Comments by Member States on National Supervisory Authorities

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Delegates will find in annex comments by Ireland on the text proposed by the Presidency on the above mentioned proposal, as regards National Supervisory Authorities.



## Ireland's Position on SES 2+ Chapter II NSA Proposals

- (1) Ireland agrees with the general direction of travel of Chapter II as originally drafted, particularly in respect to ensuring the full independence of Member State NSAs which is reflected in our comments on this Chapter. However, in agreeing with this proposition it is the mechanics involved in achieving such independence is where Ireland has a difference of opinion – most particularly in respect to the practicalities involved in the proposed NSA appointment process for persons in charge of strategic decisions and the feasibility and wisdom of splitting the NSA and NCA functions as envisioned in the original text. In simple terms we agree on the independence requirements attaching to such persons, and believe this should be ring-fenced, however it is how we arrive at that point through the appointment process is where we differ.
- (2) The Commission's Working Document, Wise Persons' Report and the 2017 Court of Auditors Report identify significant shortcomings in the economic regulation of the SES, particularly in respect to the insufficient independence and/or skills of NSAs to carry out their assigned role. The Working Document proposes to address this by ensuring full independence of NSAs, rather than functional independence, while also ensuring that NSAs are sufficiently resourced. Ireland fully agrees with the need to ensure the full independence of NSAs, as well as to ensure that NSAs have the skills and resources required to effectively carry out the tasks assigned to them.
- (3) However, Ireland does not consider it necessary to separate NSA and National Competent Authority (NCA) tasks to achieve this. Indeed, Ireland considers that there is much benefit to ensuring that economic regulatory decisions are appropriately shaped by a balanced understanding of safety and security needs and not simply commercial performance concerns.
- (4) While any identified lack of independence, competencies, and meaningful accountability of the NSAs will of course impact on the delivery of robust economic regulation, Ireland is of the view that an alternative approach to resolving any such issues under SES2+ should seek to directly address these issues in the first instance at Member State level.
- (5) In our view, the optimal approach is to have all regulatory oversight contained within one fully independent, properly resourced national aviation regulator, with appropriate skills to enable it to carry out all of its functions including both the economic and safety regulation of ANS. This approach would allow for regular cooperation among staff charged with overseeing these interrelated areas, thus avoiding information gaps and allowing both functions to easily benefit from the independent and unbiased work, analysis, and processes being carried out by the other. While the necessary skill sets required for economic regulation and safety regulation differ, operational factors need to be considered by both. Safety and economic regulators should both be working on the basis of consistent information provided by the regulated entities.
- (6) The national aviation regulator should be subject to effective oversight on both fronts to ensure it is carrying out both its NSA and NCA functions effectively. There should be separate *Accountable Managers* for both the NSA and NCA functions at an equivalent senior level in the organisation, reporting directly to the Chief Executive or equivalent. This will lead to the required level of delineation while also allowing for synergies between both functions to be exploited.
- (7) Thus, if the original proposal is suggesting that an NSA would need to be fully separate from the NCA or other bodies with aviation related functions, in Ireland's view this requirement would not be conducive to the strengthening of economic regulation of the SES.



## CHAPTER II

### NATIONAL SUPERVISORY AUTHORITIES

#### Article 3

#### Nomination, establishment and requirements regarding national supervisory authorities

1. Member States shall, jointly or individually, either nominate or establish a body or bodies as their national supervisory authority in order to assume the tasks assigned to such authority by this Regulation.

2. The national supervisory authorities shall exercise their powers impartially, independently and transparently and shall be organised, staffed, managed and financed accordingly.

3. Without prejudice to paragraph 1, the national supervisory authorities shall be legally distinct and independent from any air navigation service provider in terms of their organisation, functioning, legal structure and decision-making.

National supervisory authorities shall also be independent in terms of their organisation, funding decisions, legal structure and decision-making from any air navigation service provider.

Commented [REDACTED]: Preferred wording.

The national supervisory authorities shall be independent in organisational, hierarchical and decision-making terms from any air navigation service providers. That independence shall not prevent those entities from exercising their tasks within a common civil service framework.

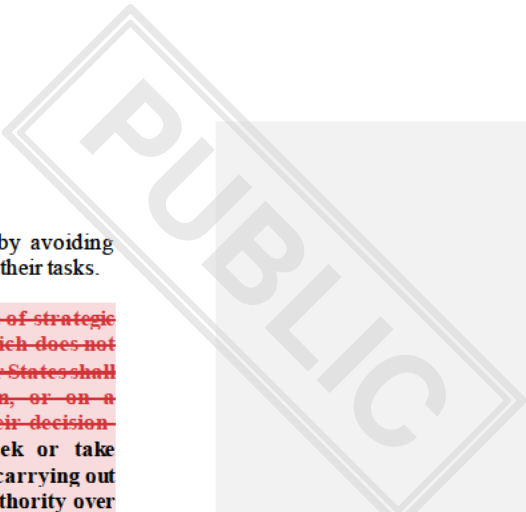
4. Member States may set up national supervisory authorities which are competent for several regulated sectors, if those integrated regulatory authorities fulfil the independence requirements set out in this Article. The national supervisory authority may also be joined in respect of its organisational structure with other public authorities, in particular the national competition authority referred to in Article 11 of Council Regulation (EC) No 1/2003<sup>1</sup>, the national competent authority or, if applicable, a national transport authority, if provided that the joint body hereby set up fulfils the independence requirements set out in this

Commented [REDACTED] Ireland accepts the Presidency's changes clarifying that Member State NSAs and NCAs can be housed within the same entity. These amendments restore the stated Staff Working Document position on this matter in that: "This distinction [NSA/NCA] would not prevent Member States from attributing both sets of tasks to one entity at national level, provided that the independence requirements are respected."

5. Staff of national supervisory authorities shall comply with the following requirements:

- (a) they shall be recruited under clear and transparent processes which ensure their independence;
- (b) they shall be selected on the basis of their specific qualifications, including appropriate competence and relevant experience or they shall be subject to appropriate training.

<sup>1</sup> Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (OJ L 1, 4.1.2003, p. 1).



Staff of national supervisory authorities shall act independently, in particular by avoiding conflicts of interest between air navigation service provision and the execution of their tasks.

~~6. In addition to the requirements set out in paragraph 5, persons in charge of strategic decisions shall be appointed by an entity of the Member State concerned which does not directly exert ownership rights over air navigation service providers. Member States shall decide whether these persons are appointed for a fixed and renewable term, or on a permanent basis which only allows dismissal for reasons not related to their decision-making. Persons~~ persons in charge of strategic decisions shall not seek or take instructions from any government or other public or private entity when carrying out their functions for the national supervisory authority and shall have full authority over the recruitment and management of its staff.

Commented [REDACTED]: Preferred wording.

~~They~~ Such persons shall refrain from any direct or indirect interest that may be considered prejudicial to their independence and which may influence the performance of their functions. ~~To that effect, they shall make an annual declaration of commitment and declaration of interests indicating any direct or indirect interests.~~

Commented [REDACTED]: An annual declaration may be excessive. A declaration on appointment may be sufficient.

~~Persons in charge of strategic decisions, audits or other functions directly linked to performance targets or oversight of air navigation service providers, shall not hold any professional position or responsibility with any air navigation service provider after their term in the national supervisory authority, for at least a period of two years.~~

Commented [REDACTED]: Ireland generally accepts the text as originally drafted.

Commented [REDACTED]: Ireland requests legal clarification on whether such a provision is legally permissible.

7. Member States shall ensure that national supervisory authorities have the necessary financial resources and capabilities to carry out the tasks assigned to them under this Regulation in an efficient and timely manner. ~~The national supervisory authorities shall manage their staff based on their own appropriations, to be set in proportion to the tasks to be fulfilled by the authority in accordance with Article 4.~~

Commented [REDACTED]: Ireland accepts the wording as originally drafted. This measure is linked to and is aligned with NSAs being independent of MA/ ANSPs. An independent self-financing mechanism is an important provision to ensure independence of NSAs. Arguably this is already required by Article 3(2).

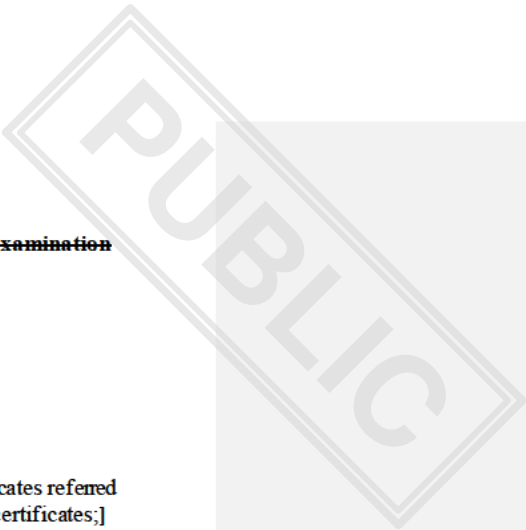
8. A Member State may request the Agency acting as Performance Review Body (PRB), to carry out the tasks related to the implementation of the performance and charging schemes laid down in Articles 14, 17, 19, 20, 21, 22 and 25, and in the implementing acts referred to in Articles 18 and 23 and for which the national supervisory authority of that Member State is responsible under this Regulation and the delegated and implementing acts adopted on the basis thereof.

Once the Agency acting as PRB accepts such a request, it shall become the supervisory authority responsible for the tasks covered by that request and the national supervisory authority of the requesting Member State shall be relieved of the responsibility for those tasks. The rules contained in Regulation (EU) 2018/1139 and pertaining to the Agency acting as PRB shall apply to the performance of these tasks, including as regards the levying of fees and charges.

Commented [REDACTED]: Ireland understands that the [square bracketing] of this text necessitates further discussion as part of the consideration of chapter 3. Based on the views expressed in Ireland's 'SES Economic Regulation' paper we anticipate that this text will have to be amended.

9. Member States shall notify the Commission of the names and addresses of the national supervisory authorities, as well as changes thereto, and of the measures taken to ensure compliance with this Article.

10. The Commission ~~shall establish detailed rules~~ may develop guidelines laying down the modalities of recruitment and selection procedures referred to in paragraph 5, points (a) and



~~(b). Those implementing acts shall be adopted in accordance with the examination procedure referred to in Article 37(3).~~

#### Article 4

##### Tasks of the national supervisory authorities

1. The national supervisory authorities referred to in Article 3 shall:

- (a) [conduct the activities necessary for the issuance of the economic certificates referred to in Article 6, including the oversight of the holders of those economic certificates;]
- (b) oversee the correct application of procurement requirements in accordance with Article 8(6) where applicable in conjunction with the national authorities in charge of procurement control, ensuring in particular the fulfilment of national security and defence requirements by the service providers ;
- (c) apply the performance and charging schemes set out in in Articles 10 to 17 and 19 to 22 and [the implementing acts referred to in Articles 18 and 23,] within the limits of their tasks defined in those articles and acts, and oversee the application of the Regulation regarding the transparency of accounts of designated air traffic service providers in accordance with Article 25.

**Commented** [redacted]: In line with Ireland's 'SES Economic Regulation' paper and the [square bracketing] of this provision Ireland will be proposing amendments to Chapter 3, which will have knock-on drafting consequences here.

2. The national supervisory authorities shall be responsible for assessing and approving the price setting for the provision of the common information service, in accordance with Article 9 [as appropriate]

**Commented** [redacted]: Ireland agrees with the text as originally drafted.

3. [Where necessary, Each each national supervisory authority shall, in cooperation with the national competent authority,] conduct the necessary inspections, audits and other monitoring activities to identify possible infringements by entities subject to their oversight under this Regulation of the requirements set out in this Regulation and the delegated and implementing acts adopted on the basis thereof.

**Commented** [redacted]: This suggested amendment is made to take account of Article 3(4) whereby some Member States may choose to house their NSA in a cross-sectoral entity separate to that of their NCA. In such circumstances, there may be instances whereby cooperation between a member State NSA and NCA may be either unnecessary or problematic.

[It shall take all necessary enforcement measures which may, where appropriate, include the amendment, limitation, suspension or revocation of economic certificates issued by them in accordance with Article 6.]

**Commented** [redacted]: In line with Ireland's 'SES Economic Regulation' paper and the [square bracketing] of this provision Ireland will be proposing amendments to Chapter 3, which will have knock-on drafting consequences here.

The air navigation service providers, airport operators and the common information service providers concerned shall comply with the measures taken by the national supervisory authorities to this effect.

#### Article 5

##### Co-operation between national supervisory authorities

1. The national supervisory authorities shall exchange information [relating to their work and decision-making principles, best practices and procedures, as well as to the application of this Regulation. To this end, the national supervisory authorities may participate and work together in a network that convenes at regular intervals,] and work together in a network in the context of the Advisory Board for Performance Review referred to in Article 114a of Regulation (EU) 2018/1139.

**Commented** [redacted]: Ireland agrees with the wording proposed by Germany on this point.

2. The national supervisory authorities shall cooperate, including in the case of provision of cross-border services, where appropriate through working arrangements, for the purposes of mutual assistance in their monitoring and supervisory tasks and handling of investigations and surveys.]

3. ~~In respect of [functional airspace blocks that extend across] the National supervisory authorities shall facilitate the provision of cross-border services by air navigation service providers for the purpose of improving network performance. In the case of provision of air navigation services in an~~ airspace falling under the responsibility of two or more Member States, the Member States concerned shall conclude if necessary, an agreement on the supervision to be carried out by them under this Regulation, of the air navigation service providers concerned. The national supervisory authorities concerned may establish a plan specifying the implementation and financing of their co-operation with a view to giving effect to that agreement.

4. In the case of provision of air navigation services in an airspace falling under the responsibility of another Member State, the agreements referred to in paragraph 3 shall provide for the mutual recognition of the discharge, by each of the authorities, of the supervisory tasks set out in this Regulation and of the results of the discharge of these tasks. They shall also specify which national supervisory authority shall be in charge of the economic certification set out in Article 6.

5. Where permitted by national law and with a view to regional cooperation, national supervisory authorities may also conclude agreements on the division of responsibilities regarding the supervisory tasks. They shall notify the Commission of these agreements.

**Commented** [REDACTED]: The rationale for limiting cooperation in this way is not clear. Are there two separate points here:

- A general ability to cooperate where appropriate as per the original drafting which would be in line with Ireland's 'SES Economic Regulation' paper?
- A requirement to cooperate in the case of cross border services as per the Presidency compromise.

If so, there may be merit in including both points in this Article.