

Managing “External Services” Legal Aspects

François RENARD – Legal Expert
O’Melveny & Myers LLP – Brussels

Dr Frederic LIEUTAUD
DAP/SSH - Eurocontrol



Agenda

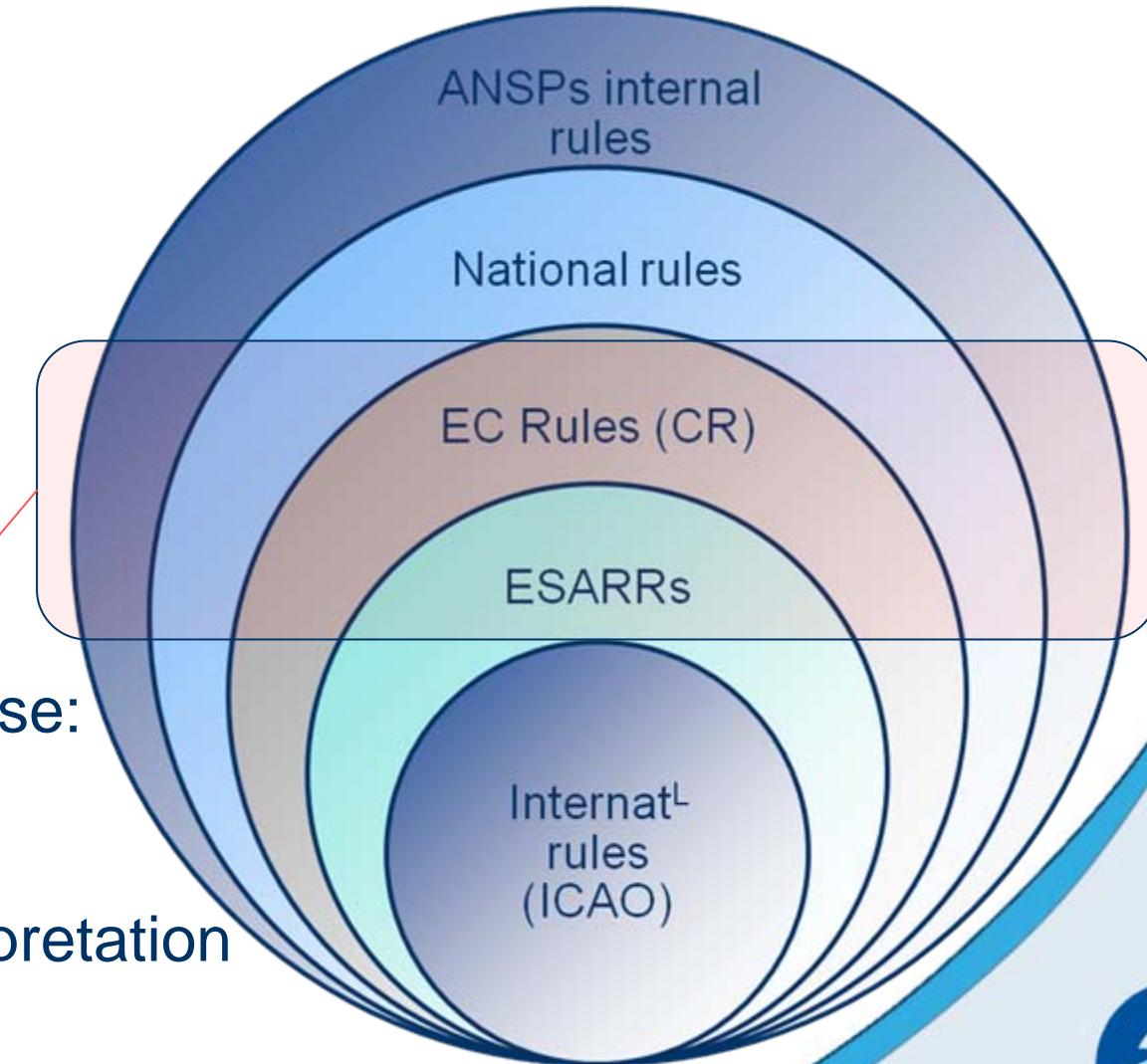
When selecting and managing external services,

- define a possible external service,
- keep in mind the legal landscape (understanding the basics)
- respect all applicable legal safety requirements
 - Find specific requirements
 - Find all other requirements
 - In all applicable legal orders
- use these legal safety requirements in your relation with External Service Provider

In the context of your risk management and assessment,
go beyond the Technical Safety Requirements – “Think legal”!



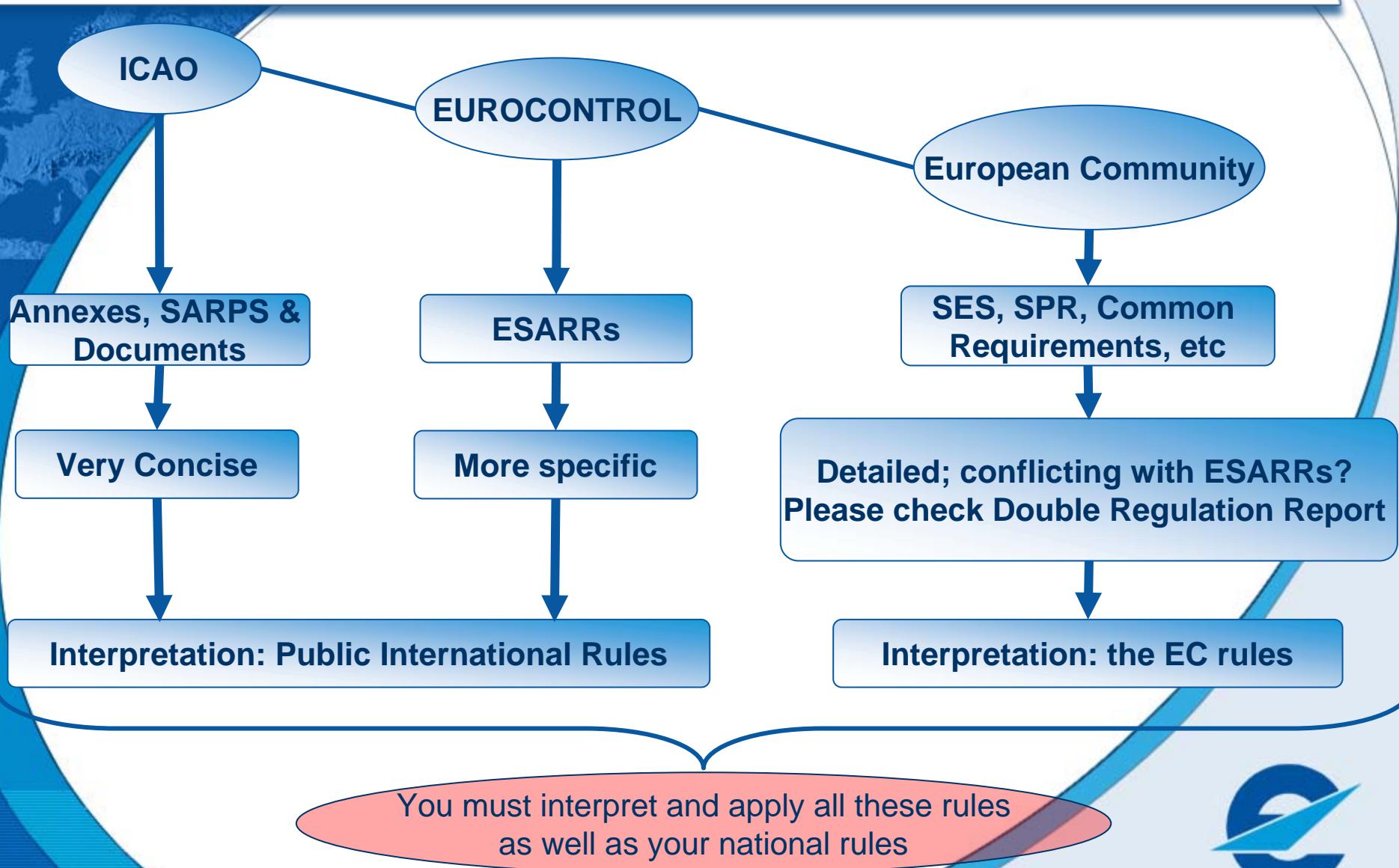
Legal Landscape: Links between legal orders



Key rules because:

- common
- detailed
- source of interpretation

Legal Landscape: European rules - Overview



Legal Landscape: Interpreting the EUROCONTROL rules

- Public International Rules (1969 Vienna Convention)
- General Rule: Interpreted in good faith
- In accordance with the ordinary meaning to be given to the terms of the treaty
- In their context:
 - preamble,
 - annexes,
 - agreement relating to the treaty,
 - instrument related to the treaty,
 - subsequent agreement or practice between the parties regarding the interpretation
- In the light of its object and purpose.
- A special meaning to be given to a term only if parties' intention

Legal Landscape: Interpreting the EUROCONTROL rules

When you read ICAO texts and ESARRs, you should:

- pay attention to the definitions/glossary of the words that are provided (e.g., in Appendix A – ESARR 3)
- apply the ordinary definition of the words (use dictionaries)
- read the texts in their entirety (preamble, scope, applicability, annexes, etc)
- avoid “contradictory” meaning
- keep in mind the object and purpose
- take into consideration:
 - “upwards” texts (e.g., ESARR 3 “external services” should be interpreted in the light of the “Revised Convention”, and of ICAO Annex 11)
 - “downwards” texts and practice (e.g., “ESARR 3 guidance to ATM Safety Regulators”, “SRC Glossary of Terms”)

⇒ The words, and then the purpose & context



Legal Landscape: Interpreting the EC rules

EC Rules (Case law of the EC Courts)

- **General rule: wording of the text**
- **Also**
 - the context in which a provision of Community law occurs,
 - the objects of the rules of which it is part, and
 - the provisions of Community law as a whole
 - in the light of the other official languages (if divergence: by reference to the purpose and general scheme of the rules of which it forms part)
- **Relation with International Rules:**
 - so far as possible, in a manner that is consistent with international law
 - [International law] may be an important point of reference for the interpretation of the concept



Legal Landscape: Interpreting the EC rules

When you apply the SES, SPR, Common Requirements, you should:

- apply the regulations directly in your legal order
- pay attention to the definitions of the words that are provided (e.g., Art. 2 Framework Regulation)
- interpret the words, as far as possible, in a manner that is consistent with ICAO/ESARRs
- read the texts in their entirety (preamble, scope, applicability, annexes, etc) and avoid “contradictory” meaning
- render your reading coherent with the objects of the rules and the purpose of Community rules (e.g., take into consideration the purpose of SES when reading the CRs)
- takes into consideration other official languages

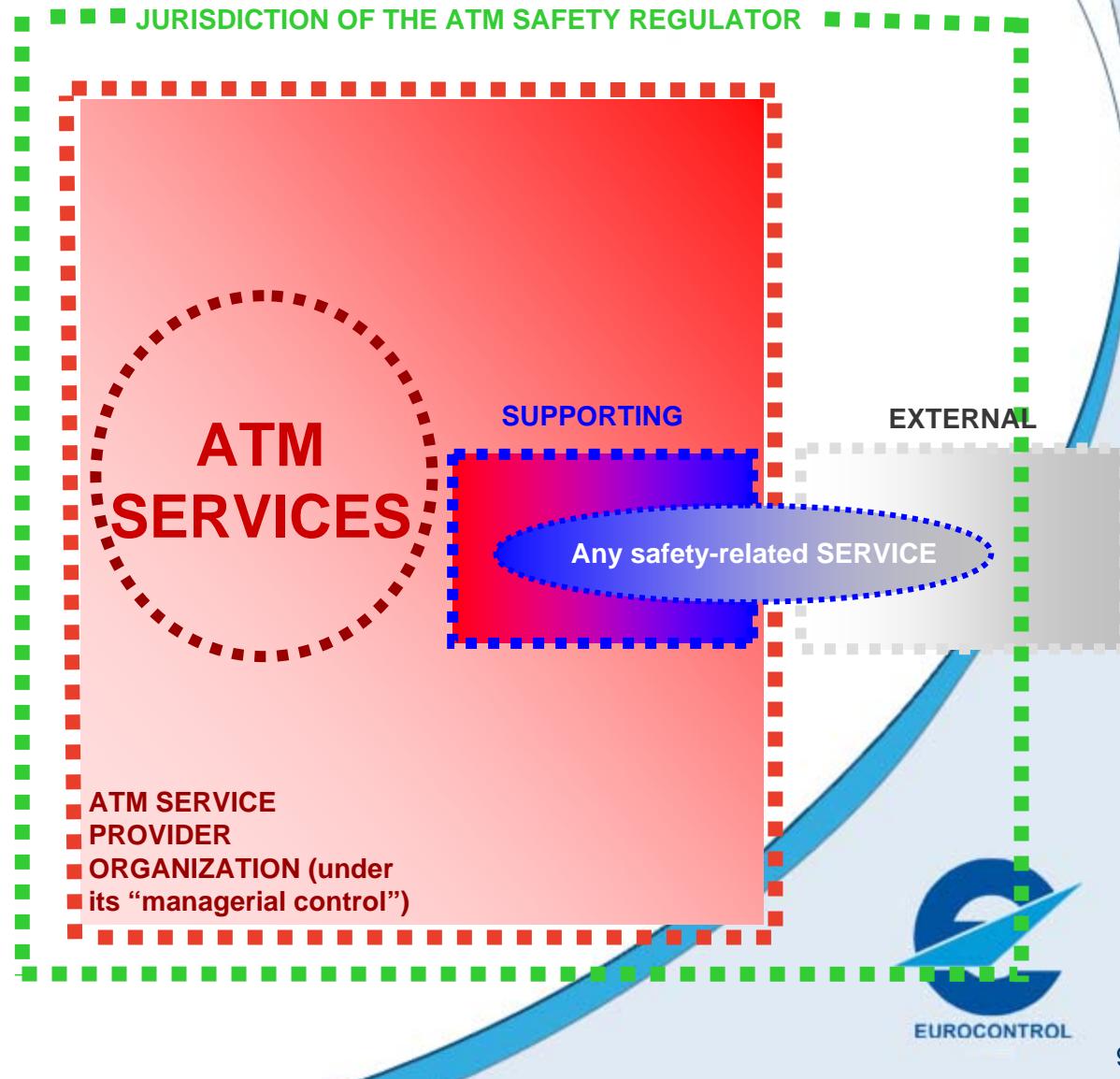
⇒ The words *together with* a teleological approach



What is an “external service” under ESARR 3?

NOTES:

- **ESARR 3 PROVISIONS:**
- SMS (**RED rectangle**) must cover all ATM and supporting services (**RED circle**)
- Supporting Services provider (**BLUE rectangle**), under the ATM service provider's managerial control, provides supporting services (**BLUE circle**)
- an External Services provider (**GREY rectangle**) is not under the ATM service provider's managerial control; its services (**BLUE/GREY circle**) can be identical to the ones provided by the supporting services provider
- an External Services provider can be in or out the jurisdiction of the ATM safety regulator (in **GREEN rectangle**)



What is an “external service” under ESSARs?

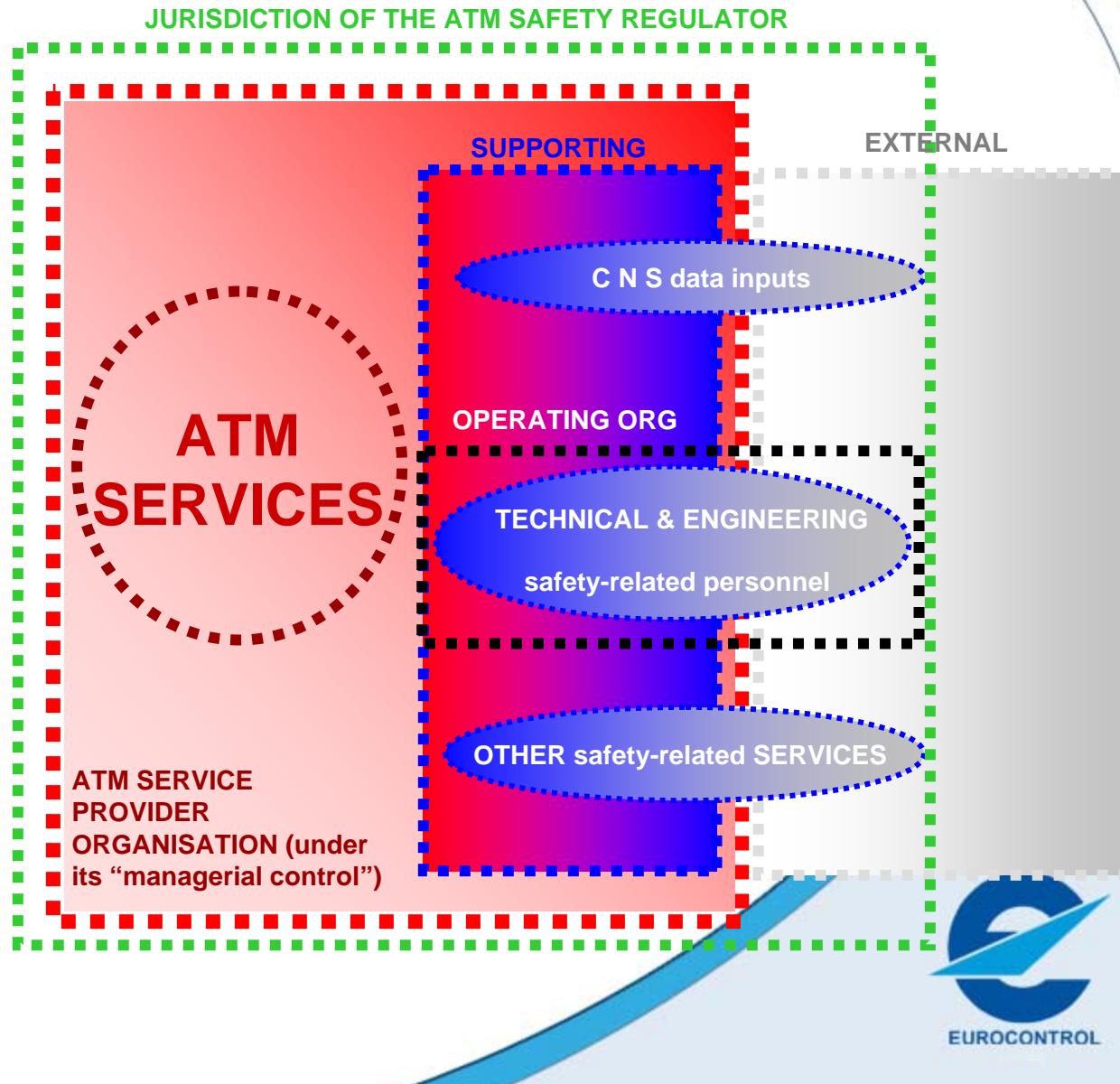
NOTES:

ESARR 3 PROVISIONS:

- See above
- CNS inputs, technical & engineering safety-related services, or other services (**BLUE/GREY circles**) can be either supporting or external

ESARR 5 PROVISIONS:

- The scope of ESARR 5 concerning “Operating org.” (**BLACK rectangle**) are technical & engineering safety-related services (also in relation to CNS)
- CNS inputs and non technical & engineering services are not concerned



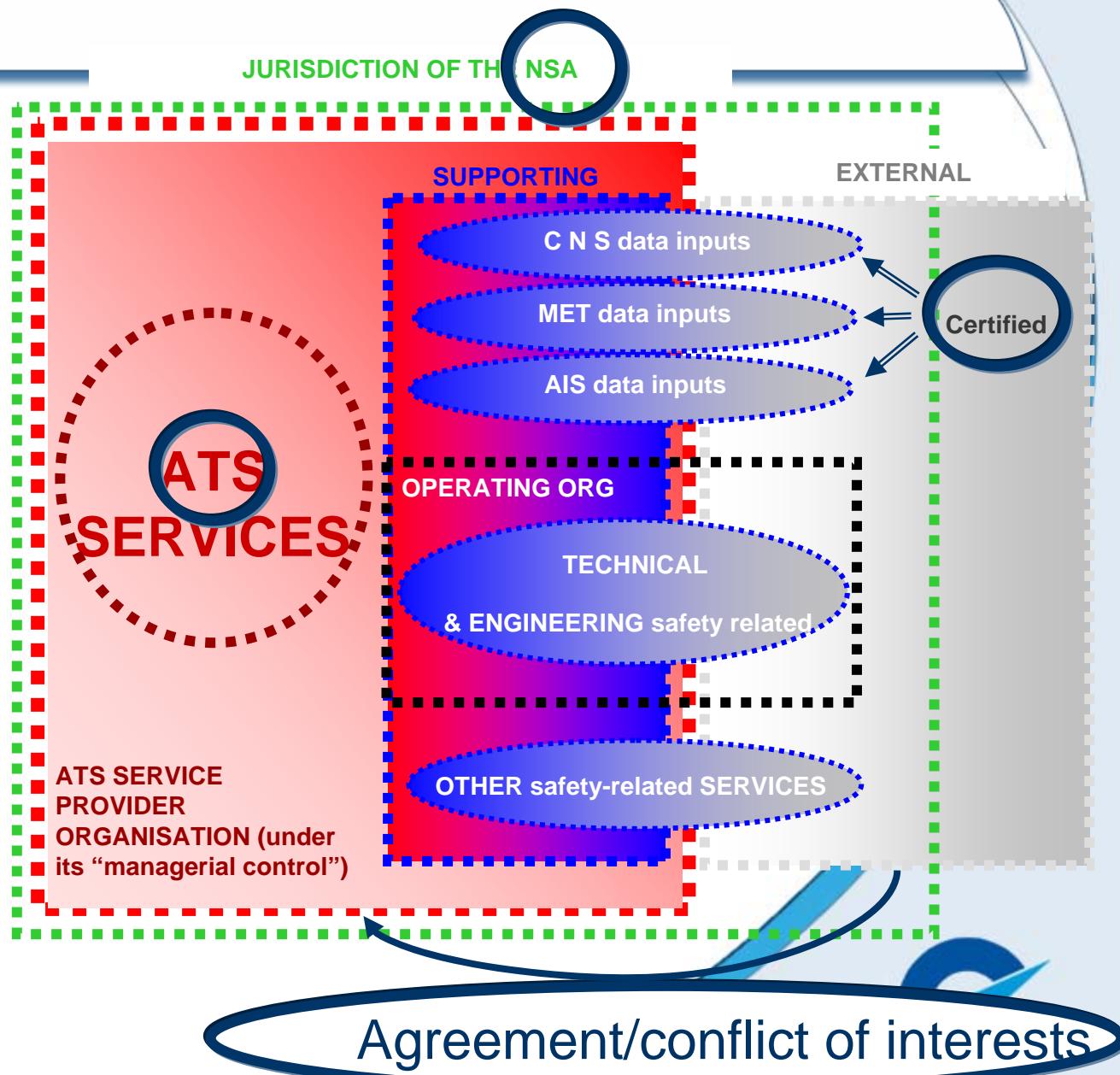
What is an “external service” under EC and ESSARs?

NOTES:

Main differences between ESARR & CRs:

- their scope of application
- the certification requirement
- the agreement requirements
- the conflict of interest issues

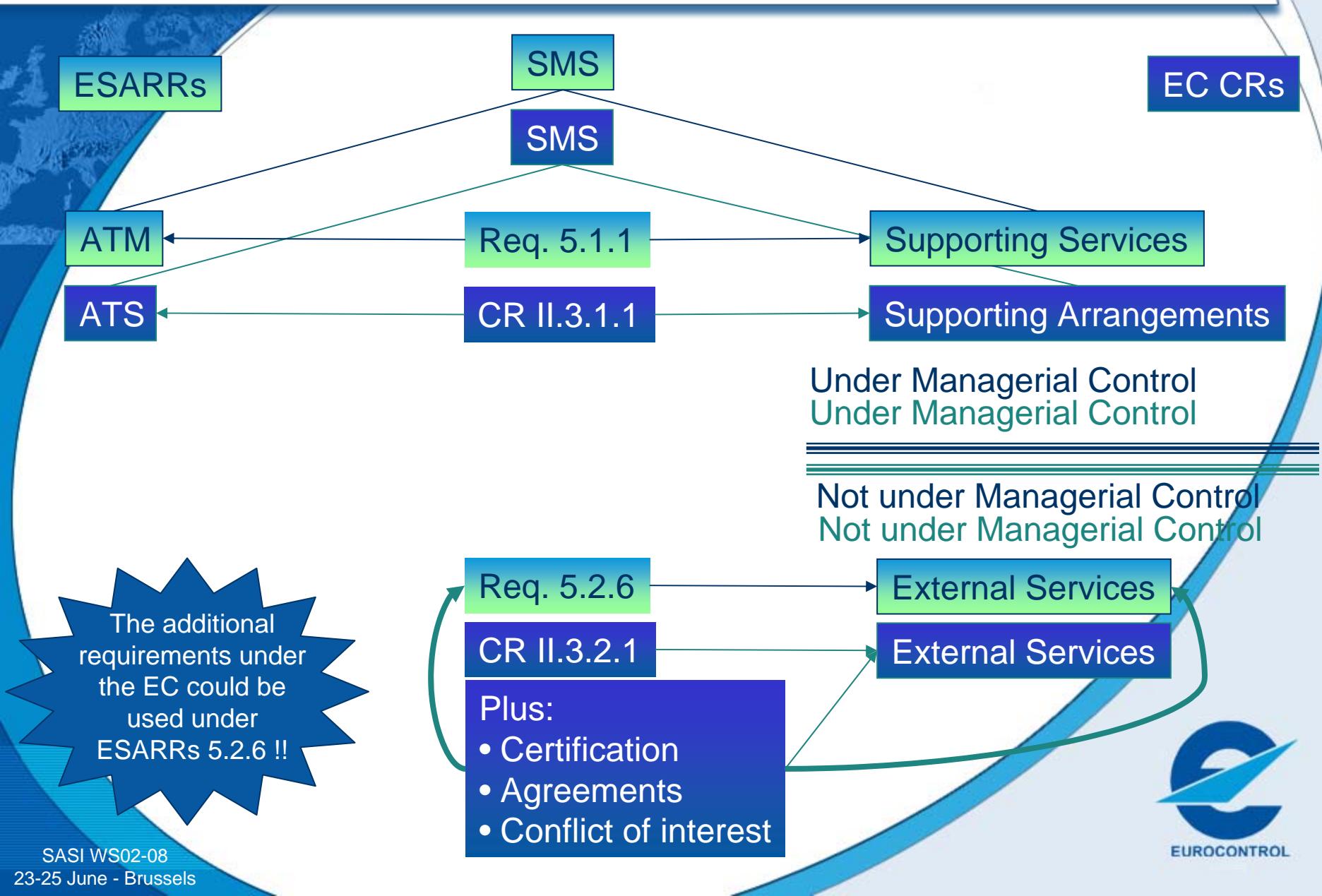
BUT are they really difference?



Legal Landscape: EC focus

- The “Double Regulation”
 - Please check Double Regulation Report (Dragh_SSC_report_e.10(23.11.2007))
 - No major discrepancies between ESARRs and EC CRs spot by survey
 - Some clarifications or modifications needed
 - Countries still bound by ICAO standards
 - Despite clarification needed, you should apply all legal requirements applicable to you
- SES 2
 - Mainly on FAB, Single Sky and Framework Reg.
 - Expected in September/October 2008
 - To be checked for the purpose of dealing with External Service Providers (ExtServProv)

What is an “external service” under EC and ESSARs?



What is an “external service” under EC and ESSARs?

- CNS
- LAN
- Radar Data Sharing
- Training
- Simulation
- MET
- AIS
- Geographical data
- Maintenance
- Energy
- Water
- Telecom
- Heating/ AC
- Catering
- Office consumable
- Furniture (software)
- Security guard
- Transportation
- Cleaning

If neither under your management control nor covered by the ATM service providers' SMS



When do you need to find out the applicable requirements?



1. What are your legal obligations (based on users needs – see M3) that you are about to delegate to external service providers?
2. Anticipate the legal requirements that you need to impose on them
3. Keep traces and use your previous experience

“Know Thyself” (Socrates)

Disclaimer

- **Purpose:**
 - This presentation focuses on European legal safety requirements
 - It does not aim to give you any legal advice whenever you hire an ExtServProv
 - It is not exhaustive, but provides examples
 - Do not forget the other legal requirements (e.g. public procurement; national safety requirements)
- **Liability:**
 - ANSPs are liable (see CR)
 - Check your insurance's policy when dealing with ExtServProv

Do not forget to think “legal” and not only technical!



Specific requirement for External Services

- ESARR 3 - 5.2.6 : " Within the operation of the SMS, the ATM service provider shall [...] ensure adequate and satisfactory justification of the safety of the externally provided services, having regard to their safety significance within the provision of the ATM service"
- EC CR 3.2.1: "Within the operation of the SMS, a provider of air traffic services shall ensure adequate justification of the safety of the externally provided services and supplies, having regard to their safety significance within the provision of its services"

Finding the specific requirements

No definition of “adequate”, but use the context of the rules and your common sense (check dictionaries!)

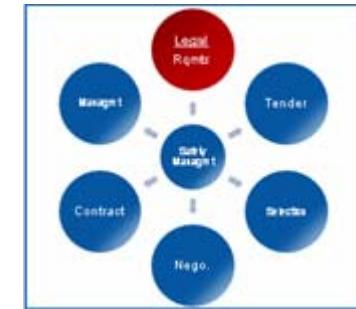
Key elements of interpretation:

- adequate: proportionate; sufficient; satisfactory
- satisfactory: meeting the expectations
- justification of: showing the rightness of, adducing adequate grounds for, demonstrate correctness of
- having regard to: so far as it concerns
- significance: importance, noteworthiness

Be proactive as one day, as you may be liable

Finding the specific requirements

- Did you make clear what you expected from the ESP?
- Did you verify the compliance of the offered External service with your requirements?
- Did you obtain an adequate “justification” (evidence)?
- Did you verify the said justification when selecting?
- Does it appear in a contract? etc



Your obligation



- As for technical requirements (see M3 presentation), did you update the “justification” if necessary?
- Can you trace it back?
- Do you audit the compliance of ESP with the said justification? Are you allowed to?
- How often? etc



Finding the general requirements

General Requirements

ESARRs 3:

- Overall safety objective (of ESARR 3) is to ensure that all safety issues within the provision of an ATM service have been addressed in a satisfactory manner, and to a satisfactory conclusion (safety objective)
- Within the overall management of the service, the service provider has a responsibility to ensure that all relevant safety issues have been satisfactorily dealt with, and to provide assurance that this has been done (ESARR Rationale)
- Safety management is that function of service provision, which ensures that all safety risks have been identified, assessed and satisfactorily mitigated (Rationale), and is defined as the management of activities to secure high standards of safety performance which meet, as a minimum, the provisions of safety regulatory requirements (SRC DOC 4)

See also EC CR:

- “an ANSP shall be able to provide services in a safe, efficient, continuous and sustainable manner [...]. To this effect, it shall maintain adequate technical and operational capacity and expertise” (Annex I, CR 1)
- “An ANSP shall have in place contingency plans for all the services it provides in the case of events which result in significant degradation or interruption of its services” (Annex I, CR 8.2)

Do not forget your national safety requirements!

Application to ExtServProv

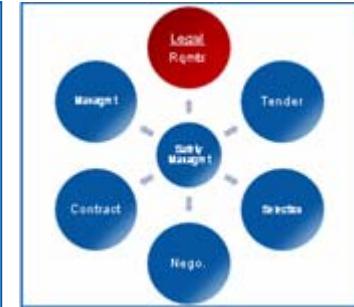
No managerial control over ExtServProv, but “adequate justification” AND you have *your own* overall safety obligation (and liability) ⇒

- Does ExtServ create a “safety issue”?
- Was it addressed in a satisfactory manner?
- Did you ensure that all relevant safety issues have been satisfactorily dealt with? Did you identify all safety risks?
- Were they satisfactorily mitigated? Are you satisfied that they reached a satisfactory conclusion?
- Did you secure high standards of safety performance which meet, as a minimum, the provisions of safety regulatory requirements?

Finding the general requirements

- Did you identify before and in the tender the risks potentially created by the ExtServProv?
- Did you exclude bidding ExtServProv b/c of risks?
- Did you address the risks in the contract? Do you foresee share of responsibility?
- Did you provide ways to mitigate the risks?
- What if the risks evolve? What can you provide? etc

Your obligation



Overall Safety

During Management

Contract:
Retaining the EXP

When
selecting the
ESP

When
preparing the
tender

Determining
your
requirements

- Do you audit the compliance of ExtServProv with its obligations? Are you allowed to?
- How often?
- Are the risks evolving?
- Should (can) you review your contract? etc

Your starting point:
Risk assessment



Finding other specific requirements: Engineering and Technical Personnel

- **Special Requirements concerning personnel (ESARR 5)**

ESARR 5 sets out the general safety requirements for all ATM services' personnel responsible for "safety related tasks" within the provision of ATM services and the safety regulatory requirements for engineering and technical personnel undertaking operational safety related tasks. (Scope)

- **General requirement:**

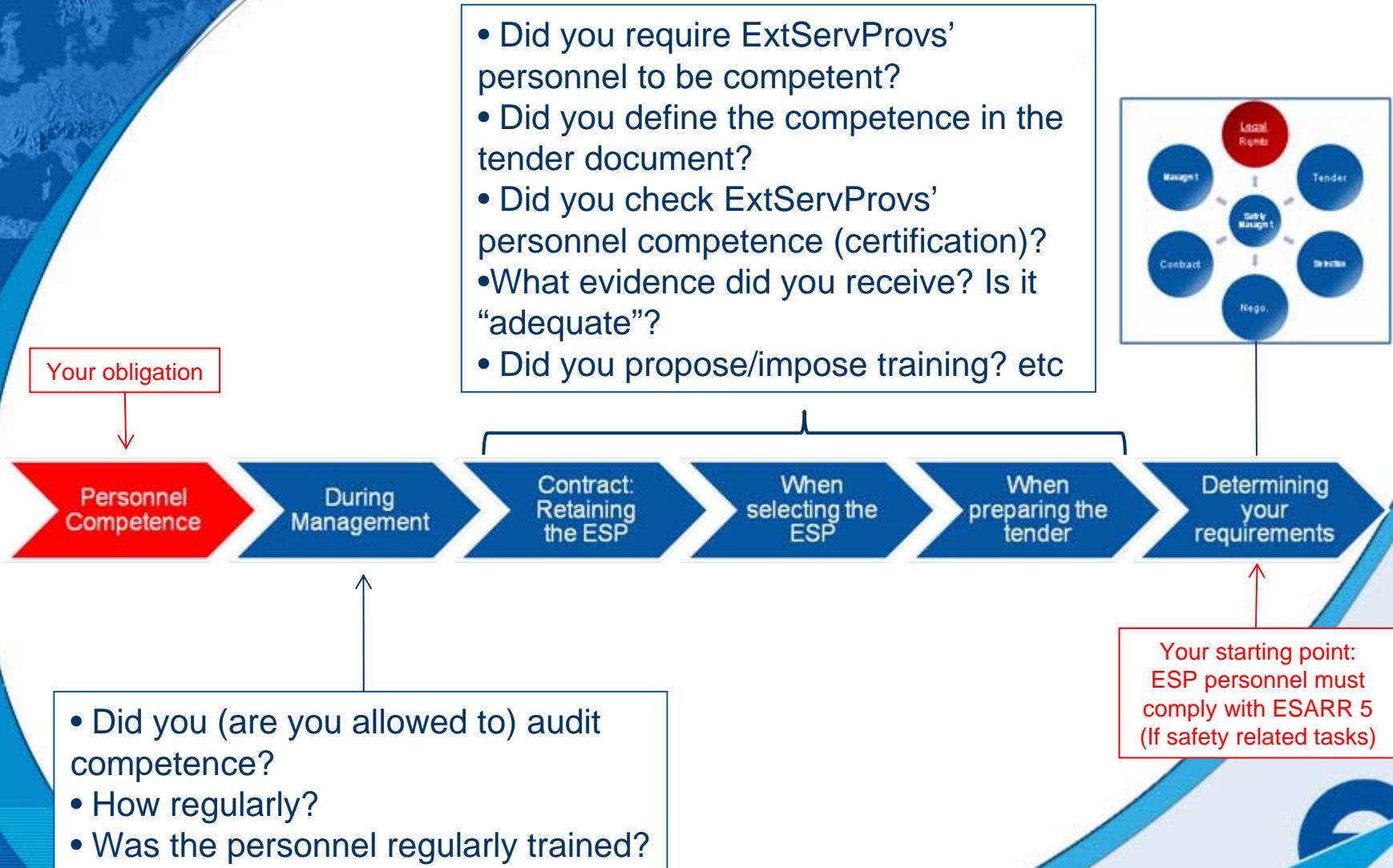
An air traffic provider at an ATS unit shall ensure, as part of its overall safety responsibilities, that all ATM services' personnel/responsible for tasks in the provision of air traffic services or supporting the provision of air traffic services, which are considered to be related to the safety of air traffic, are competent to carry out [ESARR 5] tasks (5.1.1)

Finding other specific requirements: Engineering and Technical Personnel

Specific Requirements concerning ATM engineering and technical personnel undertaking operational safety related tasks(ESARR 5)

- ATM service providers must ensure that this personnel of Operating Organization (providing external services) complies with ESARR 5
- Definition:
 - ATM engineering and technical personnel undertaking operational safety related tasks are personnel who operate and maintain all engineering systems, facilities and devices operated or supervised by the Operating Organization and serving the purpose of air navigation, regardless of whether the products used to fulfill the tasks involved in ATM are generally available on the market or have been specifically developed to ATM requirements (5.3 and Appendix A)
 - An Operating Organization is an organization that falls within the jurisdiction of the national ATM safety regulatory body and is responsible for the provision of engineering and technical services supporting ATM services. If engineering and technical supporting services are not provided by the ATM service provider, the Operating Organization would be a separate entity. (5.3)
- You should apply requirements in Section 5.3.2 when retaining an EXP (See also EC Annex II, CR 3.3)

Finding other specific requirements: Engineering and Technical Personnel



Finding other specific requirements – Certification

Additional EC requirements (ANSP \Rightarrow ANSP *in the EC or if Acquis Communautaire applies to ANSP*):

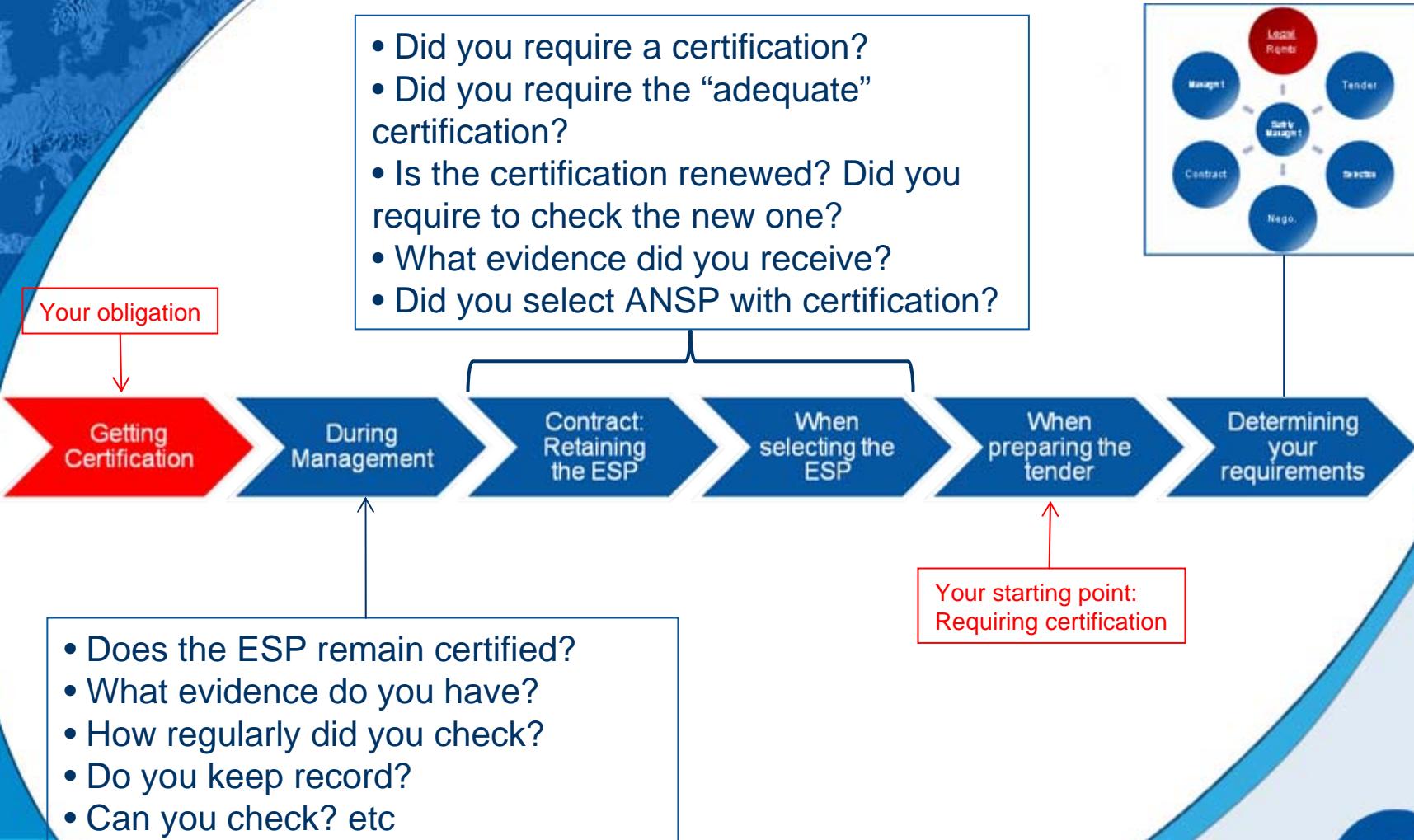
- Certification “shall confer on ANSPs the possibility of offering their services to other ANSPs, airspace users and airports within the EC” (Art. 7.6, SPR)
- ANSPs may avail themselves of the services of other service providers that have been certified in the Community (Art. 10.1, SPR)
- ANS may be provided without certification if “the provider of such services offers them primarily to aircraft movements other than GAT” (Art. 7.5, SPR)
- “Those ANSPs which may operate without a certificate should endeavour to ensure maximum compliance with the common requirements as far as their legal status allows” (Recital 2, CRs)
- Derogation may relate to safety management and “external services” only for some providers of aerodrome flight information (Art 4.3. (b), CRs)

Finding other specific requirements – Certification

⇒ Thus, in order to provide external services in the EC (or if *acquis* applies):

- ANSPs must in principle be EC certified under the CRs rules as far as their ANS services are concerned (or at least ensure maximum compliance)
- Non-ANSPs do not need to be EC certified under the CRs rules (BUT REMEMBER: certification under interoperability regulation (supplies), declarations under Directive 23/2006 (controller training services), etc, may have to be provided!)
- *BUT (at both ESARR and EC levels)*
 - Even for non-EC ANSP and even if EC derogation applicable, you should have an “adequate and satisfactory justification of the safety of the externally provided services” (ESARR 5.2.6) ⇒ does it not require that ANSP, providing external services, be certified?
 - Did you obtain the adequate certification? Does it apply to the service that the ESP (ANSP) will provide to you?

Finding other specific requirements – Certification



Finding other specific requirements – Formalization

Additional EC requirements (ANSP \Rightarrow ANSP *in the EC or if Acquis Communautaire applies to ANSP*) - Formalization of relationship:

- Formalization of ANSP-ANSP services within a “written agreement” (Art. 10.2, SPR)
- “An ANSP shall have in place arrangements to cover its liability arising from applicable law” [...]. “An ANSP which avails itself of services of another ANSP shall ensure that the agreements cover the allocation of liability between them” (Annex I, 7, CRs)
- “Different national arrangements as to liability should not prevent an ANSP from entering into agreements on the cross-border provision of services, once they have set up arrangements to cover losses for damages arising from liabilities under the applicable law” (Recital 15, CRs)
- Agreement may be part of certification (Annex II.2 (f), SPR) and ANSPs should comply with the scope of certification (incl. agreement) at any time (Art. 5.4, CRs)
- Approval of the Member States concerned: for ATS obligatory (Art. 10.3, SPR)
- “An ANSP shall manage the safety of all its services. In doing so, it shall establish formal interfaces with all stakeholders which any influence directly the safety of its services” (Annex I, CR 3.1)

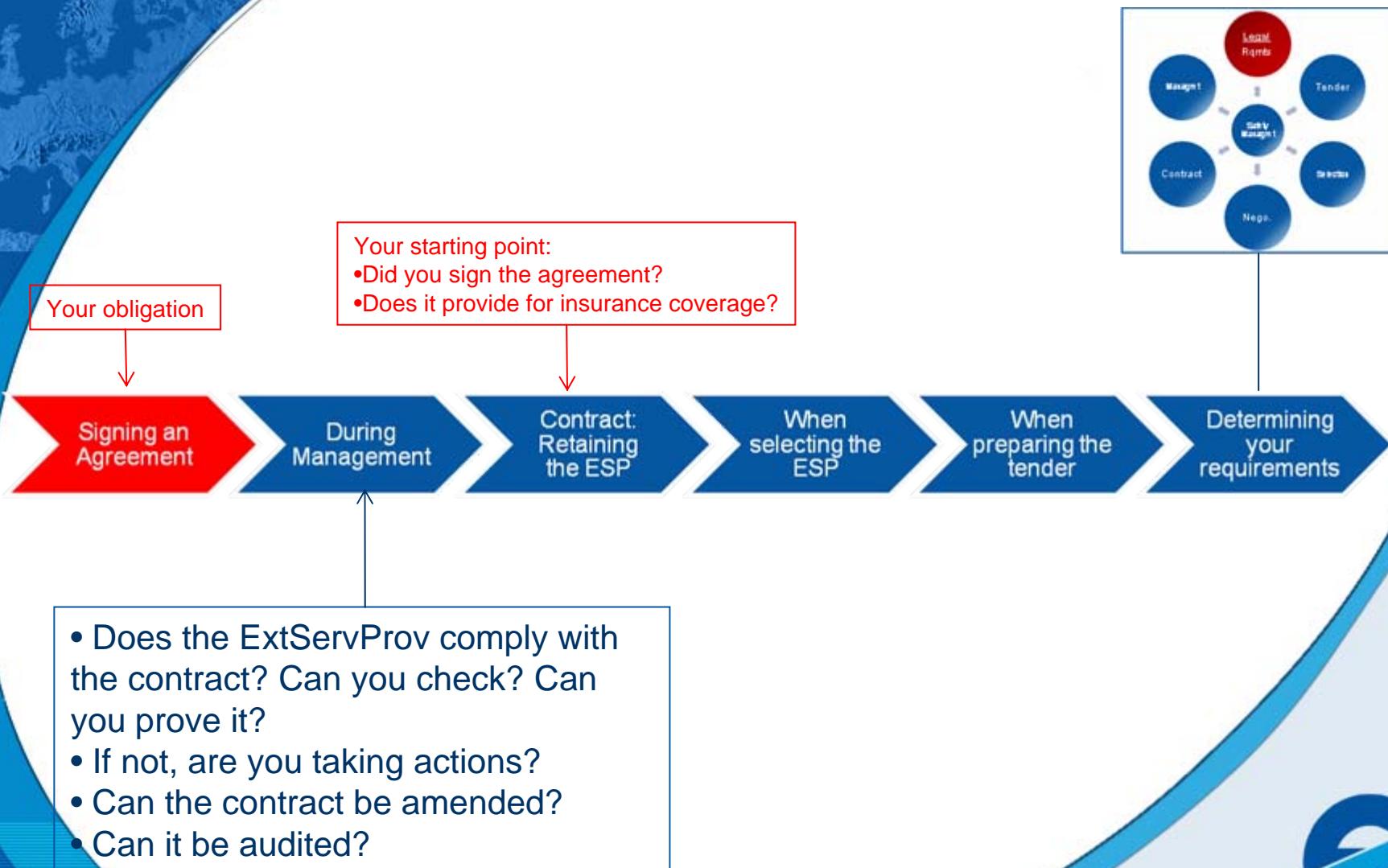
Finding other specific requirements – Formalization

Additional EC requirements (ANSP \Rightarrow ANSP in the EC or if Acquis Communautaire applies to ANSP):

\Rightarrow to provide external ANSP-type services in the EC:

- ANSPs must signed an agreement (incl. concerning liability)
- Agreement may be part of the certification
- Approval sometimes required (ATS)
- ANSPs must “establish formal interfaces” (“relations formelles”, “formali collegamenti”, “formele schmittstellen”) if influence of safety
- **BUT**
 - you should have an “adequate and satisfactory justification of the safety of the externally provided services” (ESARR 5.2.6)
 - \Rightarrow does it not require to sign such an agreement?
 - \Rightarrow is it not implied that you should sign an agreement?

Finding the other specific requirements – Formalization



Finding other specific requirements – Conflict of Interests

Additional requirements imposed on ATS provider *in the EC or if Acquis Communautaire applies to it*

“A provider of ATS shall take all necessary measures to prevent any situation of conflict of interests that could compromise the impartial and objective provision of its services.” (Annex II, 1, CRs)

⇒ to receive any external service in the EC or if Acquis Communautaire applies to it):

A provider of ATS prevent situation of any conflict of interests (if influence on service)

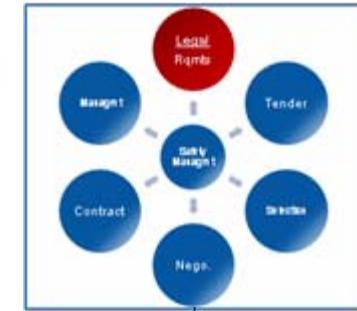
- **BUT, you should have an “adequate and satisfactory justification of the safety of the externally provided services” (ESARR 5.2.6)**

⇒ does it not require to avoid any conflict of interest and to document it?

⇒ is it not implied that you should sign an agreement?

Finding the specific requirements – Conflict of Interests

- Did you make clear that you would conflict out potential bidders?
- Did you selected them on this ground?
- Did you obtain mitigating “compensation” in case conflict is unavoidable (e.g. third party supervisor; Chinese walls; warranty and guarantee)?
- Did you involve hierarchy/adequate governmental level?
- Can the absence of conflict be audited? By whom?



Your obligation



- in case of risk of conflicts, how was this mitigated?
- Are you allowed to audit new risks of conflicts?
- is it adequately documented?

Your starting point:

- Defining potential conflict?
- Avoid them

- **Conflict of Interests**

- EXP ANSP-owned and possibly government-owned
- Ex: power or water supply, TX equipment, surveillance equipment, MET data & CNS (radar), etc
- Must be prevented if “could compromise the impartial and objective provision of [ATS]”(Annex II, 1, CRs)
- *But also*: adequate and satisfactory justification; “overall safety” obligation; obligation related to personnel; mitigation obligation; etc
- If you have no choice, see above

- **Monopoly**

- Ex: communication, power or water supply, AIS, MET, etc (also risk of conflict if government-owned – see above)
- No specific requirements but many general requirements: adequate and satisfactory justification; “overall safety” obligation; obligation related to personnel; no conflict of interests ; mitigation obligation; etc
- You have various and general obligations that you must respect (find your way)
- If you have no choice,
 - Did you identify any safety risk?
 - Did you mitigate this risk (e.g. did you define a minimum service obligation; do they offer data at request so that you can carry on your own reporting obligations; do you have minimum alternative supply; warranty and guarantee; etc)?
 - Did you keep written evidence of this?
 - What did you provide in your agreement in relation to their liability?

- **Subcontracting**

- Ex: communication, power or water supply, AIS, MET, etc (also risk of conflict if government-owned – see above)
- No specific requirements but many general requirements: adequate and satisfactory justification; “overall safety” obligation; obligation related to personnel; certification obligation; sign contract; share of liabilities; etc
- Did you
 - Accept and approve any subcontracting in your agreement with the main ESP?
 - Provide a special liability clause in your agreement?
 - Request and obtain the subcontractor’s certification?
 - Mitigate this risk (e.g. did you force main contractor to take over in case of failure of subcontractor; can you audit the sub-contractor; warranty and guarantee; etc)?
 - Keep written evidence of this?

- **Insurance**

- EC obligation: “an ANSP shall have in place arrangements to cover its liabilities arising from applicable law [...] An ANSP which avails itself of services of another ANSP shall ensure that the agreements cover the allocation of liability between them” (CR, Annex II, 7)
- But also general requirements: adequate and satisfactory justification
- Common sense
- Could you accept to be fully liable for misconduct, breach of contract, etc of an ExtServ Prov, or its sub-contractor?

Conclusion: Managing “External Services” (Legal Aspects)

- “Know Thyself”
- Anticipate all your legal obligations
- Need legal advices
- List and anticipate your legal safety requirements:
 - Specific obligation (“adequate justification”)
 - General obligation
 - Other specific obligations, both under EC and ESARRs
- Attempt to impose these requirements onto the External Service Provider
- Get the necessary (hierarchical/political) support
- Mitigate the risks

One day you may be liable: think “legal”!

