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2020/0098 (NLE)

Proposal for a

COUNCIL DECISION

on the position to be taken on behalf of the European Union in the Council of the International Civil Aviation Organization in respect of the envisaged adoption of Amendment 91 to Annex 10, Volume III and on the notification of difference from the date of application of Amendment 13 to Annex 14, Volume 1, Amendment 40C to Annex 6, Amendment 77B to Annex 3 and Amendment 39 to Annex 15

EXPLANATORY MEMORANDUM

1. SUBJECT MATTER OF THE PROPOSAL

This proposal concerns:

– The decision establishing the position to be taken on the Union's behalf in the Council of the International Civil Aviation Organization (ICAO) for the envisaged adoption of Amendment 91 to Annex 10, Volume III to the Chicago Convention by the ICAO Council in one of its upcoming sessions.

– The decision on the position to be taken on the Union's behalf after the ICAO announces the adoption of the Amendment 91 to Annex 10 in a State letter, inviting Member States to either notify its disapproval, to notify any differences or its compliance with the adopted measure.

– The decision on the position to be taken on the Union's behalf with regard to Amendment 13- to Annex 14 — Aerodromes, Volume I — Aerodrome Design and Operations, Amendment 40C of Annex 6 -- Operation of Aircraft — International Commercial Air Transport — Aeroplanes, Amendment 39 to Annex 15 Aeronautical Information Servicesas well as Amendment 77B to Annex 3 — Meteorological Service for International Air Navigation concerning the new Global Reporting Format for Runway Surface Conditions, inviting Member States to notify the difference as regards the compliance with the applicability date which is to be delayed by a period of 6 months compared to the applicability date set out in the related ICAO State letters .

2. CONTEXT OF THE PROPOSAL

2.1. The Convention on International Civil Aviation

The Convention on the 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 2019-2022, there are seven 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, designated as Annexes to the Chicago Convention.

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

2.3. The envisaged act of the International Civil Aviation Organization

2.3.1. Adoption of Amendment 91 to Annex 10, Volume III to the Chicago Convention regarding the Selective Calling System (SELCAL)

During one of its upcoming sessions, the ICAO Council is to adopt Amendment 91 to Annex 10, Volume III to the Chicago Convention regarding the Selective Calling System (SELCAL).

The purpose of Amendment 91 to Annex 10, Volume III is to amend Annex 10 to the Chicago Convention – Aeronautical Telecommunications, Volume III – Communication Systems, Part II – Voice Communication Systems, relating to SELCAL. Amendment 91 to Annex 10, Volume III introduces new tones to expand the available pool of SELCAL codes and thereby reduce the incidence of false indication in the cockpit. Amendment 91 to Annex 10, Volume III was developped during the second meeting of the Communication Panel Data Communication Infrastructure Working Group (CP DCIWG/2) and was not considered controversal at technical level.

Amendment 91 to Annex 10, Volume III is envisaged to become applicable on 5 November 2022 when it will become legally binding on the parties to the Chicago Convention.

2.3.2. The date of application of the new ICAO Global Reporting Format for Runway Surface Conditions

In 2016, the ICAO Council adopted a new methodology for assessing and reporting runway surface conditions, commonly known as the Global Reporting Format for Runway Surface Conditions aiming at enabling the harmonized assessment and reporting of runway surface conditions and a correspondingly improved flight crew assessment of take-off and landing performance.

The new ICAO Global Reporting Format for Runway Surface Conditions, applicable as from 5 November 2020, is envisaged by Amendment 13 to Annex 14 — Aerodromes, Volume I — Aerodrome Design and Operations, Amendment 40C of Annex 6 -- Operation of Aircraft — International Commercial Air Transport — Aeroplanes, Amendment 77B to Annex 3 — Meteorological Service for International Air Navigation and Amendment 39 to Annex 15 Aeronautical Information Services.

Due to the COVID-pandemic, the implementation of the new ICAO Global Reporting Format for Runway Surface Conditions as from the moment in time originally envisaged by ICAO is unrealistic at Union level and therefore the Commission is likely to adopt a postponment of that date at Union level, by way of corresponding amendments to the relevant Commission Regulations.[1] It is also currently uncertain whether the ICAO Council will include in its

[1] Commission Implementing Regulation (EU) No 923/2012 of 26 September 2012 laying down the common rules of the air and operational provisions regarding services and procedures in air navigation and amending Implementing Regulation (EU) No 1035/2011 and Regulations (EC) No 1265/2007, (EC) No 1794/2006, (EC) No 730/2006, (EC) No 1033/2006 and (EU) No 255/2010, OJ L 281, 13.10.2012, p. 1.
Commission Regulation (EU) No 139/2014 of 12 February 2014 laying down requirements and administrative procedures related to aerodromes pursuant to Regulation (EC) No 216/2008 of the European Parliament and of the Council, OJ L 44, 14.2.2014, p. 1.
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.

agenda of its 220th or 221st session an item on a possible postponement of the date of application of the new ICAO Global Reporting Format for Runway Surface Conditions, and if so, what decision the ICAO Council will take in the matter. Therefore, should the ICAO Council not postone that date in due time, for whatever reason, it is necessary to ensure that Member States notify a difference covering the postposition, if any, adopted at Union level.

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

3.1. Amendment 91 to Annex 10, Volume III

3.1.1. Main changes to be introduced by Amendment 91 to Annex 10, Volume III and their relationship with the existing Union rules

The main change to be introduced by the proposal for Amendment 91 to Annex 10, Volume III is the introduction of new tones to expand the available pool of SELCAL codes and thereby reduce the incidence of false indication in the cockpit. The system characteristics of SELCAL were originally recommendations formulated in the 1950s when the specified levels of performance could not be guaranteed. Equipment manufactured since the 1970s more readily meets those requirements and therefore their uniform application should be recognised for the safety and regularity of international navigation. However, the recommendation on the modulation envelope was separated into a standard and a recommendation because the uniform application of it is desirable only.

ICAO also provides a mechanism through which the new tones can be introduced with a minimum impact on aircraft operators. Early ground equipage, which can be achieved at lower cost, will allow for a phased installation on aircraft, which will take place predominantly through forward fit.

The Union acknowledges the shortage of SELCAL codes that could be assigned to an aircraft and the means to mitigate the shortage by expanding the number of characters that can be utilised for SELCAL code assigned to new aircraft.

SELCAL does not have great significance in the European air navigation services. However, it is a mean of communication, there is a standard way of filing it in the flight plan and some aircraft operators may request the air traffic services unit to use it in certain situations. It happens very rarely though.

SELCAL is mentioned in the EASA guidance material, in an enumeration of possible solutions, to Regulation (EU) No 923/2012 and in Regulation (EU) 2020/469 amending Annex IV - Part-ATS of Regulation (EU) 2017/373.

Amendment 91 to Annex 10, Volume III concerns mostly those air navigation service providers (ANSP) that are providing services for the ICAO North Atlantic (NAT) region, the oceanic airspace over the Atlantic Ocean, and also the services of the Network Manager, particularly the Integrated Initial Flight Plan Processing System (IFPS). The relevant ANSPs will need to install the required technical improvements. The Network Manager will need to upgrade the IFPS to allow the system to accept the new SELCAL codes in order to avoid rejection of the flight plans because of not recognising the code.

Point (c) of CNS.TR.100 ‘Working methods and operating procedures for providers of communication, navigation or surveillance services’ of Regulation (EU) 2017/373 is referring to ICAO Annex 10, Volume III up to and including Amendment 89, and would require an appropriate amendment at Union level.

3.2. Global Reporting Format for Runway Surface Conditions

3.2.1. Date of application of the new ICAO Global Reporting Format for Runway Surface Conditions

Investigations of accidents indicate that the standards for runway surface condition assessment and reporting are not harmonised, and have shown that this fact is a significant contributing factor to runway excursions, in particular when the runway is wet or contaminated. ICAO has consequently amended a number of Standards and Recommended Practices (SARPs) in several of the Annexes to the Chicago Convention. Some of these amendments required adaptation of existing Union law. This need has already been reflected in Commission implementing and delegeted acts[2].

The Amendment 77B to Annex 3, Amendment 13 to Annex 14, Amendment 40 to Annex 6 and Amendment 39 to Annex 15 to the Chicago Convention intended to reduce runway excursion incidents and accidents were adopted by the ICAO Council throughout 2016 will be applicable as of 5 November 2020. These amendments have already been incoporated at Union level in Implementing Regulations (EU) 2020/469 and 2019/1387.

However, due to the delays in implementation caused by the COVID-19 and as a response to the current lack of resources of both competent authorities and operators concerned, the Commission intends to postpone the date of application of the relevant Commission implementing and delegeted acts by a period of 6 months.

3.3. Position to be taken on Union's behalf

3.3.1. As regards Amendment 91 to Annex 10, Volume III

The proposed position to be taken on behalf of the Union in the ICAO Council is to support the proposed Amendment 91 to Annex 10, Volume III of Annex 10 in its entirety. Therefore, after its adoption by the ICAO Council and its notification by a State letter, the Union position should be for Member States to notify compliance with the adopted measure.

3.3.2. As regards the date of application of the new ICAO Global Reporting Format for Runway Surface Conditions

As regards the implementation of the new ICAO Global Reporting Format for Runway Surface Conditions, while fully supporting them, but with due consideration of the impact of the COVID-19 crisis on the capacity of Member States and operators concerned to implement

[2] Commission Implementing Regulation (EU) 2020/469 amending Regulation (EU) No 923/2012, Regulation (EU) No 139/2014 and Regulation (EU) 2017/373 as regards requirements for air traffic management/air navigation services, design of airspace structures and data quality, runway safety and repealing Regulation (EC) No 73/2010, JO L 104, 3.4.2020, p.1.
Commission Implementing Regulation (EU) No 923/2012 of 26 September 2012 laying down the common rules of the air and operational provisions regarding services and procedures in air navigation and amending Implementing Regulation (EU) No 1035/2011 and Regulations (EC) No 1265/2007, (EC) No 1794/2006, (EC) No 730/2006, (EC) No 1033/2006 and (EU) No 255/2010, OJ L 281, 13.10.2012, p. 1.
Commission Regulation (EU) No 139/2014 of 12 February 2014 laying down requirements and administrative procedures related to aerodromes pursuant to Regulation (EC) No 216/2008 of the European Parliament and of the Council, OJ L 44, 14.2.2014, p. 1.
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.

them as currently required by the ICAO rules, the proposed position to be taken on behalf of the Union is as follows:

- should the matter of postponement of the deadline not be included on the agenda of the ICAO Council during its 220th or 221st session, or should the postponement of 6 months not be adopted by the ICAO Council, the position of the Union should be to notify differences in case the deadline envisaged in the relevant EU law is postponed by 6 months. The EU Member States will notify a difference while informing ICAO that the implementation, i.e. a compliance with the new ICAO Global Reporting Format for Runway Surface Conditions, would be delayed by a period of 6 months.

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[3].

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*'[4].

4.1.2. Application to the present case

The International Civil Aviation Organization is a body set up by an agreement, namely the Convention on International Civil Aviation.

Amendment 91 to Annex 10, Volume III which the International Civil Aviation Organization is called upon to adopt constitutes an act having legal effects. It has legal effects because it changes a number of standards, which are capable of creating a binding legal obligation under international law.

Furthermore, Amendment 91 to Annex 10, Volume III changes a "recommendation" into a standard and downgrades a standard to a "recommendation". Despite their denomination, those "recommendations" are of a nature that alters the legal situation existing under the pre-existing standards. The change in the status of the provisions generates different obligations to the States.

With respect to the notification of differences as regards the date of application of the new ICAO Global Reporting Format for Runway Surface Conditions, the Union common position would ensure that all Member States notify differences within margins of this decision stemming from the Union's exclusive competence and hence will comply with Article 38 of

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

[4] 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 Chicago Convention and therefore not be regarded as being in breach of their obligations stemming from the Chicago Convention.

Those Amendments do not supplement or amend the institutional framework of the Agreement.

Therefore, the procedural legal basis for the proposed decision 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 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 envisaged acts relate to a 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 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) The Member States are Contracting States of the Chicago Convention and members of the ICAO, while 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 ICAO Council, during one of its upcoming sessions, is to adopt Amendment 91 to Annex 10, Volume III to the Chicago Convention on the selective calling system (SELCAL).

(5) It is appropriate to establish the position to be taken on the Union's behalf in the ICAO Council as the proposed Amendment 91 to Annex 10, Volume III will be binding on the Union and is capable of decisively influencing the content of Union law, namely Commission Implementing Regulation (EU) 2017/373[5]. Once adopted, the Amendment will be binding on all ICAO States, including all Member States, in accordance with and within the limits set out in the Chicago Convention. Article 38 of the Chicago Convention requires contracting States to notify ICAO if they intend to deviate from a standard, under the notification of differences mechanism.

(6) The main purpose of Amendment 91 to Annex 10, Volume III is to introduce new tones to expand the available pool of SELCAL codes and thereby reduce the incidence of false indication in the cockpit. It also makes changes regarding the requirements

[5] 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).

concerning the system characteristics and provides for a mechanism for the introduction of the new codes with minimum impact for aircraft operators.

(7) The Union is a strong supporter of the efforts by ICAO to improve aviation safety by ensuring the safe and accurate provision of communication, navigation and surveillance services. The Union should, therefore, support the above mentioned amendments.

(8) The Union's position during one of the upcoming sessions of the ICAO Council with regard to the envisaged Amendment 91 to Annex 10, Volume III is to 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 position after the adoption of Amendment 91 to Annex 10 by the ICAO Council, to be announced by the ICAO Secretary General via an ICAO State letter procedure, should be to notify compliance with the amendment and is to be expressed by all the Member States of the Union.

(10) In 2016 the ICAO Council adopted amendments to a number of annexes to the Chicago Convention intended to reduce runway excursion incidents and accidents. Those amendments are provided in State letters AN 4/1 2.26-16/19, AN 2/2.4 – 16/18, AN 10/1.1 – 16/17 and AN 11/1.3.29-16/12 and will be applicable in the ICAO Contracting States as of 5 November 2020 ("the Amendments").

(11) The Union is a strong supporter of the efforts by ICAO to improve aviation safety. These changes introducing a new harmonized methodology for assessing and reporting runway surface conditions will contribute to mitigate the risk of runway landing excursions due to runway contamination such as snow, ice, slush or water.

(12) Commission Implementing Regulation (EU) 2019/1397[6] and Commission Implementing Regulation (EU) 2020/469[7] incorporate those amendments in Union law.

(13) Implementing Regulations (EU) 2020/469 and 2019/1387 will apply in part from 5 November 2020 in line with the date of application of the Amendments. However, the COVID-19 has had a considerable impact on the efforts made by the Member States and the aviation stakeholders to prepare for the application of the new measures listed in Amendment 77B to Annex 3, Amendment 13 to Annex 14, Amendment 40 to Annex 6 and Amendment 39 to Annex 15 to the Chicago Convention .

(14) In particular, the confinement and partial unemployment of staff, combined with the additional workload required to manage the significant negative consequences of the COVID-19 for all stakeholders, has impaired progress.

(15) Both competent authorities and operators are experiencing difficulties in preparing for the implementation of the Amendments. It may therefore be necessary for the date of application provided for in Implementing Regulations (EU) 2020/469 and 2019/1387 to be postponed for 6 months.

(16) If the ICAO Council does not postpone the date of application of the Amendments by 6 months, whilst Union law postpones the date of application of the relevant ICAO standards by 6 months, the Union position should be to notify a difference in

[6] OJ L 229, 5.9.2019, p. 1
[7] OJ L 104, 3.4.2020, p.1

accordance with Article 38 of the Chicago Convention and to inform ICAO of its intention to delay by a period of 6 months the date of application to the Amendments,

HAS ADOPTED THIS DECISION:

Article 1

The position to be taken on the Union's behalf in one of the upcoming sessions of the Council of the International Civil Aviation Organization ('ICAO') shall be to support the proposed Amendment 91 to Annex 10, Volume III to the Convention on International Civil Aviation ('Chicago Convention') in its entirety.

The position to be taken on the Union's behalf after the adoption by the ICAO Council of Amendment 91 to Annex 10, Volume III to the Chicago Convention shall be to notify compliance with the adopted measure in reply to the respective ICAO State letter.

Article 2

If the ICAO Council does not postpone the date of application of Amendment 77B to Annex 3, Amendment 13 to Annex 14, Amendment 40 to Annex 6 and Amendment 39 to Annex 15 to the Chicago Convention and the Union amends Implementing Regulations (EU) 2020/469 and 2019/1387 and Delegated Regulation C(2020)710 final[8] to delay their application by 6 months, a corresponding difference from the date of application to Amendment 77B to Annex 3, Amendment 13 to Annex 14, Amendment 40 to Annex 6 and Amendment 39 to Annex 15 to the Chicago Convention by a period of 6 months shall be notified.

Article 3

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.

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

Article 4

This Decision is addressed to the Member States.

Done at Brussels,

For the Council
The President

[8] Commission Delegated Regulation C(2020)710 final amending Regulation (EU) No 139/2014 as regards runway safety and aeronautical data.