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Proposal for a

COUNCIL DECISION

on the position to be taken on behalf of the European Union at the Council of the International Civil Aviation Organization, in respect of proposals for the amendment of Annex 16, Volumes I-III to the Chicago Convention, concerning Standards and Recommended Practices relating to environmental protection

EXPLANATORY MEMORANDUM

1. SUBJECT MATTER OF THE PROPOSAL

This proposal concerns a Council Decision on the position to be taken on behalf of the European Union at the Council of the International Civil Aviation Organization (ICAO), in respect of proposals for the amendment of Annex 16, Volumes I-III of the Chicago Convention, concerning Standards and Recommended Practices relating to environmental protection.

2. CONTEXT OF THE PROPOSAL

2.1. The Convention on International Civil Aviation

The Convention on International Civil Aviation ('the Chicago Convention') aims to regulate international air transport. It entered into force on 4 April 1947 and established the ICAO.

All EU Member States are parties to the Chicago Convention.

2.2. The International Civil Aviation Organization

ICAO is a specialized agency of the United Nations. The aims and objectives of the Organization are to develop the principles and techniques of international air navigation and to foster the planning and development of international air transport.

Mandatory functions of the ICAO Council, listed in Article 54 of the Chicago Convention, include the adoption of International Standards and Recommended Practices (SARPs), designated as Annexes to the Chicago Convention.

The ICAO Council is a permanent body of the ICAO with a membership of 36 contracting States elected by the ICAO Assembly for a period of three years. A number of Member States are represented in the ICAO Council.

The EU is an ad-hoc observer in many ICAO bodies (Assembly and other technical bodies).

2.3. The envisaged acts of the Council of the International Civil Aviation Organization

The International Standards and Recommended Practices (SARPs) on Environmental Protection have been adopted as Annex 16 to the Chicago Convention by the ICAO Council. Annex 16 has four volumes, with the following scope:

- Volume I concerning Standards and Recommended Practices relating to aircraft noise;
- Volume II concerning Standards and Recommended Practices relating to aircraft engine emissions;
- Volume III, concerning Standards and Recommended Practices relating to aeroplane CO₂ emissions;
- Volume IV, concerning Standards and Recommended Practices relating to the Carbon Offsetting and Reduction Scheme for International Aviation (CORSIA).

The ICAO Council should, at its 228th Session on 13 – 31 March 2023, consider possible changes to these Volumes. State Letters¹ were sent to ICAO States in July 2022 with the expected changes for their comments.

¹ SL 22/58, SL 22/59, SL 22/60 and SL 22/61.

3. POSITION TO BE TAKEN ON THE UNION'S BEHALF

3.1. Background

In accordance with Article 19(3) of Regulation (EU) 2018/1139², the Commission is empowered to adopt delegated acts to amend the references to the provisions of the Chicago Convention referred to in the first subparagraph of Article 9(2) of that Regulation, in order to update them in light of subsequent amendments to those provisions which enter into force after 4 July 2018 and which become applicable in all Member States, in so far as such adaptations do not broaden the scope of that Regulation.

Council Decision (EU) 2016/915 of 30 May 2016³, as amended by Council Decision (EU) 2020/768 of 9 June 2020⁴, established the Union position with regard to the international instrument to be drawn up within the ICAO bodies and intended to lead to the implementation from 2020 of a single global market-based measure for international aviation emissions, i.e. the Carbon Offsetting and Reduction Scheme for International Aviation ('CORSA'). That Decision remains in force. Therefore, it is used as a basis for establishing the Union position as regards changes to Annex 16, Volume IV.

3.2. Position to be taken on behalf of the Union

It is necessary to adopt, ahead of the 228th Session of the ICAO Council, on 13 – 31 March 2023, the position on the Union's behalf to allow the Member States to participate in the decisions on the proposed changes to Annex 16, Volumes I-III to the Chicago Convention.

On amendments to Volume I, the expected proposed amendments, as set out in the above-mentioned State Letter, include:

- a) amendments regarding the proper use of modal verbs to align Annex 16, Volume I with the Directives to Divisional-type Air Navigation Meetings and Rules of Procedure for their Conduct (Doc 8143), Part II, Formulation of Proposals for International Standards, Recommended Practices and Procedures;
- b) recommended guidance for helicopter hover noise measurement as part of Annex 16, Volume I, Attachment H;
- c) amendments to address limitations of specifications with respect to the adjustments of test-day SPL (sound pressure level) to reference conditions; and
- d) minor typographical errors for correction.

On amendments to Volume II, the expected proposed amendments, as set out in the above-mentioned State Letter, include:

- a) restructuring and relevant reference updates, introduced in accordance with the Directives to Divisional-type Air Navigation Meetings and Rules of Procedure for their Conduct (Doc 8143), Part II, Formulation of Proposals for International Standards, Recommended Practices and Procedures;

² Regulation (EU) 2018/1139 of the European Parliament and of the Council of 4 July 2018 on common rules in the field of civil aviation and establishing a European Union Aviation Safety Agency (OJ L 212, 22.8.2018, p. 1).

³ Council Decision (EU) 2016/915 of 30 May 2016 on the position to be taken on behalf of the European Union with regard to the international instrument to be drawn up within the ICAO bodies and intended to lead to the implementation from 2020 of a single global market-based measure for international aviation emissions (OJ L 153, 10.6.2016, p. 32).

⁴ Council Decision (EU) 2020/768 of 9 June 2020 amending Decision (EU) 2016/915 as regards the reference period intended to be used for measuring the growth of CO₂ emissions, to take account of the consequences of the COVID-19 pandemic in the context of CORSIA (OJ L 187, 12.6.2021, p. 10).

- b) language consistency updates, which, inter alia, introduce proper use of modal verbs, and consistent application of Notes and Recommendations, in accordance with the Directives to Divisional-type Air Navigation Meetings and Rules of Procedure for their Conduct (Doc 8143), Part II, Formulation of Proposals for International Standards, Recommended Practices and Procedures;
- c) applicability language improvements, in order to reflect, inter alia, the Smoke Number and non-volatile particulate matter (nvPM) mass concentration standards applicability to the engines;
- d) introduction of a new definition for the “equivalent procedure” with the subsequent changes for consistency across Annex 16, Volume II;
- e) definitions, descriptions, references and language improvements, including, inter alia, extended clarifications, methodological descriptions, intermediate procedural steps, and additional Notes and Recommendations;
- f) improvements related to nvPM measurement procedure in accordance with the latest updates in SAE ARP 6320A and AIR 6241A on continuous sampling and measurement of nvPM emissions from aircraft turbine engines; and
- g) corrections to general technical, nomenclature and typographical issues, aimed at increasing clarity and consistency across the document.

On amendments to Volume III, the expected proposed amendments, as set out in the above-mentioned State Letter, include:

- a) definition, description, references and language improvements that aim, inter alia, to avoid potential misinterpretation and introduce additional clarifications related to Reference Geometric Factor (RGF);
- b) changes for consistency following the introduction of a new definition for the “equivalent procedure” across Annex 16, Volume III.

All proposed amendments are envisaged to become applicable on 1 January 2024.

The subject matter of the envisaged act concerns an area for which the Union has exclusive external competence by virtue of the last limb of Article 3(2) TFEU as the envisaged acts are liable to affect common rules or alter their scope, namely:

— Regulation (EU) 2018/1139 of the European Parliament and of the Council of 4 July 2018 on common rules in the field of civil aviation and establishing a European Union Aviation Safety Agency⁵;

— Commission Regulation (EU) No 748/2012 of 3 August 2012 laying down implementing rules for the airworthiness and environmental certification of aircraft and related products, parts and appliances, as well as for the certification of design and production organisations⁶.

Having regard to the relevant Union legislation, the position to be taken on behalf of the Union in the ICAO Council should be to support the proposed amendments to Volumes I, II and III.

⁵ OJ L 212, 22.8.2018, p. 1.

⁶ OJ L 224, 21.8.2012, p. 1.

4. CONSISTENCY WITH OTHER UNION POLICIES

The proposed Decision is consistent with and complements other policies of the Union, notably energy, environmental and transport policies.

5. LEGAL BASIS

5.1. Procedural legal basis

5.1.1. Principles

Article 218(9) of the Treaty on the Functioning of the European Union (TFEU) provides for decisions establishing ‘*the positions to be adopted on the Union’s behalf in a body set up by an agreement, when that body is called upon to adopt acts having legal effects, with the exception of acts supplementing or amending the institutional framework of the agreement.*’

Article 218(9) TFEU applies regardless of whether the Union is a member of the body or a party to the agreement⁷.

The concept of ‘acts having legal effects’ includes acts that have legal effects by virtue of the rules of international law governing the body in question. It also includes instruments that do not have a binding effect under international law, but that are ‘*capable of decisively influencing the content of the legislation adopted by the EU legislature*’⁸.

5.1.2 Application to the present case

The ICAO Council is a body set up by an agreement, namely the Chicago Convention.

The envisaged acts have legal effects for the purposes of article 218(9) TFEU.

In accordance with Article 54 of the Chicago Convention, the ICAO Council adopts international Standards and Recommended Practices (SARPs), designated as Annexes to the Chicago Convention. Such SARPs are binding under international law in accordance with article 90 of the Chicago Convention in so far as they become binding for all ICAO contracting parties unless a majority of the latter register their disapproval with the ICAO Council.

Further, by potentially leading to amendments, the envisaged acts are capable of decisely influencing the content of EU legislation, namely Regulation (EU) 2018/1139 and Commission Regulation (EU) No 748/2012 in so far as they explicitly refer to Annex 16, Volumes I-III to the Chicago Convention.

The envisaged acts do not supplement or amend the institutional framework of the agreement.

Therefore, the adoption of the Union position in respect of such notifications falls within the scope of Article 218(9) of the TFEU.

5.2. Substantive legal basis

5.2.1 Principle

⁷ Judgment of the Court of Justice of 7 October 2014, Germany v Council, C-399/12, ECLI:EU:C:2014:2258, paragraph 64.

⁸ Judgment of the Court of Justice of 7 October 2014, Germany v Council, C-399/12, ECLI:EU:C:2014:2258, paragraphs 61 to 64.

The substantive legal basis for a decision under Article 218(9) TFEU depends primarily on the objective and content of the adopted act in respect of which a position is taken on the Union's behalf.

If the envisaged act pursues two aims or has two components and if one of those aims or components is identifiable as the main one, whereas the other is merely incidental, the decision under Article 218(9) TFEU must be founded on a single substantive legal basis, namely that required by the main or predominant aim or component.

5.2.2 Application to the present case

The main objective and content of the adopted act relate to transport policy.

The substantive legal basis of the proposed decision is Article 100(2) of the TFEU. In accordance with this article, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may lay down appropriate provisions for air transport.

5.3. Conclusion

The legal basis of the proposed decision should be Article 100(2) TFEU, in conjunction with Article 218(9) TFEU.

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THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 100(2), in conjunction with Article 218(9) thereof,

Having regard to the proposal from the European Commission,

Whereas:

- (1) The Convention on International Civil Aviation ('the Chicago Convention'), which regulates international air transport, entered into force on 4 April 1947. It established the International Civil Aviation Organization (ICAO).
- (2) All Member States are Contracting States of the Chicago Convention and members of the ICAO, whereas the Union has observer status in certain ICAO bodies.
- (3) Pursuant to Article 54 of the Chicago Convention, the ICAO Council may adopt International Standards and Recommended Practices.
- (4) The International Standards and Recommended Practices (SARPs) on Environmental Protection have been adopted as Annex 16 to the Chicago Convention by the ICAO Council, in Volumes I-IV.
- (5) The ICAO Council, during its 228th Session to be held on 13 – 31 March, is to adopt a number of amendments to Annex 16, Volumes I to III of the Chicago Convention.
- (6) It is appropriate to establish the position to be taken on the Union's behalf in the ICAO Council as the proposed amendments have legal effect, given that they are binding under international law and are capable of decisively influencing the content of Union law, namely Regulation (EU) 2018/1139 and Commission Regulation (EU) No 748/2012.
- (7) The position to be taken on the Union's behalf should be to support the amendments to Volumes I to III.
- (8) The Union's position should be expressed by the Member States of the Union that are members of the ICAO Council, acting jointly on behalf of the Union.
- (9) The Union's position after the adoption of amendments to Annex 16, Volume I-III to the Chicago Convention by the ICAO Council, to be announced by the ICAO Secretary General via an ICAO State Letter procedure, should be not to register disapproval and to notify compliance with those measures. Where Union legislation would deviate from the newly adopted SARPs after an envisaged date of application

of those SARPs, a difference with those particular SARPs should be notified to ICAO.

HAS ADOPTED THIS DECISION:

Article 1

- (1) The position to be taken on the Union's behalf in the 228th Session of the ICAO Council, or in any subsequent session, in respect of Annex 16, Volumes I-III to the Convention on International Civil Aviation, concerning the amendments of these Volumes shall be to support the proposed amendments in their entirety.
- (2) The position to be taken on the Union's behalf, provided the ICAO Council adopts without any substantial change the proposed amendments to Annex 16, Volumes I-III to the Convention on International Civil Aviation referred to in paragraph 1, shall be not to register disapproval and to notify compliance with the adopted measure in reply to the respective ICAO State Letter. Where Union legislation would deviate from the newly adopted SARPs after the envisaged date of application of those SARPs, a difference with those particular SARPs shall be notified to ICAO. In such case, the Commission shall, in due time and at least two months before any deadline set by the ICAO for the notification of differences, submit to the Council, for discussion and approval, a preparatory document setting out the detailed differences to be notified to the ICAO on the Union's behalf by the Member States.

Article 2

The position referred to in Article 1(1) shall be expressed by the Member States of the Union that are members of the Council of the International Civil Aviation Organization, acting jointly on behalf of the Union.

The position referred to in Article 1(2) shall be expressed by all the Member States of the Union.

Article 3

This Decision is addressed to the Member States.

Done at Brussels,

*For the Council
The President*