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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 Adoption of Amendment 17
to Annex 13**

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) in connection with the envisaged adoption of Amendment 17 to Annex 13 to the Chicago Convention by the ICAO Council in its 216th 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 Organisation 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 2016-2019, 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.

2.3. The envisaged act of the International Civil Aviation Organization

During its 216th session, the Council of the International Civil Aviation Organization is to adopt Amendment 17 to Annex 13 to the Chicago Convention regarding reporting and timely investigation of accidents and incidents ('the envisaged act').

The purpose of the envisaged act is to amend Annex 13 to Chicago Convention – *Aircraft Accident and Incident Investigation* based on the recommendations from the third meeting of the Accident Investigation Panel (AIGP/3) and based on a recommendation from the Second High-Level Safety Conference (HLSC2015). The amendment introduces changes in the areas of timely investigation of accidents and serious incidents, and release of the final report; definition for "Accredited representative"; alignment of provisions on notification, and dissemination of Final Reports; facilitation of the entry of investigators; rights and entitlement of an expert; consultation of draft safety recommendations; list of examples of serious incidents; and delegation of investigation.

The proposed amendment to Annex 13 is envisaged to become effective as of July 2019 and be applicable as of 5 November 2020.

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

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

The main change introduced by the proposal for Amendment 17 to Annex 13 ('the proposal') is related to 'timely investigation of accidents and serious incidents, and release of the final report'. It is based on a recommendation from the Second High-Level Safety Conference (HLSC2015). There have been accidents when the State of Occurrence did not conduct or agree to delegate the investigation, while the State of the Operator or the State of Manufacture/Design deemed it necessary to investigate the occurrence. It is noted that there are SARPs entitling the State of Occurrence to delegate an investigation, but there are no SARPs or any other criteria entitling States to request the delegation of an investigation. The HLSC2015 considered that some investigations might not be conducted by the State of Occurrence and recommended that ICAO review relevant provisions in Annex 13, with due consideration when the State of Occurrence does not conduct an investigation called for in Annex 13 and does not intend to delegate the investigation to another State. It is recalled that the State of Occurrence has investigation obligations called for in Annex 13; should such obligations not be complied with, adversely affecting safety, the proposal would apply.

The proposed "recommended practices"¹ concern the case in which the State that, under Annex 13, is in charge of the investigation (the State of Occurrence or of Registry, as the case may be) does not comply with its duties. Other States, as identified, may then "request" a delegation. In case there is no action by the State in charge as required by Annex 13, the recommendations stipulate that the requesting State "should institute and conduct the investigation with such information as is available". Should the State of Occurrence decline the request to delegate the investigation, however, which is one of the possible outcomes, the requesting State would not conduct the investigation.

The problem that has prompted this change should normally not arise as between Union Member States. Article 5 of Regulation (EU) No 996/2010 establishes obligations to investigate and define scope and extend of the safety investigations, and defines which Member State is in charge according to the case. Should a Member State fail to comply with these obligations, this would constitute an infringement of the Union law, and the Commission would be entitled to launch infringement proceedings. However, if the amendment proposed were to be adopted, failure by a Member State to conform to its duties of investigation (i.e. under Regulation (EU) No 996/2010 and, by the same token, Annex 13 of the Chicago convention) could give rise to action, under new points 5.1.3 and 5.3.2 of Annex 13, according to the case.

Another subject regarding timely investigations relates to the late release of Final Reports or when no Final Report was released. A review of 1 157 fatal accidents that occurred between 1990 and 2016 involving aircraft with a MCTOM over 5 700 kg indicated that 59 per cent of the Final Reports were not publically available. The lack of these Final Reports is a major concern as relevant safety information is not available to implement safety actions. In some cases, States that participated in such investigations were aware of safety issues but unable to disseminate the information as the responsibility was with the State conducting the investigation to release information either in the Final Report or in an interim statement.

In this connection, the proposed "recommended practice"² would "entitle" States participating in the investigation to request consent to release a statement containing safety issues, if the State conducting the investigation would not publish the Final Report or an interim statement

¹ To figure as points 5.1.3 and 5.3.2 of Annex 13 to the Chicago Convention.

² To figure as point 6.6.1 of Annex 13 to the Convention.

within a reasonable timeframe. This kind of mechanism is not contained in Regulation (EU) No 996/2010, nor would it be necessary (see consideration set out above regarding delegation)

It should be noted that the two above mentioned items, presented as “recommended practices” alter the legal position in the matter, in the sense that they affect the allocation of tasks as between ICAO States, as emerging from the pre-existing standards.

Further areas on which the Accident Investigation Panel (AIGP/3) has recommended, as part of the proposal for Amendment 17 to Annex 13, to introduce changes are the following: the definition for “Accredited representative”; alignment of provisions on notification, and dissemination of Final Reports; facilitation of the entry of investigators; rights and entitlement of an expert; consultation of draft safety recommendations; list of examples of serious incidents; and delegation of investigation.

As regards the change to the definition of 'accredited representative', the proposed text fits with Article 2 paragraph 2 of Regulation (EU) No 996/2010 defining 'accredited representative' and stating an accredited representative designated by a Member State shall be from a safety investigation authority. In the Union, all Member States have established a permanent and independent Aviation Investigation Authority.

On the alignment of provisions on notification, and dissemination of Final Reports, the proposed amendments aligns various provisions of Annex 13 to the remainder of the Annex. The impact of these changes on the Union rules would have to be assessed and, where needed, a difference could be notified.

The proposed amendment of the Note 2 of article 5.24 on ' facilitation of the entry of investigators' aims to remind the Member States that the establishment of prior agreements between the accident investigation authorities and customs authorities within a State may expedite the entry of the investigation personnel and equipment. Article 12 of Regulation (EU) No 996/2010 contributes to the implementation of this objective by means of advanced arrangements that should be established with other authorities likely to be involved in the activities related to the safety investigation, in order to allow the technical investigation to be conducted diligently and efficiently.

To avoid potential confusion related to the rights and entitlements of an expert with those of an accredited representative, it is proposed to delete the word “participation” from the heading of 5.27 because it is similar to those of 5.18 and 5.23 in which participating States are entitled to appoint accredited representatives to the investigation. The impact of these changes on the Union rules would have to be assessed and, where needed, a difference could be notified.

The proposed Note to article 6.8 aims to inform the State conducting an investigation of the possibility to coordinate draft safety recommendations with States that participated in the investigation. This text fits with Article 17 of Regulation (EU) No 996/2010 according to which the Union Aviation Accident Authorities at any stage of the safety investigation shall, after appropriate consultation with relevant parties, send any safety recommendation that it considers necessary.

The proposed amendments to Attachment C 'List of examples of serious incidents' intends to assist Aviation Investigation Authorities in their assessment on whether an occurrence is an accident, serious incident or just an incident. The list is not exhaustive and it will evolve in the future to take into account new hazards such as unmanned aircraft or cybersecurity breaches. It also contains a short guidance for AIAs to apply a risk-based analysis approach when determining if an incident was a serious incident is needed. It is proposed to include a

simplified version of the Aviation Risk Management Solutions (ARMS) event risk classification (ERC) matrix in Attachment C.

Annex 'List of examples of serious incidents' to Regulation (EU) No 996/2010 contains typical examples of incidents that are likely to be serious incidents. The list is not exhaustive and only serves as guidance with respect to the definition of 'serious incident'. As such, the Union welcomes any initiative that might help to determine in a harmonised way what a serious incident is. The additions suggested are not matched by corresponding items in the Annex to Regulation (EU) No 996/2010. However, they appear reasonable and in the same spirit as the items already listed. Should one or more of these items nevertheless create problems, differences can still be notified at later stage.

The proposed change to Attachment F 'Investigation delegation agreements' refers to whole or partial delegation agreements of the safety investigation. This proposal addresses the importance of differentiating between the institution and the conduct of an investigation, and the responsibilities of the State to which the investigation is delegated. It introduces the possibility to delegate it to a regional accident and incident investigation organization (RAIO).

There are several articles in Regulation (EU) No 996/2010 dealing with this area. Article 6 deals with cooperation between safety investigation authorities; and gives a safety investigation authority the possibility to delegate the task of conducting an investigation into an accident or serious incident to another safety investigation authority subject to mutual agreement. Article 7 sets up the European Network of Civil Aviation Safety Investigation Authorities (ENCASIA), which is supported by the European Commission, and has as one of its objectives providing, at the request of the safety investigation authorities for the purpose of the application of Article 6, appropriate assistance, including, but not limited to, a list of investigators, equipment and capabilities available in other Member States for potential use by the authority conducting an investigation. For information, ENCASIA has been already listed as a RAIO in the ICAO register. Nonetheless, Regulation (EU) No 996/2010 does not allow the delegation from a safety investigation authority to a RAIO (ENCASIA).

3.2. Position to be taken on Union's behalf

The proposed position to be taken on behalf of the Union is to support the proposed amendment in its entirety.

It is true that, next to the cases where Union legislation is already in line with changes proposed by Amendment 17, there are some points where such alignment is missing or not certain.

However, there are important arguments in favour of supporting the amendment as presented, it being understood that a decision as to whether Regulation (EU) No 996/2010 should be amended on certain details and/or whether differences should be notified in accordance with Article 38 of the Chicago convention can still be taken at a later stage.

The first reason for supporting the amendment is that it represents an international consensus achieved by experts coming from a wide spectrum of ICAO Member States, including a number of experts from the European Union Member States. The common objective of the amendment's various elements consists in improving the international system of aircraft accident and incident investigation. A position whereby the proposed amendment is not supported by the Union Member States would risk undermining the international efforts to this effect. Secondly, it is essential that the Amendment 17 is supported in its entirety as it introduces a number of changes that are inter-linked. Decision to support just parts of the Amendment 17 would result in disturbing the internal logic of the proposed amendment and

would risk further misalignments of the rules contained in Annex 13. Finally, it should be noted that while the European legal framework in the area of aviation safety investigations might be considered both comprehensive and effective, this is not the case in a number of other ICAO Member States.

As already mentioned, the above is without prejudice to the assessment, to be conducted at a later stage, as to whether the Union should amend its own rules and/or decide that differences be notified. In either case, the Commission would take the necessary initiatives. In particular, should it see the need for a difference to be notified, it would make a corresponding proposal for a decision under Article 218(9) TFEU.

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 agreement³.

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.

The act which the International Civil Aviation Organization is called upon to adopt constitutes an act having legal effects. The envisaged act has legal effects because it changes a number of standards, which are capable of creating a binding legal obligation under international law.

Furthermore, the Amendment introduces a number of changes designated as “recommendations”. Despite their denomination, these “recommendations” are of a nature that alters the legal situation existing under the pre-existing standards.

The envisaged act does 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

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.

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 act 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.

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 Adoption of Amendment 17 to Annex 13

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 its 216th session, starting on 14 February 2019, is to adopt Amendment 17 to Annex 13 to the Chicago Convention on reporting and timely investigation of accidents and incidents.
- (5) It is appropriate to establish the position to be taken on the Union's behalf in the ICAO Council as the proposed amendment has legal effect and is in whole or in part capable of decisively influencing the content of Union law, namely Regulation (EU) No 996/2010 of the Parliament and the Council⁵.
- (6) The purpose of the amendment is to introduce the following changes: in the areas of timely investigation of accidents and serious incidents, and the release of the final report; the definition for 'Accredited representative'; the alignment of provisions on notification, and the dissemination of Final Reports; facilitation of the entry of investigators; rights and entitlement of an expert; consultation of draft safety recommendations; the list of examples of serious incidents; and delegation of investigation
- (7) The Union is a strong supporter of these efforts by ICAO to improve aviation safety by ensuring a high level of efficiency, expediency, and quality of civil aviation safety investigations.

⁵ Regulation (EU) No 996/2010 of the Parliament and 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)

(8) The Union's position is to be expressed by the Member States of the Union that are members of the ICAO Council,

HAS ADOPTED THIS DECISION:

Article 1

The position to be taken on the Union's behalf in the 216th session of the Council of the International Civil Aviation Organization ('ICAO') shall be to support the proposed Amendment 17 to Annex 13 to the Convention on International Civil Aviation ('Chicago Convention') without prejudice to the right to notify differences in accordance with Article 38 of the Chicago Convention.

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.

Article 3

This Decision is addressed to the Member States.

Done at Brussels,

*For the Council
The President*