



Brussels, 20.10.2022
COM(2022) 545 final

2022/0336 (NLE)

Proposal for a

COUNCIL DECISION

establishing the position to be taken on behalf of the European Union for the adoption of international standards, amendments or the notification of differences with respect to international standards of Annexes 1, 2, 3, 4, 6, 7, 8, 10, 11, 12, 13, 14, 15, 18 and 19 to the Convention on International Civil Aviation

EXPLANATORY MEMORANDUM

1. SUBJECT-MATTER OF THE PROPOSAL

The present proposal concerns the position to be taken on behalf of the European Union, as regards:

- the adoption in the International Civil Aviation Organization (ICAO) Council of acts in civil aviation safety, air navigation and air traffic management, namely in Annexes 1, 2, 3, 4, 6, 7, 8, 10, 11, 12, 13, 14, 15, 18 and 19 of the Convention on International Civil Aviation ('the Chicago Convention').
- the notification of differences with the adopted acts having legal effects in the areas of the above-mentioned Annexes of the Chicago Convention in response to the State Letters sent by ICAO, inviting its contracting States to either notify their disapproval, to notify any differences with the adopted measures.
- the notification of differences with existing Standards and Recommended Practices to ICAO pursuant to Article 38 of the Chicago Convention stemming from changes of the Union *acquis* in relation to the above-mentioned Annexes of the Chicago Convention.

2. CONTEXT OF THE PROPOSAL

2.1. The Chicago Convention

ICAO was established by the Chicago Convention, signed in 1944 in Chicago and which entered into force on 4 April 1947. All Member States of the European Union are contracting parties to that Convention and therefore members of ICAO. The Union has an observer status in ICAO and concluded a Memorandum of Cooperation with ICAO that provides a framework for enhanced cooperation in the fields of aviation safety, aviation security, air traffic management and environmental protection.¹

The Chicago Convention contains 96 articles laying the ground rules and principles governing ICAO. It is supported by 19 Annexes containing Standards and Recommended Practices, which are amended regularly.

2.2. The International Civil Aviation Organization

ICAO adopts international standards for civil aviation, in particular on aviation safety, air navigation and air traffic management, environment, aviation security, economic development in air transport, passenger rights and facilitation. These subjects are covered by the provisions of the Treaty on the Functioning of the European Union (TFEU) and fall to a large extent under the competence of the European Union. To the extent possible, the Union aims to ensure consistency with international standards in the area of civil aviation.

2.3. The envisaged acts by the ICAO Council having legal effects in the Union

As one of the two governing bodies of ICAO, the ICAO Council gives continuing direction to the work of ICAO. It convenes several times per year.

¹ Council Decision (EU) 2011/530 of 31 March 2011 on the signing, on behalf of the Union, and provisional application of a Memorandum of Cooperation between the European Union and the International Civil Aviation Organization providing a framework for enhanced cooperation (OJ L 232, 9.9.2011, p. 1-7).

According to Article 54(1) of the Chicago Convention, the ICAO Council adopts international Standards and Recommended Practices, designates these as Annexes to the Chicago Convention, and notifies all contracting States of the action taken. The ICAO Council shall also consider recommendations of the Air Navigation Commission for amendment of the Annexes according to Article 54(m). According to Article 90 of the Chicago Convention, the adoption by the Council of Annexes or any amendment of an Annex shall require the vote of two-thirds of the ICAO Council.

3. POSITION TO BE ADOPTED ON BEHALF OF THE UNION

It is proposed that the position to be adopted on behalf of the Union at the ICAO Council sessions be established according to a two-tier approach. First, by this Council Decision, the guiding principles and orientations of the Union's position are set out in Annex 1 on a multiannual basis. In a second step, the detailed position for each session of the ICAO Council will be transmitted by the Commission to the Council, in the form of a written document, for discussion and approval. The Commission will propose the detailed position in the written document based on the guiding principles and orientations laid out in Annex 1 and on the procedure laid out in Annex 2.

This approach is currently implemented for other international organisations, and notably within the transport sector within the Port State Control Committee of the Paris Memorandum of Understanding on Port State Control².

In the aviation sector, a similar Council Decision establishing the position on the Union's behalf relating to the notification of differences to ICAO already exists (Council Decision (EU) 2021/1092³) but expires on 30 November 2022. Therefore the objective of the current proposal is also to provide continuity to that Council Decision and revise the terms of its scope to ensure that the relevant issues under the Chicago Convention are treated coherently at Union level.

The Commission proposes the above-described procedure due to the characteristics of the process in ICAO:

- (a) regarding the adoption of new or amended acts;
- (b) following the announcement of the adoption of new acts in the form of a State Letter inviting its Contracting States to either notify their disapproval, or notify any differences and the date of compliance with the adopted measures; and
- (c) for the requirement to notify differences with existing Standards and Recommended Practices.

In particular, the internal rules of ICAO allow between ten days and 24 hours before the ICAO Council session (depending on the nature of the documents) for the submission of documents. It is only at that point that all submissions are available and that the Commission can analyse the documents with a view to preparing the Union position on the topics of EU competence for discussion and decision at the ICAO Council. The timeframe between the

² Council Decision (EU) 2016/381 of 14 March 2016 on the position to be adopted, on behalf of the European Union, within the Port State Control Committee of the Paris Memorandum of Understanding on Port State Control (OJ L 72, 17.3.2016, p. 53).

³ Council Decision (EU) 2021/1092 of 11 June 2021 establishing the criteria and procedure for the notification of differences with respect to international standards adopted by the International Civil Aviation Organization in the field of aviation safety (OJ L 236, 5.7.2021, p. 51).

availability of documents and the beginning of the ICAO Council session can put at risk the timely preparation and adoption of the legally required Council Decision under Article 218(9) TFEU.

To ensure coherence of the Union position throughout the ICAO adoption process, the proposed two-tier process should apply equally to the notification of disapproval according to Article 90 and of differences according to Article 38 of the Chicago Convention.

It is therefore proposed to adopt a Council Decision on the basis of Article 218(9) TFEU, establishing the position to be taken on behalf of the European Union for the adoption of international standards, amendments or the notification of differences, for:

- (a) each ICAO Council session;
- (b) when a registration of disapproval or a notification of difference with the adopted measures is required as a response to the ICAO State Letter process;
- (c) when a notification of difference stemming from changes of the Union *acquis* is required.

4. LEGAL BASIS

4.1. Procedural legal basis

4.1.1. Principles

Article 218(9) 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 at issue.⁴

The notion 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*’.⁵

4.1.2. Application to the present case

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

The acts which ICAO is called upon to adopt constitute acts having legal effects. This is because the Standards and Recommended Practices adopted by ICAO are applicable under the Chicago Convention unless a Contracting State files a difference to ICAO (Article 38 of the Chicago Convention) and, once adopted and effective, are binding on all ICAO Contracting States, in accordance with and within the limits set out in the Chicago Convention. Indeed, in accordance with Article 37 of the Chicago Convention, each Contracting State undertakes to collaborate in securing the highest practicable degree of uniformity in such Standards and Recommended Practices. Further, to the extent possible, they are reflected in Union law and therefore these Standards and Recommended Practices are capable of decisively influencing the content of Union legislation in the area of civil aviation.

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

⁴ Case C-399/12 Germany v Council (OIV), ECLI:EU:C:2014:2258, paragraph 64.

⁵ Case C-399/12 Germany v Council (OIV), ECLI:EU:C:2014:2258, paragraphs 61-64.

The procedural legal basis for the proposed Decision, therefore, 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 adopted on behalf of the Union. 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 envisaged acts pursue objectives and have components in the area of common transport policy.

The substantive legal basis of the proposed Decision, therefore, 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 was signed in Chicago on 7 December 1944 and regulates international air transport, entered into force on 4 April 1947. It established the International Civil Aviation Organization (‘ICAO’).
- (2) The Member States of the Union are Contracting Parties to the Chicago Convention and ICAO Contracting States, while the Union has observer status in certain ICAO bodies.
- (3) Pursuant to Article 54(1) of the Chicago Convention, the ICAO Council may adopt international Standards and Recommended Practices for civil aviation and designate them as Annexes to the Chicago Convention (‘ICAO Annexes’).
- (4) As ICAO Standards and Recommended Practices are capable of decisively influencing the content of Union law in the area of civil aviation insofar as they are reflected in the legislation referred to in recitals (9) and (10), it is appropriate to establish a position on behalf of the Union to be adopted in the ICAO Council.
- (5) Pursuant to Article 90 of the Chicago Convention, any ICAO Annex or any amendment to an ICAO Annex is to 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. Once adopted and effective, standards are binding on all ICAO Contracting States, including all Member States of the Union, in accordance with and within the limits set out in the Chicago Convention, in particular Articles 37 and 38 thereof.
- (6) Pursuant to Article 38 of the Chicago Convention, any ICAO Contracting State which finds it impracticable to comply in all respects with any standard or to bring its own regulations or practices into full accord with any standard after amendment of the latter, or which deems it necessary to adopt regulations or practices differing in any particular respect from those established by a standard, is to give immediate notification to ICAO of the differences between its own regulations or practices and those established by the standard. In the case of amendments to standards, any State

which does not make the appropriate amendments to its own regulations or practices is to give notice to ICAO within sixty days of the adoption of the amendment to the standard, or indicate the action which it proposes to take.

- (7) The internal rules of ICAO, in particular the late availability of documents for decisions regarding new standards or amendments of standards in the ICAO Council, or the deadlines set by ICAO for ICAO Contracting States to notify differences with respect to standards, as well as the number of differences in the areas of aviation safety, air navigation and air traffic management to be notified each year, make it difficult to establish the position to be adopted on behalf of the Union in a Council Decision based on Article 218(9) TFEU in a timely manner.
- (8) Moreover, the standards adopted by the ICAO Council in the field of aviation safety, air navigation and air traffic management concern to a large extent matters of Union exclusive competence. It is therefore efficient and appropriate to establish a framework for the adoption of new standards or amendments of standards and the notification of differences with respect to standards in the field of aviation safety, air navigation and air traffic management falling within Union competence, without prejudice to the rights and obligations of Member States under the Chicago Convention. At ICAO level, aviation safety, air navigation and air traffic management standards are mainly contained in ICAO Annexes 1, 2, 3, 4, 6, 7, 8, 10, 11, 12, 13, 14, 15, 18 and 19.
- (9) At Union level, the requirements contained in those standards for aviation safety are mainly reflected and referred to in Regulation (EU) 2018/1139, Regulation (EU) 996/2010⁶, Regulation (EC) No 2111/2005⁷ and Regulation (EU) No 376/2014⁸ of the European Parliament and of the Council⁹ and in the implementing and delegated acts adopted on the basis thereof in particular Commission Regulation (EU) No 1178/2011¹⁰, Commission Regulation (EU) No 748/2012¹¹, Commission Regulation

⁶ 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).

⁷ Regulation (EC) No 2111/2005 of the European Parliament and of the Council of 14 December 2005 on the establishment of a Community list of air carriers subject to an operating ban within the Community and on informing air transport passengers of the identity of the operating air carrier, and repealing Article 9 of Directive 2004/36/EC (OJ L 344, 27.12.2005, p. 15).

⁸ Regulation (EU) No 376/2014 of the European Parliament and of the Council of 3 April 2014 on the reporting, analysis and follow-up of occurrences in civil aviation, amending Regulation (EU) No 996/2010 of the European Parliament and of the Council and repealing Directive 2003/42/EC of the European Parliament and of the Council and Commission Regulations (EC) No 1321/2007 and Commission (EC) No 1330/2007 (OJ L 122, 24.4.2014, p. 18).

⁹ 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, and amending Regulations (EC) No 2111/2005, (EC) No 1008/2008, (EU) No 996/2010, (EU) No 376/2014 and Directives 2014/30/EU and 2014/53/EU of the European Parliament and of the Council, and repealing Regulations (EC) No 552/2004 and (EC) No 216/2008 of the European Parliament and of the Council and Council Regulation (EEC) No 3922/91 (OJ L 212, 22.8.2018, p. 1).

¹⁰ Commission Regulation (EU) No 1178/2011 of 3 November 2011 laying down technical requirements and administrative procedures related to civil aviation aircrew pursuant to Regulation (EC) No 216/2008 of the European Parliament and of the Council (OJ L 311, 25.11.2011, p. 1).

¹¹ 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 organisations (OJ L 224, 21.8.2012, p. 1).

(EU) No 965/2012¹², Commission Regulation (EU) No 139/2014¹³, Commission Regulation (EU) No 452/2014¹⁴, Commission Regulation (EU) No 1321/2014¹⁵, Commission Regulation (EU) 2015/640¹⁶ Commission Regulation (EU) 2019/947¹⁷, Commission Regulation (EU) 2019/945¹⁸, and Commission Regulation (EU) 2021/664¹⁹.

- (10) At Union level, for air navigation and air traffic management, the requirements contained in those standards are mainly reflected and referred to in Regulation (EC) No 549/2004²⁰, Regulation (EC) No 550/2004²¹, Regulation (EC) 551/2004²² of the European Parliament and of the Council and in the implementing and delegated acts adopted on the basis thereof in particular Commission Regulation (EU) No 923/2012²³, Commission Regulation (EU) No 1332/2011²⁴ Commission Regulation (EU) 2018/1048²⁵, Commission Regulation (EU) 2015/340²⁶.

¹² 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 (OJ L 296, 25.10.2012, p. 1).

¹³ 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).

¹⁴ Commission Regulation (EU) No 452/2014 of 29 April 2014 laying down technical requirements and administrative procedures related to air operations of third country operators pursuant to Regulation (EC) No 216/2008 of the European Parliament and of the Council (OJ L 133, 6.5.2014, p. 12).

¹⁵ Commission Regulation (EU) No 1321/2014 of 26 November 2014 on the continuing airworthiness of aircraft and aeronautical products, parts and appliances, and on the approval of organisations and personnel involved in these tasks (OJ L 362, 17.12.2014, p. 1).

¹⁶ Commission Regulation (EU) 2015/640 of 23 April 2015 on additional airworthiness specifications for a given type of operations and amending Regulation (EU) No 965/2012 (OJ L 106, 24.4.2015, p. 18).

¹⁷ Commission Implementing Regulation (EU) 2019/947 of 24 May 2019 on the rules and procedures for the operation of unmanned aircraft (OJ L 152, p. 45).

¹⁸ Commission Delegated Regulation (EU) 2019/945 of 12 March 2019 on unmanned aircraft systems and on third-country operators of unmanned aircraft systems (OJ L 152, p. 1).

¹⁹ Commission Implementing Regulation (EU) 2021/664 of 22 April 2021 on a regulatory framework for the U-space (OJ L 139, 23.4.2021, p. 161)

²⁰ Regulation (EC) No 549/2004 of the European Parliament and of the Council of 10 March 2004 laying down the framework for the creation of the single European sky (the framework Regulation) (OJ L 096, 31/03/2004, p. 1-8).

²¹ Regulation (EC) No 550/2004 of the European Parliament and of the Council of 10 March 2004 on the provision of air navigation services in the single European sky (the service provision Regulation) (OJ L 96, 31/03/2004, p. 10).

²² Regulation (EC) No 551/2004 of the European Parliament and of the Council of 10 March 2004 on the organisation and use of the airspace in the single European sky (the airspace Regulation) (OJ L 96, 31.3.2004, p. 20).

²³ 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).

²⁴ Commission Regulation (EU) No 1332/2011 of 16 December 2011 laying down common airspace usage requirements and operating procedures for airborne collision avoidance (OJ L 336, 20.12.2011, p. 20).

²⁵ Commission Implementing Regulation (EU) 2018/1048 of 18 July 2018 laying down airspace usage requirements and operating procedures concerning performance-based navigation (OJ L 189, 26.7.2018, p. 3)

²⁶ Commission Regulation (EU) 2015/340 of 20 February 2015 laying down technical requirements and administrative procedures relating to air traffic controllers' licences and certificates pursuant to Regulation (EC) No 216/2008 of the European Parliament and of the Council, amending Commission

- (11) Given the specificity of civil aviation safety, air navigation and air traffic management compared to other sectors dealt with by ICAO, in particular the high number of standards adopted in these sectors by the ICAO Council and other related decisions and the number of differences to be notified every year, it is efficient to establish such a position on a multiannual basis, consisting of guiding principles and orientations. Most of the topics in the ICAO Council concern matters covered by the ICAO work programme as established by its triannual Assembly. It is therefore possible to establish a general position to be adopted on behalf of the Union in the ICAO Council.
- (12) The detailed Union position should be defined based on the guiding principles and orientations laid out in Annex 1 and on the procedure laid out in Annex 2, and in accordance with the objectives pursued by the Union within the framework of the common transport policy in aviation, in order to promote a safe, secure, efficient, performant, open, economically viable and environmentally sound air transport system.
- (13) The differences to be notified to ICAO should be based in particular on the information provided by the European Union Aviation Safety Agency (EASA) in accordance with Article 90(4) of Regulation (EU) 2018/1139, where applicable. Differences should follow the format defined by ICAO in the Electronic Filing of Differences system, where required by ICAO. Where, pursuant to this Decision, the position to be adopted on behalf of the Union is established in a written document submitted by the Commission to the Council for discussion and approval, such document should, where appropriate, and on a case-by-case basis, indicate whether flexibility should be granted to Member States for the form of the notification of the differences in question. Moreover, the Commission should endeavour to start preparing such document as soon as possible in order to allow for sufficient time for such preparation, including any appropriate consultation to be conducted at experts' level.
- (14) Differences to standards adopted by the ICAO Council in the field of aviation safety, air navigation and air traffic management may also stem from national measures adopted pursuant to Article 71 of Regulation (EU) 2018/1139 in the event of urgent unforeseeable circumstances, where those measures differ from standards and therefore require the notification of differences to ICAO pursuant to Article 38 of the Chicago Convention. It is therefore also appropriate to define in this Decision the procedure to be followed for the definition of such differences. That procedure should depend on the scope and duration of the national measures adopted and should enable Member States to comply without delay with their international obligations under Article 38 of the Chicago Convention. That procedure should be without prejudice to the conditions and procedure laid down in Article 71 of Regulation (EU) 2018/1139.
- (15) The Union's position is to be expressed by the Member States of the Union that are members of ICAO, acting jointly in the interest of the Union, and assisted by the Commission, in line with the Union's observer status.
- (16) The implementation of this Decision should allow Member States to comply with their obligations under the Chicago Convention.
- (17) This Decision should apply for a limited period of time, namely until after the ICAO Council session following the 42nd ICAO Assembly.

Implementing Regulation (EU) No 923/2012 and repealing Commission Regulation (EU) No 805/2011 (OJ L 63, 6.3.2015, p.1)

HAS ADOPTED THIS DECISION:

Article 1

The position to be adopted on behalf of the Union in the International Civil Aviation Organization Council when that body is called upon to adopt decisions in the areas of civil aviation safety, air navigation and traffic management relating to Annexes 1, 2, 3, 4, 6, 7, 8, 10, 11, 12, 13, 14, 15, 18 and 19, is set out in Annex 1.

Article 2

The specification of the Union's position to be taken in each session of the ICAO Council shall be conducted in accordance with Annex 2.

Article 3

The position to be adopted on behalf of the Union as regards the notification of differences to ICAO with respect to standards contained in the above-mentioned Annexes to the Chicago Convention shall be established according to the position set out in Annex 1.

Article 4

Where Union law differs from the standards referred to in Article 1 of this Decision and the notification to ICAO of differences with respect to those standards is therefore required in accordance with Article 38 of the Chicago Convention, the Commission shall, in due time and at least two months before any deadline set by ICAO for the notification of differences, submit to the Council, for discussion and approval, a written document, based in particular on the information provided by the European Union Aviation Safety Agency (EASA) in accordance with Article 90(4) of Regulation (EU) 2018/1139, where applicable, setting out the detailed differences to be notified to ICAO, and where appropriate, indicating flexibility granted to Member States for the form of the notification.

Article 5

Where a Member State adopts, in accordance with Article 71 of Regulation (EU) 2018/1139, national measures granting exemptions concerning individual natural or legal persons or with a total duration not exceeding eight months, and where those national measures differ from the standards referred to in Article 3 of this Decision and require the notification of differences to those standards in accordance with Article 38 of the Chicago Convention, that Member State shall immediately inform the Commission of any difference to be notified.

Where the exemptions granted in accordance with Article 71 of Regulation (EU) 2018/1139 are of general application and their total duration exceeds eight months, the Commission shall, no later than two weeks after receiving the EASA recommendation in accordance with Article 71(2) of that Regulation, submit to the Council, for discussion and approval, a written document, taking into account the information provided by the Member State concerned and, when applicable, information provided by EASA in accordance with Article 90(4) of that Regulation, setting out the detailed differences to be notified to ICAO.

Article 6

The implementation of this Decision shall facilitate Member States to comply with their obligations under the Chicago Convention.

Article 7

The position to be adopted on behalf of the Union within ICAO shall be expressed by the Member States acting jointly in the interest of the Union, within the ICAO bodies, and assisted by the Commission, in line with the Union's observer status.

Article 8

This Decision applies until 31 December 2025. On a proposal from the Commission, the Council may extend its application or otherwise amend it.

Article 9

This Decision is addressed to the Member States.

Done at Brussels,

*For the Council
The President*