

Will There Be More Competition After the Single European Sky Is Implemented?

by Delphine Defossez*

I. Introduction

The European Union's Single European Sky (SES) initiative was launched in 1999 to improve the efficiency of air traffic management and air navigation services.¹ Since then, great progress has been made in bringing the European Union's internal market into the skies. As with the internal market, the European Union wants the common aviation market to be subject to fair competition. However, despite the successful steps taken to introduce fair competition in the provision of air transport services, fair competition in other aspects of the air transport sector – in particular the provision of air navigation services – poses greater challenges. The current air traffic regulation system consists of monopolies that enjoy State protection. Furthermore, the main objective of the SES is not fair competition, but rather the decongestion of the European airspace.² Fair competition is simply one more argument the Commission is using to “sell” its proposal.

The problem of air traffic congestion started in the '90s with the introduction of liberal policies allowing European air carriers to freely operate routes within the Union.³ Today, 26,000 aircraft land at, or depart from, a European airport every day.⁴ Some predict that the amount will double by 2030.⁵ European airports are already considered saturated and there has been a cry for change.⁶ As a result, the European Commission is trying to prevent a capacity shortage by

* LL.B (Maastricht University), LL.M. (European University Institute); LL.M. candidate at Swansea University.

¹ European Parliament, Air Transport: Single European Sky, http://www.europarl.europa.eu/aboutparliament/en/displayFtu.html?ftuId=FTU_5.6.9.html (last visited Jan. 18, 2015).

² *Id.*; Niels van Antwerpen, *Single European Sky*, 27 AIR & SPACE L. 3 (2002); Daniel Calleja Crespo & Timothy Fenoulhet, *The Single European Sky (SES): “Building Europe in the Sky,”* in ACHIEVING THE SINGLE EUROPEAN SKY: GOALS AND CHALLENGES 3, (Daniel Calleja Crespo & Pablo Mendes de Leon eds., 2011); Francis Schubert, *The Single European Sky – Controversial Aspects of Cross-Border Service Provision*, 28 AIR & SPACE L. 32 (2003).

³ Pablo Mendes de Leon, *Liberal of Air Transport in Europe*, in THE UTILIZATION OF THE WORLD'S AIR SPACE AND FREE OUTER SPACE IN THE 21ST CENTURY: PROCEEDINGS OF THE INTERNATIONAL CONFERENCE ON AIR AND SPACE POLICY, LAW AND INDUSTRY FOR THE 21ST CENTURY HELD IN SEOUL FROM 23-25 JUNE 1997 15, 17 (Doo Hwan Kim & Chia-Jui Cheng eds., 2000).

⁴ Luigi Jorio, *Ciel Unique pour Voler Plus Sûr et Moins Cher*, SWISSINFO, July 30, 2013, <http://www.swissinfo.ch/fre/ciel-unique-pour-voler-plus-s%C3%BBr-et-moins-cher/36483300>; NATS, *Single European Sky*, <http://www.nats.aero/news/projects/ses/> (last visited Jan. 13, 2015); Eurocontrol, *Single European Sky*, <http://www.eurocontrol.int/dossiers/single-european-sky> (last visited Jan. 13, 2015); Banque Européenne d'Investissement, *l'Aviation Civile*, at 1 (Apr. 2013), http://www.eib.org/attachments/thematic/civil_aviation_fr.pdf.

⁵ Jean Weissenberger, *New Rules on EU Airport Noise Restriction*, at 1, Library Briefing, Library of the European Parliament (Feb. 5, 2013), [http://www.europarl.europa.eu/RegData/bibliotheque/briefing/2013/120421/LDM_BRI\(2013\)120421_REV1_EN.pdf](http://www.europarl.europa.eu/RegData/bibliotheque/briefing/2013/120421/LDM_BRI(2013)120421_REV1_EN.pdf); Banque Européenne d'Investissement, *supra* note 4, at 1; SESAR, *SESAR: the Future of Flying*, YOUTUBE (May 18, 2011), https://www.youtube.com/watch?v=k-2G_vxso9g.

⁶ Banque Européenne d'Investissement, *supra* note 4, at 1; *Single European Sky II: Towards More Sustainable and Better Performing Aviation*, at 2, COM (2008) 389 final (June 25, 2008).

developing plans to triple airspace capacity.⁷ The Commission aims to remedy this emerging problem while leaving a margin of error in case the growth predictions are incorrect. This also leaves more time for the Commission to develop a new action plan for additional increases in European flight capacity.

The current inefficiency of the European air traffic management system costs airline companies an estimated 5 billion euros per year.⁸ These costs are then passed on to the consumer. On average, every flight travels an additional 42 kilometers beyond the most direct route because no shorter route is available, which burns more fuel and harms the environment.⁹ Re-routing under the new system could save up to ten percent of the fuel currently used.¹⁰ To this end, the Commission has proposed implementing the SES. Although this initiative was launched in 1999, its intended outcome has not yet been achieved. Some progress was obtained through the enactment of four regulations by the Commission in 2004, which were subsequently adopted by the European legislature. In 2009, after the Commission realized that further actions were needed, a fifth regulation was added.¹¹ However, the five regulations did little to diminish the competition problems that currently exist.

In the last few decades, the institutions of the European Union have become more willing to push Europeanization to its maximum extent, whereas Member States have become increasingly protective of the last bits of full sovereignty they exercise over fields that may possibly be harmonized by the Union without conflicting with the provisions of the Treaties. This conflict is exemplified by the Single European Sky, an ambitious project, but hardly a success. In order for its proposal to be adopted, the Union has tried to prop it up with various aspects of European law in which it has some kind of competence. The competence of the Union varies between exclusive competences,¹² shared competences,¹³ and competences to support Member States' actions.¹⁴ For instance, competition is part of the European Union's exclusive competences, according to Article 3(1)(b) of the Treaty on the Functioning of the European Union (TFEU), whereas the internal market and transport are shared competences.

⁷ IATA, *A Blueprint for the Single European Sky: Delivering on Safety, Environment, Capacity and Cost-Effectiveness*, Feb. 12, 2013, available at <https://www.iata.org/pressroom/pr/Documents/blueprint-single-european-sky.pdf>; *Air Traffic Management: Freeing Europe's Airspace*, at 2, COM (1996) 57 final (Mar. 6, 1996); *Le "Ciel Unique Européen," Qu'est-ce que C'est?*, LE NOUVEL OBSERVATEUR (Jun. 11, 2013), <http://tempsreel.nouvelobs.com/social/20130611.OBS2746/le-ciel-unique-europeen-qu-est-ce-que-c-est.html>; Centre for Aviation (CAPA), *Europe to Take a Third Attempt at Sorting Out the Single European Sky*, (Oct. 26, 2012), <http://centreforaviation.com/analysis/europe-to-take-a-third-attempt-at-sorting-out-the-single-european-sky-86383>.

⁸ Christopher Lawless, *Bounding the Vision of a Single European Sky*, 180 GEOGRAPHICAL J. 76 (2014).

⁹ Press Release, Europa, Single Sky: Commission Acts to Unblock Congestion in Europe's Airspace, IP/13/523, (June 11, 2013), available at http://europa.eu/rapid/press-release_IP-13-523_en.htm.

¹⁰ Jorio, *supra* note 4; *Single European Sky II: Towards More Sustainable and Better Performing Aviation*, *supra* note 6, at 4; IATA, *supra* note 7, at 2.

¹¹ A detailed discussion of the coming into existence of the SES is beyond the scope of this paper. A large range of articles and books is dedicated to the description of lengthy process that led to the drafting of the five regulations. See, e.g., Niels van Antwerpen, *supra* note 2; Daniel Calleja Crespo & Timothy Fenoulhet, *supra* note 2; Francis Schubert, *supra* note 2.

¹² See Treaty on the Functioning of the European Union art. 3, Sept. 5, 2008, 2008 O.J. (C 115) 47, reprinted in *consolidated form at 2010 O.J. (C 83) 47* [hereinafter TFEU].

¹³ *Id.* art. 4.

¹⁴ *Id.* art. 6.

The TFEU further deals, under Title VII, with the rules on competition. One of the fundamental principles of European law is that monopolies are only allowed as long as they do not influence the internal market. Because Air Navigation and Air Traffic Service (ANTS) is provided under a monopoly which has the potential to affect trade between Member States and thereby infringe Article 102 TFEU, the potential competitive effects have given the Union a premise to undertake the SES as part of its efforts to enhance fair competition. While it is undeniable that solutions are needed, it is doubtful that the solutions in the SES will enhance fair competition.

The main reason the SES will not enhance fair competition is because the provision of ANTS has the characteristics of a natural monopoly, since it would be prohibitively expensive to have several ANTSs providing their services above the same area. Therefore, a market-based approach to competition in the air traffic management sector might not be suitable.¹⁵ Additionally, in order to make such a system work, there would be a need for coordination, which would increase the cost and might outweigh any benefits of a competitive market.¹⁶ Moreover, due to the specific characteristics of the air transport field, not every company would be able to provide these services.

Opening the field to fair competition can lead to disastrous consequences, such as a reduction of maintenance or safety measures.¹⁷ Furthermore, the Member States might decide to stop investing in the service provider, leaving the company with few resources. Although state aids have been prohibited under Article 107 TFEU, most Member States currently are shareholders or own the Air Navigation Service Provider (ANSP), which allows them to go around the restriction on state aids.¹⁸ It is also worth noting that, unlike in the U.S., the technologies used in Europe for air traffic management were designed in the 1950s and can be considered archaic.¹⁹ Therefore, it is not an option for the States to stop investing in the companies, because the ANSP/ANSs must continue receiving the financial support necessary to maintain, service, and eventually update aging technology.

Another impediment to introducing greater competition to the provision of ANTS is liability. As it now stands, the SES does not address the question of liability, which deters companies from entering into air service provision contracts because it is unclear who will be liable in the event of an accident. ANSPs may be subject to foreign law and might be brought before the courts of a foreign country,²⁰ a conclusion that may be deduced from the provisions on

¹⁵ EUROPEAN AVIATION: A FRAMEWORK FOR DRIVING PERFORMANCE IMPROVEMENT, REPORT OF THE HIGH LEVEL GROUP FOR THE FUTURE AVIATION REGULATORY FRAMEWORK 15 (2007).

¹⁶ Francis Schubert, *The Regulation of Air Navigation Service in the Single European Sky, the Laws of Increasing Complexity*, 37 ANNALS AIR & SPACE L. 125, 136 (2012).

¹⁷ See *infra* Part III.

¹⁸ The prohibition in Article 107 TFEU only extends to State aid. However, when a State is acting in a similar way as a private investor, the capital or loan the State provides to the company will not fall under Article 107 TFEU. Note, though, that in the air sector, State aid has never been challenged. Therefore, the normal assumption for other sectors is applied by the author to the air sector. See [U.K.] DEP'T FOR BUS. INNOVATION & SKILLS, THE STATE AID GUIDE (June, 2011), available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/31700/11-1040-state-aid-guide.pdf.

¹⁹ Press Release, Europa, Single Sky: Commission Acts to Unblock Congestion in Europe's Airspace (June 11, 2013), available at http://europa.eu/rapid/press-release_IP-13-523_en.htm.

²⁰ See *infra* note 77 and accompanying text. In the Überlingen case, Skyguide was judged in a German court. If the effective service provider doctrine is followed, then the courts of the State of occurrence will have jurisdiction to

liability in the treaties establishing the Functional Airspace Blocks (FABs).²¹ Due to the lack of a liability framework at the Union level and the wish of the Commission not to touch upon the issue, the liability framework will remain as it was before the SES was enacted. Until the Union addresses the matter, ANSPs will likely be reluctant to provide cross-border services due to the uncertainty linked to the liability issues.

Aside from being a natural monopoly, the ANTS system is also a monopoly in the legal sense, and most of the national laws in Europe give exclusive rights to provide ANTS to a designated national provider. This exclusivity is primarily based on political reasons, but there also are historical reasons. Before 2004, most Member States provided air navigation service over their own airspace through state-owned administrations or corporations, and Member States were fully liable for any incidents within their airspace. This concept flows directly from the Chicago Convention, which had a clear liability scheme.²² In theory, it is possible for a country to designate a certified provider without taking its nationality into account. But in practice, only a very few Member States, such as Germany, Belgium, and the U.K., have liberalized their airspace to allow control operations by a foreign ANSP.²³

This paper explains why the new system will hardly change the competition picture within the concerned sectors. First, it will explain the system under the SES. Second, it will address the Commission's stated purposes as to why the SES is needed. Third, the fair competition problem will be explored, followed by a discussion of the fear of certain actors as to why the opening of the sector is not a good idea. Finally, the paper will briefly address the lack of specific rules on liability and the effect it might have on competition.

II. *The System under the SES*

The major problem currently facing European airspace is its fragmentation, leading to delays, longer flights, inefficiency, and huge divergences in the quality of safety standards.²⁴ The problem is a direct result of Air Traffic Management (ATM) being controlled under different legal systems.²⁵ It might be surprising to learn that there are still borders in the airspace, while one of the biggest achievements of the EU's internal market was precisely the elimination of borders. In other words, there is a unified internal market, but there has never been a unified air market, even after the full liberalization of the market in 1997.²⁶ Liberalization

judge the foreign ANSP. See Francis Schubert, *Legal Aspects of Cross-Border Service Provision in the Single European Sky*, 35 AIR & SPACE L. 113, 133 (2010).

²¹ See, e.g., Agreement Relating to the Establishment of the Functional Airspace Block Europe Central Between The Federal Republic of Germany, The Kingdom of Belgium, The French Republic, The Grand Duchy of Luxembourg, The Kingdom of The Netherlands and The Swiss Confederation art. 30.5, Dec. 2, 2010 (entered into force June 1, 2013).

²² Schubert, *supra* note 20, at 132.

²³ Schubert, *supra* note 16, at 137.

²⁴ European Commission Mobility and Transport, *Functional Airspace Blocks (FABs)*, (June 12, 2012), http://ec.europa.eu/transport/modes/air/single_european_sky/fab/; *Building the Single European Sky through Functional Airspace Blocks: A Mid-Term Status Report*, at 5, COM (2007) 101 final (Mar. 15, 2007).

²⁵ Belgocontrol, *Ciel Unique Européen: en Route vers l'Europe*, http://www.belgocontrol.be/belgoweb/publishing.nsf/Content/Single_European_Sky_FR (last visited Jan. 13, 2015).

²⁶ ANDREAS LOEWENSTEIN, EUROPEAN AIR LAW: TOWARDS A NEW SYSTEM OF INTERNATIONAL AIR TRANSPORT REGULATION 48 (1991); Calleja Crespo & Fenoulhet, *supra* note 2, at 3.

brought some transparency in the price of airline tickets, but not much more. Consequently, monopolies formed in the European airspace which prevent fair competition.

Until recently, a plane could be serviced by as many different ANSPs as countries it crossed while in flight,²⁷ each subject to a different set of rules, economic conditions, and operational requirements.²⁸ Additionally, most ANSPs have designed their own training schools and support functions, which makes harmonization even more complicated. However, the fact that the ANSPs have their own training schools does not enhance fair competition; quite the contrary. It might well be that one ANSP has a more efficient way of training, which will make it more competitive in the area it wants to control; however, the sovereign nature of the Air Navigation Service results in protectionism from the States, as the division of air traffic control sectors follows political boundaries, which creates even more constraints.²⁹ These detriments to efficiency and performance have an impact on costs and safety.³⁰ As stated *supra*, the inefficiency of the European system costs the airlines an estimated 5 billion euros per year,³¹ which is then passed on to the consumer. Currently, the costs of air traffic management represent 6 to 12 percent of ticket prices.³² Therefore, the key solution to this problem is enhancing cooperation among Member States and raising the level of solidarity.³³ To this end, the Commission claims that the SES system will reduce flight times and increase flight safety.³⁴

Initially, the SES was meant to address the dramatic growth in air travel by creating a legislative framework for EU aviation.³⁵ The cornerstone of the SES Regulations was to create so-called Functional Airspace Blocks (FABs), which would satisfy the growing capacity requirements of all airspace users with minimum delay by managing air traffic more dynamically, which would in turn increase efficiency.³⁶ The SES envisions that the FABs will

²⁷ Kenneth Button & Rui Neiva, *Single European Sky and the Functional Airspace Blocks: Will They Improve Economic Efficiency?*, 33 J. AIR TRANSPORT MGMT. 73, 79 (2013); Schubert, *supra* note 16, at 140.

²⁸ LOEWENSTEIN, *supra* note 26, at 49; *Building the Single European Sky through Functional Airspace Blocks: A Mid-Term Status Report*, *supra* note 24, at 2.

²⁹ Francis Schubert, *supra* note 20, at 113.

³⁰ European Commission, *supra* note 24.

³¹ Lawless, *supra* note 8, at 76.

³² Press Release, Europa, *supra* note 9.

³³ Julian Moxon, *Single European Sky Still Fragmented*, AINONLINE, June 7, 2013, <http://www.ainonline.com/aviation-news/paris-air-show/2013-06-17/single-european-sky-still-fragmented>; Schubert, *supra* note 16, at 114; *Building the Single European Sky through Functional Airspace Blocks: A Mid-Term Status Report*, *supra* note 24.

³⁴ For this reason, the Commission created the European Aviation Safety Programme (EASP). “The main objective of the Safety Plan is to create a common focus on European aviation safety issues as a continuation of the European work to increase aviation safety and to comply with ICAO standards.” See EUROPEAN AVIATION SAFETY AGENCY, EUROPEAN AVIATION SAFETY PLAN 2012-2015, at 4, TE.GEN.00400-002 final (2012), *available at* [http://www.easa.europa.eu/system/files/dfu/sms-docs-European-Aviation-Safety-Plan-\(EASp\)-2012-2015--v1.0-FINAL.pdf](http://www.easa.europa.eu/system/files/dfu/sms-docs-European-Aviation-Safety-Plan-(EASp)-2012-2015--v1.0-FINAL.pdf). See also Jorio, *supra* note 4.

³⁵ *Single European Sky II: Towards More Sustainable and Better Performing Aviation*, *supra* note 6, at 2.

³⁶ Lawless, *supra* note 8, at 76; EUROCONTROL PERFORMANCE REVIEW COMMISSION, EVALUATION OF FUNCTIONAL AIRSPACE BLOCK (FAB) INITIATIVES AND THEIR CONTRIBUTION TO PERFORMANCE IMPROVEMENT (2008), *available at* http://ec.europa.eu/transport/modes/air/studies/doc/traffic_management/evaluation_of_fabs_final_report.pdf; Button & Neiva, *supra* note 27, at 74; BELGOCONTROL, THE FUNCTIONAL AIRSPACE BLOCKS IN THE SINGLE EUROPEAN SKY 2, *available at* [http://www.belgocontrol.be/belgoweb/publishing.nsf/AttachmentsByTitle/Background_on_FABs.pdf/\\$FILE/Background_on_FABs.pdf](http://www.belgocontrol.be/belgoweb/publishing.nsf/AttachmentsByTitle/Background_on_FABs.pdf/$FILE/Background_on_FABs.pdf).

be created based on traffic flow and efficiency-based criteria rather than according to national borders.³⁷ The route-by-route, as opposed to state-by-state, strategy will more accurately reflect the realities of an airspace system where flights cross borders often and route-based guidance would be more efficient.³⁸ Consequently, the airspace would be managed more rationally.³⁹ The FABs would help meet the growing capacity requirements of airspace users, reduce delays, and enable more dynamic management of the air traffic. They are also regarded as the best solution for achieving the highest level of integration possible by maximizing cooperation.⁴⁰ In hopes of achieving this goal, the Union launched the SES proposal in 1999.⁴¹

Under the SES, the Union will be divided into nine FABs, and within each FAB the highest level of fair competition would be required.⁴² It is already clear that in central Europe the number of sectors will not radically decrease because of its current small size.⁴³ However, it is expected that the number of sectors will decline from the current 650,⁴⁴ thereby reducing the number of control centers, which are one of the causes of the inefficiency. Currently, there are 58 en-route centers using several different operating systems;⁴⁵ by comparison, the U.S. has only 21.⁴⁶ These changes should bring Europe closer to the American model.⁴⁷ The number of air traffic service providers should also be reduced by the new system, as there are currently more than 38 in Europe.⁴⁸ Furthermore, the sectors will be opened to fair competition. In other words,

³⁷ Lawless, *supra* note 8, at 76; Mark Franklin, *Sovereignty and Functional Airspace Blocks*, 32 AIR & SPACE L. 425, 425 (2007).

³⁸ ALBERTO ALEMANNI, GOVERNING DISASTERS: THE CHALLENGES OF EMERGENCY RISK REGULATION 239 (2011).

³⁹ European Commission Mobility and Transport, *supra* note 24.

⁴⁰ Button & Neiva, *supra* note 27, at 75.

⁴¹ Joeri Meerts, A Critical Assessment of the Regulation 996/2010 of the European Parliament and the Council of the Investigation and Prevention of Accidents and Incidents in Civil Aviation 7 (2012) (unpublished LL.M. thesis, Ghent University).

⁴² The division is as follows: Danish-Swedish FAB, U.K.-Ireland FAB, FABEC (Belgium, France, Germany, Luxembourg, the Netherlands and Switzerland), South West FAB (Portugal, Spain), BLUE MED FAB (Cyprus, Greece, Italy and Malta), Baltic FAB (Lithuania, Poland), FAB CE (Austria, Bosnia & Herzegovina, Croatia, Czech Republic, Hungary, Slovak Republic, Slovenia), Danube FAB (Bulgaria, Romania) and North European FAB (Estonia, Finland, Latvia, and Norway). EUROCONTROL PERFORMANCE REVIEW COMMISSION, *supra* note 37, at 21; Button & Neiva, *supra* note 27, at 75; BELGOCONTROL, *supra* note 37, at 2.

⁴³ Some sectors will be merged or split mostly above the borders (ground). But their size will still depend on the amount of traffic flow that one controller is able to track.

⁴⁴ Moxon, *supra* note 34.

⁴⁵ For instance, the MUAC and the FABEC share the same system. See Royal Netherlands Air Force, Shared ATS System (SAS) Operational at Royal Netherlands Air Force Sites, <https://www.eurocontrol.int/sites/default/files/content/documents/official-documents/brochures/2014-sas-factsheet.pdf> (last visited Feb. 4, 2015). NATS uses the SITA ATS AIRCOM system. See SITA, En Route Systems: Maintaining and Enhancing Air Navigation Safety and Efficiency, <http://www.sita.aero/file/9871/ATS-AIRCOM-En-Route-Systems-use-case.pdf>.

⁴⁶ NASA, Center or Air Route Traffic Control Center (ARTCC), <http://virtualskies.arc.nasa.gov/atm/6.html>; European Commission, *SES 2+ Cost and Flight Efficiency*, at 1, http://ec.europa.eu/transport/modes/air/single_european_sky/doc/ses2plus/cost-flight-efficiency.pdf; *Single European Sky II: Towards More Sustainable and Better Performing Aviation*, *supra* note 6, at 6.

⁴⁷ Press Release, Europa, *supra* note 9.

⁴⁸ Lithuanian Presidency of the Council of the European Union, Single European Sky for Faster and More Convenient Air Travel, Aug. 22, 2013, <http://www.eu2013.lt/en/news/features/single-european-sky-for-faster-and-more-convenient-air-travel>; John Gulding et al., *US/Europe Comparison of ATM-Related Operational Performance: An Initial Harmonized Assessment by Phase of Flight*, EIGHTH USA/EUROPE AIR TRAFFIC MANAGEMENT RESEARCH

national ANSPs will be placed in competition with all European ANSPs able to control the airspace in question. For instance, Belgocontrol, the Belgian ANSP, might – if more competitive – control part of the French airspace because it is part of the same FAB.

A word of warning should be given: one should not believe that the SES will introduce an entirely new regime in which only one ANSP will supply its services for an entire FAB. Article 8 of Regulation 550/2004 requires each Member State to establish one exclusive ANSP for the airspace under its responsibility.⁴⁹ Furthermore, in order to comply with its obligations flowing from international law, each Member State must have an ANSP. The only novelty introduced by the proposal is that cross-border cooperation will be extended and, hopefully, this will in turn lead to an even closer Europe and fair competition.

One of the major critiques from opponents of the SES is that the Commission has tried to establish a truly European project to harmonize the system of air traffic management but realizing this would never occur, it instead took a pragmatic approach, aiming to increase the level of cooperation between ANSPs. Critics believe this ignores the realities and fundamental problems facing the European ATM system, and moreover, that this cooperation may result in strong alliances that will add another layer of fragmentation within the European airspace while also enabling stronger monopolies.^{50, 51}

III. Why Does the Commission Want the SES?

The SES will bring some major advantages, such as shorter flights, fewer delays, fewer CO₂ emissions, and more efficient management. The question remains, however, why the Commission has been pushing so much for the SES, as these advantages will not directly affect the Union itself. Indeed, the main advantages of the SES, besides increasing efficiency and security, will be for passengers, in the form of shorter flights and cheaper tickets. The airspace will be more tailored with respect to passengers' needs, rather than divided according to national borders, as it was before.⁵²

Despite the arguments given by the Commission to justify the SES, they don't withstand the criticisms.⁵³ However, there are two underlying arguments as to why the Commission has taken it upon itself to advance the SES:

AND DEVELOPMENT 2 (2009), *available at* http://www.atmseminarus.org/seminarContent/seminar8/papers/p_115_APMM.pdf; Centre for Aviation (CAPA), *Europe to Take a Third Attempt at Sorting Out the Single European Sky*, Oct. 26, 2012, <http://centreforaviation.com/analysis/europe-to-take-a-third-attempt-at-sorting-out-the-single-european-sky-86383>.

⁴⁹ See Council Regulation 550/2004, Provision of Air Navigation Services in the Single European Sky, 2004 O.J. (L 96) 10, art. 8.

⁵⁰ *Functional Airspace Blocks (FAB) – the EC's Biggest Blunder?*, ROGERWILCO.NET, Apr. 30, 2011, <http://www.roger-wilco.net/functional-airspace-blocks-fab-the-ec%E2%80%99s-biggest-blunder/>.

⁵¹ The SES also raises a competition issue regarding airports. Most of the major European airports are grouped in one FAB, namely the FABEC. In the FABEC, we find Brussels airport, Zurich, Schiphol, Frankfurt, and Paris-Charles-de-Gaulle. London Heathrow is in another FAB, the UK-Ireland FAB, while Rome Fiumicino is in the BLUE MED FAB. Fair competition between airports will be hard to achieve, when five of the major airports are included in the same FAB and are, therefore, required to closely cooperate.

⁵² Lawless, *supra* note 8, at 76.

⁵³ Moxon, *supra* note 34; *Functional Airspace Blocks (FAB) – the EC's Biggest Blunder?*, *supra* note 51.

First, since 1990, air travel within Europe has continued to grow, which has led to major problems including delays, longer flights, inefficiency, and huge divergences in the quality of safety standards. But the principal issue is that the airspace system is managed inefficiently, which wastes time and money. Transport is part of shared competences according to Article 4(2)(g) TFEU. Furthermore, Article 100(2) TFEU gives the Council the power to act with regard to air transportation. The ECJ clarified in the *French Seamen* case that Article 100(2) TFEU (at that time 84(2) EEC Treaty) means transport is “subject to the general rules of the Treaty,” even if the Council has not yet acted.⁵⁴ However, air transportation has for a long time been governed exclusively by the Member States.⁵⁵ Traditionally, air navigation services were under the control of government or corporate ANSPs, which had a monopoly on the market.⁵⁶ This led to protective behavior by the Member States, mostly with regard to airline companies, but which also had the effect of distorting competition within Europe.⁵⁷ Because ANSPs were entirely or partially state-owned, they had advantages over private companies.⁵⁸ Likewise, because airports were – and still are – entirely or partially state-owned, competition between airports was nearly impossible.⁵⁹ Additionally, pricing was not entirely transparent.⁶⁰ In other words, the Commission wants the SES because the current system distorts competition.

Second, in order to avoid hindering two out of four of the EU single market’s fundamental freedoms,⁶¹ namely the free movement of persons and goods, it is imperative to cure this deficit. Above all, the mutual recognition principle, one of the most important concepts in European law, is only tackled in Regulation 550/2004 as amended.⁶² Article 7 obliges Member States to recognize certificates delivered by any European State. Therefore, the Union felt the urge to redress this problem.

⁵⁴ Case 167/73, *Comm’n v. French Republic*, 1974 E.C.R. 359, 371.

⁵⁵ LOEWENSTEIN, *supra* note 26, at 51.

⁵⁶ Calleja Crespo & Fenoulhet, *supra* note 2, at 3; *Single European Sky II: Towards More Sustainable and Better Performing Aviation*, *supra* note 6, at 5; Kenneth Button & Glen McDougall, *Institutional and Structure Changes in Air Navigation Service-Providing Organizations*, 12 J. AIR TRANSPORT MGMT. 236, 237 (2006).

⁵⁷ LOEWENSTEIN, *supra* note 26, at 51.

⁵⁸ Int’l Civil Aviation Org. (ICAO), *Worldwide Air Transport Conference (ATCONF) Sixth Meeting: Basic Principles of Fair Competition*, ATConf/6-WP/51 (2013), available at http://www.icao.int/Meetings/atconf6/Documents/WorkingPapers/ATConf6-wp051_en.pdf; Button & McDougall, *supra* note 57, at 244; PAUL STEPHEN DEMPSEY, *EUROPEAN AVIATION LAW* 4 (2004); van Antwerpen, *supra* note 2, at 13; Schubert, *supra* note 16, at 129.

⁵⁹ As airports are partly or entirely state-owned they are also receiving state aids or are publicly funded. “The charge level is a key factor, since public funding granted to an airport manager could be used to maintain airport charges at an artificially low level in order to attract traffic and may thus significantly distort competition.” See *Communication from the Commission: EU Guidelines on State Aids to Airports and Airlines*, §40, COM (2013) draft, available at

http://ec.europa.eu/competition/consultations/2013_aviation_guidelines/aviation_guidelines_en.pdf; A. E. du Perron, *Liability of Air Traffic Control Agencies and Airport Operators in Civil Law Jurisdictions*, 10 AIR L. 203, 210 (1985).

⁶⁰ Report on the Annual Report on EU Competition Policy, at 12, EUR. PARL. DOC. A7-0143 (2013), available at <http://www.europarl.europa.eu/document/activities/cont/201304/20130430ATT65503/20130430ATT65503EN.pdf>.

⁶¹ The four fundamental freedoms of the EU’s single market are the free movement of people, goods, services, and capital. TFEU, *supra* note 12, art. 26(2).

⁶² See Council Regulation 1070/2009, Amending Regulations (EC) No. 549/2004, (EC) No. 550/2004, (EC) No. 551/2004 and (EC) No. 552/2004 in order to Improve the Performance and Sustainability of the European Aviation System, 2009 O.J. (L 300) 34, 42.

Taking into account the above-mentioned reasons, one can understand why the Commission decided to launch infringement procedures against 25 out of 27 Member States after the December 4, 2012 deadline for implementing the SES had passed.⁶³ These Member States had made little or no progress toward reform.⁶⁴ The infringement procedure is in two stages, starting with informal proceedings in which the Union requires the Member State to rectify its errors or to justify why the legislation has not yet been implemented. The second stage is a formal one, in which at the end the Court of Justice of the European Union can be involved and the State can be fined.⁶⁵

In April 2014, the informal proceedings led to letters of formal notice for the members of the FABEC. After consideration, the Commission sent formal letters to the members of the Baltic, Danube, BLUEMED, FAB CE, Southwest, and UK-Ireland FABs.⁶⁶ To date, formal proceedings have begun for 18 countries.⁶⁷ A reasoned opinion was sent to Bulgaria for the implementation of a regulation.⁶⁸ The outcome of these proceedings is expected soon, with perhaps some referral to the Court of Justice.

IV. *The Fair Competition Problem*

In its 2013 report on the SES, the Commission stated that it wants to open the air sector to fair competition while ensuring that safety and environmental conditions are still met.⁶⁹ With the opening of the market, the Commission hopes that new business opportunities will be created. Only some services will be separated to enable new companies to compete.⁷⁰ For instance, support services, such as meteorology and communication, will be open to competition, while the core air traffic control services will remain a monopoly.⁷¹

⁶³ For more information, see European Commission Mobility and Transport, *Infringement Proceedings in the Field of Air transport*, http://ec.europa.eu/transport/media/infringements/proceedings/air_en.htm; *Single European Sky: EU urges action on joint airspace*, BBC-NEWS, Oct. 12, 2012, <http://www.bbc.com/news/world-europe-19921805>; Isabelle Smets, *Commission to Launch Infringement Procedures*, EUROPOLITICS, Dec. 4, 2012, <http://europolitics.eis-vt-prod-web01.cyberadm.net/commission-to-launch-infringement-procedures-artb345916-20.html>.

⁶⁴ Press Release, Europa, *supra* note 9.

⁶⁵ See TFEU, *supra* note 12, art. 258.

⁶⁶ Press Release, Europa, *Single European Sky: Commission Urges Germany, Belgium, France, the Netherlands, and Luxembourg to Make a Decisive Move Towards a Common Airspace*, IP/14/446 (Apr. 16, 2014), available at http://europa.eu/rapid/press-release_IP-14-446_en.htm.

⁶⁷ Press Release, Europa, *Single European Sky: Commission urges eighteen Member States to make a decisive move towards common airspace management*, IP/14/818 (Jul. 10, 2014) available at http://europa.eu/rapid/press-release_IP-14-818_en.htm.

⁶⁸ Press Release, Europa, *November Infringements Package: Main Decisions*, MEMO/14/2130 (Nov. 26, 2014) available at http://europa.eu/rapid/press-release_MEMO-14-2130_en.htm.

⁶⁹ Report on the Annual Report on EU Competition Policy, *supra* note 61, at 11.

⁷⁰ Press Release, Europa, *supra* note 9.

⁷¹ “Monopoly” under European law mostly refers to market power and dominant position. The dominant position can be a joint dominance. Article 102 TFEU stipulates an abuse of dominant position by “one or more undertakings,” this was to cover cases such as Cases C-395-396/96, P *Companie Maritime Belge Transports SA, Companie Maritime Belge SA & Dfra Lines A/S v. Comm’n*, 2000 ECR I-1365. See PAUL CRAIG & GRAINNE DE BURCA, *EU LAW: TEXT, CASES, AND MATERIALS* (5th ed. 2011).

Achieving fair competition, therefore, seems somewhat unrealistic: first, because of how air navigation service provision has been managed until now; and second, because it is not easy to enter into the air traffic business.

As stated *supra*, air navigation services traditionally have been under the control of government or corporate ANSPs, which had both a legal and a natural monopoly and led to protective behavior by the Member States.⁷² In order to prevent ANSPs from discriminating against users by charging more for international than for national flights, regulation is of crucial importance. In other words, if there is no regulation of the system competition will be distorted. Most Member States have established a system to ensure that the charges are fair.⁷³

For the core functions of ANS, the number of providers will not drop to one in each FAB,⁷⁴ which would have brought the EU system closer to the U.S. system but would have led to the “supremacy” of one country over an entire FAB. For example, Germany will not be the sole provider of air traffic control services in the FABEC, for several reasons. On the one hand, the Chicago Convention requires each Member State to provide an ANSP; and, although not specifically stated, traditionally, the ANSP was of the same nationality.⁷⁵ On the other hand, the Commission does not desire the supremacy of one ANSP in each FAB. Article 8 of Regulation 550/2004 makes clear that the SES does not intend to create an entirely new regime in which only one ANSP will supply its services for the whole FAB. Finally, one could argue that the Member States will probably never agree to entirely give up the sovereign power they currently enjoy because most ANSPs are state-owned.

For now, the ANSPs are protected because they are the only companies with the privilege of providing services over the airspace of a country, with the sole exception of Eurocontrol, which has a special status. The opening of the sector to fair competition would probably not change the number of providers because the work of an air traffic control provider is highly complex and requires experience.

Nevertheless, as was pointed out by the French controllers during their protests against the SES, competition may have an adverse effect on air transport security.⁷⁶ This argument is not without merit, as competition among the different players will become more intense. For example, States may invest less in their own ANSPs and delegate control over part of their airspace to a cheaper entity, which certainly will not help modernize the system with which the controllers are working. Additionally, the French air traffic controllers’ syndicate claims that

⁷² See *supra* text accompanying notes 57–61.

⁷³ Schubert, *supra* note 166, at 138.

⁷⁴ One of the core ideas of the Single European Sky is to divide the European airspace into nine blocks of countries.

⁷⁵ Convention on International Civil Aviation art. 28, *opened for signature* Dec. 7, 1944, 61 Stat. 1180, 15 U.N.T.S. 295 (entered into force Apr. 4, 1947) [Chicago Convention]. Ben van Houtte, *The Single European Sky-EU Reforms of ATM*, in *EUROPEAN AIR TRAFFIC MANAGEMENT: PRINCIPLE, PRACTICE AND RESEARCH* 181 (Andrew Cook ed., 2007).

⁷⁶ The French traffic controllers went on strike June 11–14, 2013 to protest against the Single European Sky proposal. See Mariama Diallo, *Ciel Unique Européen: Les Contrôleurs Aériens en Grève*, *LE JOURNAL DE L’AVIATION*, Jun. 6, 2013, <http://www.journal-aviation.com/actualites/23120-ciel-unique-europeen-les-controlleurs-aeriens-en-greve>; *France Air Traffic Controller Strike over EU ‘Single Sky’*, *EURONEWS*, JUN. 6, 2013, <http://www.euronews.com/2013/06/11/france-air-traffic-controller-strike-over-eu-single-sky/>.

France's 64-euro fee is one of the cheapest in Europe.⁷⁷ The controllers also fear that safety will be compromised by a change in their working conditions.⁷⁸ The 2002 mid-air collision over Überlingen was partially caused by the fact that only one controller was on duty on the night of the accident.⁷⁹ It is feared that if competition starts to intensify, service providers will want to reduce their costs by diminishing the numbers of controllers.

As Francis Schubert stated, by simplifying the airspace system, the work of the controllers will also be simplified, therefore reducing costs.⁸⁰ The fear of externalization and opening of sectors, such as communication and surveillance, to "real" competition in a good part of airspace service may have some basis.⁸¹ But it could have been foreseen that the sector would be opened to competition, as the Union has always tried to encourage it. The Union understood that natural monopolies will be hard to eradicate and a better approach will be to monitor such situations closely by seeking justification for their cost policies.⁸² The Union has also enacted a regulation on a common charging scheme for air navigation services, therefore controlling, at least partially, the fair charging of airspace users.⁸³

V. *The Fears of Certain Actors*

⁷⁷ Marie-Pierre Haddad, *Pourquoi les Contrôleurs Aériens Font Grève*, L'EXPRESS L'EXPANSION, Jun. 11, 2013, http://lexpansion.lexpress.fr/economie/pourquoi-les-controleurs-aeriens-sont-en-greve_388834.html; Guy Dutheil, *Les Contrôleurs Aériens s'Élèvent Contre le Projet de Ciel Unique Voulu par Bruxelles*, LE MONDE, Jun. 11, 2013, available at http://www.lemonde.fr/economie/article/2013/06/11/les-controleurs-aeriens-en-greve-contre-le-projet-de-ciel-unique-voulu-par-bruxelles_3427784_3234.html.

⁷⁸ *Air Traffic Controller Strike Hits French Airports*, BBC.COM, Jun. 11, 2013, <http://www.bbc.co.uk/news/world-europe-22850250>.

⁷⁹ On July 1, 2002 at 23:35, a mid-air collision occurred between Bashkirian Airlines Flight 2937 and DHL Flight 611 over the towns of Überlingen and Owingen in Southern Germany. The fact that both planes were flying at the same level, namely 36,000 feet, caused the accident. All 71 people aboard the two aircraft died. The controller, Peter Nielsen, was on two workstations at the time of the accident. This was against air control regulations (normally each controller has his own station), but was nevertheless, common practice in the Swiss company, Skyguide. Due to some maintenance on the main radar requiring the controller to work with a slower system, in addition to his own negligence, he failed to notice that the two aircrafts were on the same route at the same level and therefore, he failed to keep them at a safe distance from one another. Furthermore, each plane had an on-board system called Traffic Collision Avoidance System (TCAS), and this system is linked to the air traffic control post in Zurich, where Skyguide was established. However, the system failed to alert Nielsen and only alerted the two pilots less than a minute before the crash. When Nielsen realized that the danger of having an accident was present, he requested the Russian plane to go down by a thousand feet. At the same time, however, the TCAS of both aircraft gave orders to avoid an accident; instructing the DHL plane to descend and the Russian plane to climb. Under Russian regulations, in case of conflicting instructions, the final decision is left to the pilot. In this case, the pilot listened to Nielsen's instructions and descended. Therefore both planes descended. Nielsen did not receive a notification of the alerts issued by the TCAS. The last crucial mistake he made was to tell the Russian crew that the DHL plane was on its right while in fact it was on its left. As a result, the Russian crew saw the DHL plane a few seconds before the collision but could not climb quickly enough to avoid it. See P. Nikolai Ehlers, Case Note, *Lake Constance Mid-Air Collision: Bashkirian Airlines v. Federal Republic of Germany*, 32 AIR & SPACE L. 75 (2007).

⁸⁰ Jorio, *supra* note 4.

⁸¹ Dutheil, *supra* note 85; Diallo, *supra* note 84; Haddad, *supra* note 85.

⁸² *First Report on the Implementation of the Single Sky Regulation: Achievements and the Way Forward*, at 11, COM (2007) 845 final (Dec. 20, 2007).

⁸³ Commission Regulation 1794/2006, Laying Down a Common Charging Scheme for Air Navigation Services, 2006 O.J. (L 341).

In June 2013 there was a call by the air traffic controllers' unions of ten different European countries for a European day of protest against the Single European Sky proposal.⁸⁴ The strike was avoided *in extremis*, when, after lengthy discussions with ATCEUC,⁸⁵ the Commission agreed to renegotiate the liberalization of the airspace's market.⁸⁶ Nevertheless, this did not satisfy the French controllers, who decided to maintain the strike. One of their main complaints was that the opening of the sector to real competition would undermine security. Their real fear, however, was a change in their working conditions.⁸⁷

Nonetheless, not all air space management actors share the opinion that the SES will bring only disadvantages. For instance, Lionel Guérin, president of the National Federation for Commercial Aviation (FNAM), favors the proposal and has stated that he finds the creation of a single airspace system within Europe to be a logical step. He has also pointed out that the SES will bring more fluidity to air traffic and might result in overall savings of up to ten percent of the fuel currently used in air travel. Moreover, the reduction in the number of airspace management centers will reduce costs for airline companies. This would align the fees more closely to those in the U.S., which are currently half the amount of those imposed in Europe.⁸⁸

The fact that the establishment of the nine FABs, instead of leading to harmonization, has led Member States to become even more protective of their authority to control their airspace, supports the controllers' argument. Furthermore, the division is not the most efficient, as a number of major airports have been grouped in the same FAB. A too-intense competition between ANSPs could very well lead to a diminution of the safety budget and of the number of controllers, which might lead to a disastrous accident.

VI. What about Liability under this Fair Competition System?

Fair competition is important; however, without a strong and clear system of liability, it may prevent some companies from entering into a contract with a certain State while continuing to provide services in another. If the new company trying to provide services in another country has no clear picture of its rights and obligations, it will have to conduct research in order to know what types of liability claims it might face, and its costs will be higher. A second major issue is whether a foreign ANSP will face a dual burden with regard to liability. It seems highly unlikely that a country delegating its authority over a foreign ANSP will consent to having the law of that ANSP control any issue arising out of this relationship. For instance, if a German ANSP provides services over France, will the German ANSP be obliged to also comply with French legislation? Would the German ANSP be subjected to French tort law, German tort law, or

⁸⁴ Dutheil, *supra* note 85; David Millward, *Air Travellers Face Summer of Disruption as Strikes Spread*, THE TELEGRAPH, June 13, 2013, available at <http://www.telegraph.co.uk/travel/travelnews/10115903/Air-travellers-face-summer-of-disruption-as-strikes-spread.html>.

⁸⁵ Air Traffic Controllers European Unions Coordination, an umbrella group created in 1989 that is composed of 28 trade unions representing more than 14,000 air traffic controllers in Europe. See ATCEUC, Presentation, <http://www.atceuc.org/presentation/> (last visited Jan. 14, 2015).

⁸⁶ Diallo, *supra* note 84; Jo Tweedy, *Relief for Autumn Sunseekers as Europe's Air Traffic Controllers 'Postpone' Strike*, DAILYMAIL.COM, Oct. 7, 2013, <http://www.dailymail.co.uk/travel/article-2448553/Europes-air-traffic-controllers-postpone-Thursday-strike.html>.

⁸⁷ *Air Traffic Controller Strike Hits French Airports*, BBC.COM, June 11, 2013, available at <http://www.bbc.co.uk/news/world-europe-22850250>; Haddad, *supra* note 84.

⁸⁸ Dutheil, *supra* note 85.

both? These are only a few of the many as yet unresolved questions concerning ANSP liability under the SES.

Another potential problem is immunity. For instance, in most Member States, including France and Sweden, controllers are civil servants, which restricts their liability *per se*.⁸⁹ In contrast, in Germany, the U.K., and Italy, the ANSP is a private entity, which means that such controllers would no longer be able to seek protection under the umbrella of State liability and will be held directly liable.⁹⁰

VII. Conclusion

Opening the air transport sector to fair competition is clearly not an easy task. First, the system as currently envisioned will not considerably change the actual picture. There is a risk that cooperation within an FAB will lead to stronger partnerships, which will in turn lead to stronger monopolies. Second, ANSPs were, and still are, monopolies and trying to create fair competition while simultaneously maintaining the monopoly are conflicting objectives. Due to the natural monopoly formed within the ANTS, elimination of the monopolies will be impossible. Fair competition will have to run alongside these monopolies, which seems paradoxical.

The most problematic issue is that Air Navigation Service is a specialized field and not every company can enter the market. The controllers must undergo specialized training, which is often developed and offered by the ANSP companies themselves.

Third, competition might undermine safety. As the French controllers' syndicate astutely stated, France is one of the cheapest countries to fly above, but its equipment used in providing traffic control is old. Without the help of the State, and if the competition is too intense, the reduction in costs will first affect the controllers themselves. Reducing the number of controllers and the quality of their training means increasing the risk of collisions. Direct evidence of this can be seen in the Überlingen case; that collision was attributed to the fact that the controller was working alone at the time of the incident and the control system was undergoing repair. If there were free competition, State aid would be permitted only in specific cases, as prescribed by Article 107 TFEU.

Fourth, it is unclear whether there will be public calls for the newly created jobs, or if the companies will have to canvass States to win a contract as an ANSP for a part of that State.

Finally, if the liability issue is not dealt with, it might cause some companies to stop providing services. The companies might be subjected to two different set of rules and face serious risks regarding compensation to victims under unfamiliar laws. This uncertainty might keep companies from competing for service provision contracts.

It seems that the closer we get to the final system, the further away it seems to be. Indeed, one may wonder whether this component of the air transport sector can ever effectively be subject to fair competition.

⁸⁹ Eurocontrol, *Impact de la Responsabilité Juridique dans le Domaine du Contrôle du Trafic Aérien*, Projet INO-1-AC-SHIF, Note EEC No. 06/05, at 3 (2005); Chrystel Erotokritou, *The Legal Liability of Air Traffic Controllers*, 4 STUDENTPULSE 1 (2012), available at <http://www.studentpulse.com/articles/613/2/the-legal-liability-of-air-traffic-controllers>.

⁹⁰ Eurocontrol, *supra* note 9789, at 44.