EUROPEAN
COMMISSION

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2023/0032 (NLE)

Proposal for a

COUNCIL DECISION

on the position to be taken on behalf of the European Union in the 228th session of the Council of the International Civil Aviation Organization (ICAO) as regards the envisaged adoption of Amendment 93 to Annex 10 - Aeronautical Telecommunications, Volume I - Radio Navigation Aids of the Convention on International Civil Aviation

EXPLANATORY MEMORANDUM

1. SUBJECT MATTER OF THE PROPOSAL

This proposal concerns:

(i) the position to be taken on the Union's behalf in the 228th session of the Council of the International Civil Aviation Organization (ICAO) for the envisaged adoption of Amendment 93 to Annex 10 — Aeronautical Telecommunications, Volume I — Radio Navigation Aids, and

(ii) the position to be taken on the Union's behalf after the ICAO announces the adoption of the Amendment 93 to Annex 10 — Aeronautical Telecommunications, Volume I — Radio Navigation Aids of the Convention on International Civil Aviation in respective State Letters, inviting its contracting States to either notify their disapproval, to notify any differences or compliance with the adopted measures.

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. The Chicago Convention entered into force on 4 April 1947 and established the International Civil Aviation Organization.

All EU Member States are Parties to the Chicago Convention.

2.2. The International Civil Aviation Organization

The International Civil Aviation Organization 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.

The ICAO Council is a permanent body of ICAO with a membership of 36 contracting States elected by the ICAO Assembly for a period of three years. For the period of 2022-2025, there are six EU Member States represented in the ICAO Council.

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.

Pursuant to Article 90 of the Chicago Convention, any such Annex or any amendment of an Annex shall become effective within three months after its submission to the ICAO contracting States, or at the end of such longer period of time as the ICAO Council may prescribe, unless in the meantime a majority of contracting ICAO States register their disapproval.

Following the adoption of such measures, ICAO States are required to comply with those measures or to notify either their disapproval or any differences with these measures before they enter into force and become legally binding.

Pursuant to Article 38 of the Chicago Convention, any State which finds it impracticable to comply in all respects with any such international standard or procedure, or to bring its own regulations or practices into full accord with respect to any such international standard or procedures or which deems it necessary to adopt regulations or practices differing in any particular respect from those established by an international standard, shall give immediate

notification to the ICAO of the differences between its own practice and that established by the international standard.

2.3. The envisaged act of ICAO and their relationship with the existing Union rules

During its 228th or any consequent session, the ICAO Council is expected to adopt:

- Amendment 93 to Annex 10, Volume I relating to the

  a) support of the introduction of dual-frequency, multi-constellation (DFMC) global navigation satellite system (GNSS) by adding provisions for additional frequencies of operation for the global positioning system (GPS), the global navigation satellite system (GLONASS) and the satellite-based augmentation system (SBAS), and by introducing provisions for the new BeiDou Navigation Satellite System (BDS) and Galileo system;

  and

  b) support of ionospheric gradient mitigation for the ground-based augmentation system (GBAS), arising from the sixth meeting of the Navigation Systems Panel (NSP/6).

The purposes of the envisaged acts are as follows:

– ***Amendment 93 to Annex 10, Volume I concerning support of the introduction of dual-frequency, multi-constellation (DFMC) global navigation satellite system (GNSS) by adding provisions for additional frequencies of operation for the global positioning system (GPS), the global navigation satellite system (GLONASS) and the satellite-based augmentation system (SBAS), and by introducing provisions for the new BeiDou Navigation Satellite System (BDS) and Galileo system***

The amendment concerning DFMC GNSS is intended to reflect the ongoing evolution of the global GNSS infrastructure and facilitate its fruition by international civil aviation. As part of the evolution, multiple GNSS constellations offering dual-frequency signals are being introduced into service by the United States (GPS modernization), the Russian Federation (GLONASS modernization), European Union (Galileo constellation) and China (BeiDou Navigation Satellite System (BDS) constellation). A number of States and regions also plan to deploy DFMC satellite-based augmentation systems (SBASs). DFMC GNSS offers an opportunity to further enhance GNSS robustness, navigation performance and operational benefits. The use of dual frequencies will help mitigate vulnerabilities in respect of ionospheric disturbance and radio frequency interference. The availability of multiple constellations will contribute to mitigating ionospheric scintillation and the risk of having insufficient satellites within a single constellation. These technical improvements will enable operational benefits in terms of safety and efficiency, such as improved operational reliability for communications, navigation and surveillance (CNS) applications, increased deployment of 3D instrument approach operations worldwide in line with Performance Based Navigation (PBN) global goals, introduction of innovative operational concepts and applications and continued rationalization of conventional navigation aids.

– ***Amendment 93 to Annex 10, Volume I concerning support of ionospheric gradient mitigation for the ground-based augmentation system (GBAS)***

This amendment is intended to allow airports to optimize their GBAS service volume coverage on the basis that the availability of the GBAS service remains acceptable. This is particularly needed in case of a large airport or of a single GBAS ground station

supporting multiple runways because current SARPS implicitly limit the maximum distance allowed between the ground station and the runway threshold(s).

The amendment is envisaged to become applicable on 02 November 2023.

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

3.1. Proposed Amendments and their relationship with the existing Union rules

Amendment 93 to Annex 10, Volume I concerning support of the introduction of dual-frequency, multi-constellation (DFMC) global navigation satellite system (GNSS) by adding provisions for additional frequencies of operation for the global positioning system (GPS), the global navigation satellite system (GLONASS) and the satellite-based augmentation system (SBAS), and by introducing provisions for the new BeiDou Navigation Satellite System (BDS) and Galileo system

This amendment to ICAO Annex 10 Volume I, has an effect on Commission Implementing Regulation (EU) 2017/373 of 1 March 2017 laying down common requirements for providers of air traffic management/air navigation services and other air traffic management network functions and their oversight. In point CNS.TR.100(a) of Annex VIII (Part-CNS) of Regulation (EU) 2017/373 the reference shall be amended to the latest amendment of Volume I.

Amendment 93 to Annex 10, Volume I concerning support of ionospheric gradient mitigation for the ground-based augmentation system (GBAS)

This amendment to ICAO Annex 10 Volume I, also has an effect on Commission Implementing Regulation (EU) 2017/373 of 1 March 2017 laying down common requirements for providers of air traffic management/air navigation services and other air traffic management network functions and their oversight. In point CNS.TR.100(a) of Annex VIII (Part-CNS) of Regulation (EU) 2017/373 the reference shall be amended to the latest amendment of Volume I.

3.2. Position to be taken on Union’s behalf

The Union acknowledges the need to establish a harmonised regulatory framework at international level.

Furthermore, the adoption of such standards will enable the aeronautical use of the EU GNSS flagship programmes such as Galileo, and the ongoing modernization of the European Geostationary Navigation Overlay Service (EGNOS) to support applications in all phases of flight, such as performance-based navigation, as foreseen in the ATM Master Plan. This will also increase the robustness of GNSS against interferences in line with resolutions from ICAO 41st Assembly.

The representatives of EU Member States, the European Commission, and the European Union Aviation Safety Agency (EASA) to the Navigation Systems Panel, supported by the experts of EUROCONTROL contributed to the development of the proposal related to the amendment 93 to Annex 10, Volume I.

The proposed position to be taken on behalf of the Union is then to support this amendment.

Hence, the position to be taken on the Union’s behalf, provided the ICAO Council adopts without any substantial change the proposed Amendments to the Chicago Convention, shall be not to notify disapproval and to comply with the adopted measures in reply to the respective ICAO State Letter. Where Union legislation would deviate from the newly adopted ICAO Standards after an envisaged date of application of those Standards (02 November

2023), the Union position on the differences with those particular Standards should be notified to ICAO by Member States, on the basis of preparatory document submitted in due time by the Commission to the Council for discussion and approval, and setting out the detailed differences for the time necessary to complete the implementation.

4. LEGAL BASIS

4.1. Procedural legal basis

4.1.1. 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 agreement[1].

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*'[2].

4.1.2. Application to the present case

The ICAO Council is a body set up by an agreement, namely the Convention on International Civil Aviation ('Chicago Convention').

In accordance with Article 54 of the Chicago Convention, the ICAO Council adopts international Standards and Recommended Practices, designated as Annexes to the Chicago Convention. These are acts having legal effects. Indeed, once adopted and effective, Standards and Recommended Practices adopted by ICAO are binding on all ICAO Contracting States. Certain legal effects of these acts could depend on the notifications regarding a disapproval and regarding differences, and on the terms of those notifications.

Further, to the extent possible, these Standards and Recommended Practices are reflected in Union law and therefore are capable of decisively influencing the content of Union legislation in the area of civil aviation, namely Commission Implementing Regulation (EU) 2017/373.

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

Therefore, the procedural legal basis for the proposed Decision position in respect of such notifications is Article 218(9) TFEU.

4.2. Substantive legal basis

4.2.1. Principles

The substantive legal basis for a decision under Article 218(9) TFEU depends primarily on the objective and content of the envisaged 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

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

[2] 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.

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.

4.2.2. Application to the present case

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

Therefore, the substantive legal basis of the proposed decision is Article 100(2) TFEU.

4.3. Conclusion

The legal basis of the proposed Council Decision is 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) The Member States are Contracting States to the Chicago Convention and members of the ICAO, while the Union has observer status in certain ICAO bodies. There are six Member States represented in the ICAO Council.

(3) Pursuant to Article 54 of the Chicago Convention, the ICAO Council may adopt international Standards and Recommended Practices ('SARPs'), and designate them as Annexes to the Chicago Convention.

(4) The ICAO Council, at its 228th session, is to adopt Amendment 93 to Annex 10, Volume I to the Convention on International Civil Aviation.

(5) The main purpose of the Amendment 93 to Annex 10, Volume I to the Chicago Convention is to support the introduction of dual-frequency, multi-constellation (DFMC) global navigation satellite system (GNSS) by adding provisions for additional frequencies of operation for the global positioning system (GPS), the global navigation satellite system (GLONASS) and the satellite-based augmentation system (SBAS), and by introducing provisions for the new BeiDou Navigation Satellite System (BDS) and Galileo system. It is also to support ionospheric gradient mitigation for the ground-based augmentation system (GBAS).

(6) It is appropriate to establish the position to be taken on the Union's behalf within the ICAO Council as Amendment 93 to Annex 10, Volume I to the Convention on International Civil Aviation will be binding under international law and is capable of decisively influencing the content of Union law, namely Commission Implementing Regulation (EU) 2017/373([3]).

[3] Commission Implementing Regulation (EU) 2017/373 of 1 March 2017 laying down common requirements for providers of air traffic management/air navigation services and other air traffic management network functions and their oversight, repealing Regulation (EC) No 482/2008, Implementing Regulations (EU) No 1034/2011, (EU) No 1035/2011 and (EU) 2016/1377 and amending Regulation (EU) No 677/2011 (OJ L 62, 8.3.2017, p. 1)

(7) The Union's position during the 228th session of the ICAO Council or any consequent session with regard to the adoption of the envisaged Amendment 93 to Annex 10, Volume I to the Chicago Convention as outlined in the State Letter 2021/41 should be to support and comply with these amendments in their entirety. This position should be expressed by the Member States of the Union that are members of the ICAO Council, acting jointly in the interest of the Union.

(8) Once adopted and effective, Amendment 93 to Annex 10, Volume I to the Chicago Convention will be binding on all ICAO Member States, including all Member States of the Union.

(9) Pursuant to Article 38 of the Chicago Convention, any State which finds it impracticable to comply in all respects with any such international standard or procedure, or to bring its own regulations or practices into full accord with any such international standard or procedures or which deems it necessary to adopt regulations or practices differing in any particular respect from those established by an international standard, should give immediate notification to the ICAO of the differences between its own practice and that established by the international standard.

(10) Pursuant to Article 90 of the Chicago Convention, any such Annex or any amendment of an Annex shall become effective within three months after its submission to the ICAO contracting States, or at the end of such longer period of time as the ICAO Council may prescribe, unless in the meantime a majority of contracting ICAO States register their disapproval.

(11) The Union's position after the adoption of Amendment 93 to Annex 10, Volume I 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 comply with the amendments. 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. The Union position with respect of such difference should be based on a written document submitted by the Commission to the Council for discussion and approval.

(12) This position should be expressed by all the Member States of the Union, acting jointly in the interest of the Union

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 one of the consequent sessions, shall be to support the proposed Amendment 93 to Annex 10, Volume I to the Chicago Convention 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 Amendment 93 to Annex 10, Volume I to the Chicago Convention referred to in paragraph 1, shall be not to register disapproval and to comply 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 accordance with Article 38 of the Chicago Convention.

In such a 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 Union position on 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 ICAO Council, acting jointly in the interest of the Union.

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

Article 3

This Decision is addressed to the Member States.

Done at Brussels,

For the Council
The President