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Proposal for a

COUNCIL DECISION

on the position to be taken on behalf of the European Union in the 231st session of the Council of the International Civil Aviation Organization (ICAO) as regards the envisaged amendment to Annex 13 - *Aircraft Accident and Incident Investigation*

EXPLANATORY MEMORANDUM

1. SUBJECT MATTER OF THE PROPOSAL

This proposal concerns:

(i) the position to be taken on the Union's behalf in the 231st session of the Council of the International Civil Aviation Organization (ICAO) for the envisaged Amendment 19 to Annex 13 – *Aicraft Accident and Incident Investigation*

(ii) the position to be taken on the Union's behalf after the ICAO announces the adoption of the Amendment 19 to Annex 13 – *Aicraft Accident and Incident Investigation* of the Convention on International Civil Aviation in respective State Letters, inviting its contracting States 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 231st or any consequent session, the ICAO Council is expected to consider and adopt:

– Amendment 19 to Annex 13 – *Aicraft Accident and Incident Investigation* as referred to in the State Letter AN 6/1.2-22/85 is arising from deliberations at sixth meeting of the Accident Investigation Panel (AIGP/6). It relates to investigations involving unmanned aircraft, release of investigative information, the use of Global Aeronautical Distress and Safety System (GADSS), the reduction of the consultation period for the final report, as well as obligation to publish in the electronic format.

– The above Amendment has a potential to influence the EU law as explained more in details below.

The envisaged Amendment covers the following areas as follows:

– in relation to the investigations involving unmanned aircraft: to distinguish between manned aircraft and remotely piloted aircraft (RPA), Annex 13 will clarify which types of RPA occurrences are mandated to be investigated. In addition, the amendment proposes to clarify in Annex 13 the main elements of RPAs occurrences to which the investigator-in-charge should have access during investigations.

– in relation to the guidance for investigative authorities: the Amendment proposes to consider the release of information early in the investigations of accidents and incidents that draw heightened public attention, as appropriate, and then later more formally with a written preliminary report.

– with regard to the availability to the investigation of recordings that originate from the fixed recorders fitted to the aircraft: the Amendment mandates such recordings to be made available without delay and ensures that those are not divulged without the consent of the State conducting the investigation.

– with regard to the consultation period for draft final reports: the Amendment proposes to reduce the current consultation period to thirty days with a possibility to be extended to sixty days.

– Finally, the Amendment proposes to raise awareness about the e-Library of final reports and introduces a preference that final reports are submitted to ICAO in an electronic format.

The Amendment is envisaged to become applicable from 28 November 2024, except for provisions that relate to investigations involving unmanned aircraft, which are envisaged for applicability on 26 November 2026.

Most of the proposed amendments are in line with the provisions of Regulation (EU) 996/2010[1], however some adjustments might be necessary at the level of implementation of Regulation (EU) No 996/2010. In particular the working procedures of the EU Safety Investigation Authorities (SIAs) migh need to be appropriately supplemented/amended. The current EU legislative framework, Regulation (EU) No 996/2010, in its Article 16(4) specifies

[1] Regulation (EU) No 996/2010 of the European Parliament and of the Council of 20 October 2010 on the investigation and prevention of accidents and incidents in civil aviation and repealing Directive 94/56/EC, OJ L 295, 12.11.2010, p. 35–50

that the safety investigation authority shall follow the international standards and recommended practices, which assures compliance with Annex 13.

The above assessment has been prepared on the basis of a contribution received from the European Network of Civil Aviation Safety Investigation Authorities (ENCASIA). The Network is set up by Article 7(1) of Reg (EU) 996/2010 and it is composed of the heads of the Safety Investigation Authorities in each of the Member States and/or, in the case of a multimodal authority, the head of its aviation branch, or their representatives. ENCASIA has the duty, among others, to prepare suggestions to and advising Union institutions on all aspects of development and implementation of Union policies and rules relating to safety investigations and the prevention of accidents and incidents.

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

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

Amendment 19 to Annex 13

The proposed Amendment as referred to in the State Letter AN 6/1.2-22/85 cover the provisions of Regulation (EU) 996/2010 and are in line with Union law.

The subject matter of the envisioned amendments fall under exclusive Union competence pursuant to the last limb of Article 3(2) TFEU.

The proposed Amendment would contribute to the improvement of aviation safety by ensuring a high level of efficiency, expediency, and quality of civil aviation safety investigations, the sole objective of which is the prevention of future accidents and incidents without apportioning blame or liability. The Union acknowledges the need for improved accident and incident investigations including the publication of its reports by introducing some changes to Annex 13 – *Aicraft Accident and Incident Investigation*.

The objective of the proposed changes is twofold: On the one hand, to assist the safety investigation authorities of the Member States in their investigations by identifying the types of RPA incidents to be investigated, and also by making available without delay data from fixed recorders installed on aircraft, subject to the investigating State permission. Furthermore, the Amendment recognises the increased expectations of the public and the media, and therefore the need to provide information more promptly during investigations of accidents and incidents that attract increased public attention, as well as to disseminate the Final Reports in electronic format. Finally, the use of new technologies should help to reduce the consultation period, which will speed up the publication of the final report and the safety recommendations (if any) it contains, with a consequent benefit for aviation safety.

The current EU legislative framework, Regulation (EU) No 996/2010, in its Article 16(4) specifies that the safety investigation authority shall follow the international standards and recommended practices, which assures compliance with Annex 13. There is no perceived need to amend Regulation (EU) No 996/2010 or to adopt a new legislative act. The correct implementation of the proposed Amendment 19 to Annex 13 can be achieved by adapting the current working procedures of the safety investigation authorities.

The representatives of EU Member States and the European Union Aviation Safety Agency (EASA) as members and observers to the ENCASIA WG 7 in charge of coordinating the views of the SIAs as regards as ICAO State Letters related to safety investigations, contributed to the development of the proposal related to the amendment 19.

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 amendment 19 to Annex 13 – *Aicraft Accident and Incident Investigation,* should be to not notify any disapproval but 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, 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[2].

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*'[3]. As explained above the proposed Amendment falls within Union law (i.e. Regulation (EU) No 996/2010)

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 pursuant to Article 90(a) of the Chicago Convention. , which provides that: *"The adoption by the Council of the Annexes described in Article 54, subparagraph I), shall require the vote of two-thirds of the Council at a meeting called for that purpose and shall then be submitted by the Council to each contracting State. Any such Annex or any amendment of an Annex shall become effective within three months after its submission to the contracting States or at the end of such longer period of time as the Council may prescribe, unless in the meantime a majority of the contracting States register their disapproval with the Council"*. As explained above, the envisioned Amendment to Annex 13 is capable of decisively influencing the content of Union legislation. Namely, the Amendment would bring

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

[3] 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.

need to adapt the current working procedures of the safety investigation authorities regulated by Regulation (EU) No 996/2010. .

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 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 231st session, is to adopt amendment 19 to Annex 13 – *Aicraft Accident and Incident Investigation* to the Chicago Convention.

(5) The main purpose of the amendment 19 to Annex 13 - *Aicraft Accident and Incident Investigation* to the Chicago Conventionto is to to improve aviation safety by ensuring a high level of efficiency, expediency, and quality of civil aviation safety investigations.

(6) The proposed changes aim to reach these objectives by assisting the safety investigation authorities of the Member States in their investigations on Remotely Piloted Aircraft (RPAS), and making available without delay information and data from recorders installed on aircraft. The amendment also recognises the expectations of the public and the media to be informed, and therefore includes provisions to provide timely factual information during safety investigations. Furthermore, the use of modern technologies may facilitate shortening the consultation period thus expediting the publication of the final report. Finally, sending the final reports in electronic format will help to upload them into the ICAO central database.

(7) The European Network of Civil Aviation Safety Investigation Authorities (ENCASIA) set up by Article 7 of Regulation (EU) No 996/2010[1], which one of its duties is to

[1] Regulation (EU) No 996/2010 of the European Parliament and of the Council of 20 October 2010 on the investigation and prevention of accidents and incidents in civil aviation and repealing Directive 94/56/EC, OJ L 295, 12.11.2010, p. 35–50

advising Union institutions on all aspects of development and implementation of Union policies and rules relating to safety investigations and the prevention of accidents and incidents, has contributed to the development of the proposal related to the amendment 19.

(8) It is appropriate to establish the position to be taken on the Union's behalf within the ICAO Council as the Amendment 19 to Annex 13 – *Aicraft Accident and Incident Investigation* to the Chicago Convention will be binding under international law in accordance with Article 90(a) of the Chicago Convention and is capable of decisively influence EU law, in particular Regulation (EU) 996/2010.

(9) The Union's position during the 231st session of the ICAO Council or any consequent session with regard to the adoption of the envisaged Amendment 19 to Annex 13 - *Aicraft Accident and Incident Investigation* to the Chicago Convention should be to support and comply with these amendments in their entirety.

(10) 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.

(11) 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.

(12) The Union's position after the adoption of Amendment 19 to Annex 13 - *Aicraft Accident and Incident Investigation* to the Chicago Convention by the ICAO Council, to be announced by the ICAO Secretary General via an ICAO State Letter procedure, should be to not register any 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.

(13) 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 231st session of the ICAO Council, or in one of the consequent sessions, shall be to support the proposed amendment to Annex 13 – *Aicraft Accident and Incident Investigation* 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 to Annex 13 – *Aicraft*

Accident and Incident Investigation to the Chicago Convention referred to in paragraph 1, shall be to not register any 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 accordance with Article 38 of the Chicago Convention.

In the event that Union legislation differs from the standards contained in the Annex 13 to the Chicago Convention, 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