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Proposal for a

COUNCIL DECISION

on the position to be taken on behalf of the European Union in the 226th session of the Council of the International Civil Aviation Organization as regards the envisaged adoption of Amendment 48 to Annex 6 Part I to the Convention on International Civil Aviation

EXPLANATORY MEMORANDUM

1. SUBJECT MATTER OF THE PROPOSAL

This proposal concerns the position to be taken on the Union's behalf at the International Civil Aviation Organization (ICAO) on the differences to be notified to ICAO regarding Amendment 48 to Annex 6 Part I to the Convention on International Civil Aviation to be adopted by the ICAO Council in its 226th session.

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 specialised 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 (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 notify either their disapproval, any differences or their compliance with the measure 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 International Civil Aviation Organization of the differences between its own practice and that established by the international standard.

2.3. The envisaged acts of the International Civil Aviation Organization and their relationship with the existing Union rules

During its 226th session, the ICAO Council is expected to adopt Amendment 48 to Part I of Annex 6 to the Chicago Convention related to means for locating an aeroplane in distress.

2.3.1. Standards in the scope of Amendment 48 to ICAO Annex 6 Part I

Standard 6.18.1 of ICAO Annex 6 Part I requires that all aeroplanes of a maximum certificated take-off mass of over 27 000 kg for which the individual certificate of airworthiness is first issued on or after 1 January 2023, shall autonomously transmit information from which a position can be determined by the operator at least once every minute, when in distress.

The purpose of standard 6.18.1, as stated in ICAO Annex 6 Part I, Appendix 9, is to establish the location of an accident site within a 6 NM radius.

Standard 6.18.1 of ICAO Annex 6 Part I has been transposed¹ into point CAT.GEN.MPA.210 of Annex IV (Part-CAT) to Commission Regulation (EU) 965/2012² ('EU air operation rules'), which requires the following:

'The following aeroplanes shall be equipped with robust and automatic means to accurately determine, following an accident during which the aeroplane is severely damaged, the location of the point of end of flight:

- (1) all aeroplanes with an MCTOM of more than 27 000 kg, with a MOPSC of more than 19 and first issued with an individual CofA³ on or after 1 January 2023; and
- (2) all aeroplanes with an MCTOM of more than 45 500 kg and first issued with an individual CofA on or after 1 January 2023.'

2.3.2. Changes introduced by draft Amendment 48 to ICAO Annex 6 Part I

The draft Amendment 48 to ICAO Annex 6 Part I postpones the applicability date of standard 6.18.1 to 1 January 2025 (instead of 1 January 2023) and restricts its applicability to aeroplanes first issued with an individual CofA on or after 1 January 2024 (instead of aeroplanes first issued with an individual CofA on or after 1 January 2023). The main reasons for proposing these changes are:

- significant delays faced by all concerned aircraft manufacturers worldwide to equip aeroplanes with the necessary equipment,
- significant delays in setting up the communication infrastructure for complying with standard 2.4 of Appendix 9⁴, and achieving its full operational capability, and
- insufficient time left for rescue coordination centers and air traffic service units to prepare and adapt their procedures.

Note: the acceptable means of compliance for point CAT.GEN.MPA.210 contains conditions that are more stringent regarding robustness and accuracy than those specified in ICAO

¹ It was recommended to Member States to notify a difference with ICAO standard 6.18.1, as aeroplanes with a MOPSC of 19 or less and with a MCTOM in the range between 27 000 kg and 45 500 kg are not in the scope of point CAT.GEN.MPA.210.

² Commission Regulation (EU) No 965/2012 of 5 October 2012 laying down technical requirements and administrative procedures related to air operations pursuant to Regulation (EC) No 216/2008 of the European Parliament and of the Council.

³ CofA: certificate of airworthiness.

⁴ Standard 2.4 of Appendix 9 to ICAO Annex 6 Part I requires that the organisations that must have access to the transmitted information shall include, as a minimum, air traffic service unit(s) and search and rescue coordination center(s) and sub-centers.

Annex 6, Part I, 6.18 and Appendix 9. Aircraft manufacturers aim at fitting their aeroplanes with equipment that will meet both ICAO standard 6.18.1 and point CAT.GEN.MPA.210, so that these aeroplanes can be operated in the EU and worldwide without modification or restriction. This in turn has significantly increased the amount of work needed to design and certify that equipment.

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

3.1. Main changes and their relationship with the existing Union rules

Draft Amendment 48 to ICAO Annex 6 postpones the applicability date of standard 6.18.1 of ICAO Annex 6, Part I by two years:

‘6.18.1 As of 1 January 2025, all aeroplanes of a maximum certificated take-off mass of over 27 000 kg for which the individual certificate of airworthiness is first issued on or after 1 January 2024, shall autonomously transmit information from which a position can be determined by the operator at least once every minute, when in distress, in accordance with Appendix 9.’

3.2. Position to be taken on Union's behalf

All aircraft manufacturers are encountering significant delays in the process to comply with standard 6.18.1 of ICAO Annex 6 Part I and point CAT.GEN.MPA.210 of the EU air operation rules. Maintaining the current applicability date will probably lead to a situation whereby many EU-based aircraft operators will have to request temporary exemptions for aeroplanes delivered in 2023 and to perform very expensive equipment retrofit. Such temporary exemptions might have to be extended to 2024 to grant sufficient time for all concerned aeroplanes to be retrofitted. In addition, the full operational capability of the communication infrastructure and full readiness of air traffic service units and rescue coordination centers might not be achieved before 2024. EU-based aircraft operators have little leverage to accelerate the implementation of ICAO standard 6.18.1 and point CAT.GEN.MPA.210.

The proposed change to the applicability date of standard 6.18.1 of ICAO Annex 6 Part I has limited impact on aviation safety, as this ICAO standard is just one of the measures taken by ICAO to facilitate the locating of aircraft in distress. Most aeroplanes in the scope of standard 6.18.1 shall also be tracked by the operator when flying over oceanic areas according to standard 3.5.3 of ICAO Annex 6 Part I (transposed into point CAT.GEN.MPA.205 of the EU air operation rules) and equipped with two emergency locator transmitters according to standard 6.17.3 of ICAO Annex 6 Part I (transposed into point CAT.IDE.A.280 of the EU air operation rules).

Therefore, the Union should support the proposal to postpone the applicability date of standard 6.18.1 of ICAO Annex 6 Part I.

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 agreement⁵.

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*’⁶.

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. Certain legal effects of these acts could depend on the submission of notification of differences, and on the terms of those notifications. Therefore, the adoption of the Union position in respect of such notifications falls within the scope of Article 218(9) TFEU.

The envisaged act is capable of decisively influencing the content of EU legislation, namely the point CAT.GEN.MPA.210 of Commission Regulation (EU) 965/2012.

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 adopted act in respect of which a position is taken on the Union's behalf. If the adopted 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.

⁵ Judgment of the Court of Justice of 7 October 2014, Germany v Council, C-399/12, ECLI:EU:C:2014:2258, paragraph 64.

⁶ 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.

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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 currently seven 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 Chicago Convention.
- (4) 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 ICAO Contracting States register their disapproval.
- (5) 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.
- (6) The ICAO Council, at its 226th session, is to adopt Amendment 48 to Annex 6 Part I to the Chicago Convention.
- (7) The main purpose of Amendment 48 to Annex 6, Part I is expected to postpone the applicability date of its standard 6.18.1 to 1st January 2025.
- (8) It is appropriate to establish the position to be taken on the Union's behalf in the 226th session of ICAO Council with regard to the envisaged Amendment 48 to Annex 6 Part I. This position should be to support this amendment and be expressed by the Member

States of the Union that are members of the ICAO Council, acting jointly on behalf of the Union.

HAS ADOPTED THIS DECISION:

Article 1

The position to be taken on the Union's behalf in the 226th session of the ICAO Council, or in any subsequent session, shall be to support the proposed Amendment 48 to Annex 6 Part I to the Convention on International Civil Aviation in its entirety.

Article 2

The position referred to in Article 1 shall be expressed by the Member States of the Union that are members of the ICAO Council, acting jointly on behalf of the Union.

Article 3

This Decision is addressed to the Member States.

Done at Brussels,

*For the Council
The President*