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PROPOSAL

From: Secretary-General of the European Commission,
signed by Mr Jordi AYET PUIGARNAU, Director

date of receipt: 12 January 2018

To: Mr Jeppe TRANHOLM-MIKKELSEN, Secretary-General of the Council of
the European Union

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Subject: Proposal for a COUNCIL DECISION on the position to be adopted, on
behalf of the European Union, in the International Civil Aviation
Organization

Delegations will find attached document COM(2018) 19 final.

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Brussels, 12.1.2018
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Proposal for a

COUNCIL DECISION

**on the position to be adopted, on behalf of the European Union, in the International
Civil Aviation Organization**

EXPLANATORY MEMORANDUM

1. SUBJECT-MATTER OF THE PROPOSAL

The present proposal concerns the decision establishing the position to be adopted on behalf of the Union in the International Civil Aviation Organization (ICAO) in connection with the envisaged adoption of acts having legal effects in the area of civil aviation.

2. CONTEXT OF THE PROPOSAL

2.1. The Chicago Convention

The International Civil Aviation Organization ('ICAO') was established by the Convention on International Civil Aviation ('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 is not a contracting party to the Chicago Convention but has an observer status in ICAO.

2.2. The International Civil Aviation Organization

The 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 provisions of the Lisbon Treaty and are to a large extent a competence of the European Union. To the extent possible the EU aims to ensure consistence with international standards in the area of civil aviation.

2.3. The envisaged acts having legal effects in the International Civil Aviation Organization

The general orientations of the ICAO in each of the aforementioned domains are adopted at the Assembly of the ICAO, for a period corresponding to the triennium up to the following Assembly of the ICAO.

It is proposed that the EU position in the ICAO is established according to a two-tier approach. A Council Decision sets out the guiding principles and orientations of the Union's position on a multiannual basis, for each ICAO triennium. It is thereafter adjusted for each ICAO Council session by Commission non-papers to be discussed in the relevant body of the Council of the EU. This approach is currently implemented for other international organisations, notably within the Port State Control Committee of the Paris Memorandum of Understanding on Port State Control¹.

¹ 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. 53–56.

3. POSITION TO BE ADOPTED ON BEHALF OF THE UNION

This proposal aims at setting out the Union's position in the ICAO for the current triennium, which implements the ICAO's Work programme for the period 2016-2019 in accordance with the recommendations and conclusions of the 39th session of the ICAO Assembly.

The Commission proposes the above-referred two-tier approach due to the characteristics of the decisional process in the ICAO. The ICAO Council is the governing body responsible for the adoption of acts having legal effects in the ICAO. The internal rules of the ICAO fix at between ten days and 24 hours before the ICAO Council session (depending on the nature of the documents) the latest date for submission of any documents by members of the ICAO Council, ICAO Council President and ICAO Secretary General. 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 to be discussed at the ICAO Council. The timeframe between the availability of documents and the beginning of the ICAO Council session does not allow for the preparation and the adoption of a Council Decision under Article 218(9) of the Treaty on the Functioning of the European Union ('TFEU').

It is therefore proposed to adopt a Council Decision on the basis of Article 218(9) TFEU defining the EU position for the current triennium and to complement it with Commission non-papers for each ICAO Council session.

This proposal is consistent with EU policies in the area of civil aviation and in particular as regards to civil aviation safety, air navigation and air traffic management, environment, aviation security, economic development in air transport, passenger rights and facilitation.

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.²

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*'.³

4.1.2. Application to the present case

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

² Case C-399/12 Germany v Council (OIV), ECLI:EU:C:2014:2258, paragraph 64.

³ Case C-399/12 Germany v Council (OIV), ECLI:EU:C:2014:2258, paragraphs 61-64.

The acts which ICAO is called upon to adopt constitute acts having legal effects. The envisaged acts are capable of decisively influencing the content of EU legislation in the area of civil aviation. This is because the standards adopted by ICAO are applicable under the Chicago Convention unless a Contracting State files a difference to ICAO (Article 38 of the Chicago Convention). Moreover, to the extent possible, the EU aims to ensure consistence with international standards in the area of civil aviation.

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

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.

With regard to an envisaged act that simultaneously pursues a number of objectives, or that has several components, which are inseparably linked without one being incidental to the other, the substantive legal basis of a decision under Article 218(9) TFEU will have to include, exceptionally, the various corresponding legal basis.

4.2.2. Application to the present case

The envisaged acts pursue objectives and have components in the area of common transport policy and Union policy on the environment. These aspects of the envisaged acts are inseparably linked without one being incidental to the other.

The substantive legal basis of the proposed decision, therefore, comprises the following provisions: Articles 100(2) and 191 TFEU.

4.3. Conclusion

The legal basis of the proposed decision should be Articles 100(2) and 191 TFEU in conjunction with Article 218(9) TFEU.

Proposal for a

COUNCIL DECISION

on the position to be adopted, on behalf of the European Union, in the International Civil Aviation Organization

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Articles 100(2) and 191 in conjunction with Article 218(9) thereof,

Having regard to the proposal from the European Commission,

Whereas:

- (1) Pursuant to Article 47 of the Convention on International Civil Aviation ('the Chicago Convention'), the International Civil Aviation Organization ('ICAO') may adopt international standards for aviation, in particular as regards civil aviation safety, air navigation, air traffic management, environment, aviation security, economic development in air transport, passenger rights and facilitation.
- (2) It is appropriate to establish the position to be adopted on behalf of the Union in the ICAO, as it adopts acts that are capable of decisively influencing the content of Union law in the area of civil aviation.
- (3) As the internal rules of ICAO, and in particular the rules of procedure of the ICAO Council, make it impossible to establish a position to be adopted on behalf of the Union in accordance with Article 218(9) of the Treaty on the Functioning of the European Union in a timely manner, it is efficient in this situation to establish such a position on a multiannual basis, consisting of guiding principles and orientations, together with a framework for its annual specification. At the same time, most of the topics discussed in the ICAO concern matters covered by the ICAO work programme as established by its triannual Assembly. In the particular framework of the ICAO, it is therefore possible to establish a general position to be adopted on behalf of the Union in the ICAO.
- (4) The Union position should be defined in accordance with the objectives pursued by the Union within the framework of the common transport policy and the environment policy of the Union, established in accordance with Articles 100(2) and 191 of the Treaty on the Functioning of the European Union, in order to promote a safe, secure, efficient, performant, open, economically viable and environmentally sound air transport system.

- (5) Council Decision (EU) 2016/915⁴ determines the position to be taken on behalf of the Union with regard to the international instrument to be drawn up within the ICAO bodies and intended to lead to the implementation from 2020 of a single global market-based measure for international aviation emissions, elements of which are still being discussed at the ICAO. The Union's position regarding this item should be exclusively governed by Decision (EU) 2016/915, more specific in this respect than this Decision.

HAS ADOPTED THIS DECISION:

Article 1

The position to be adopted on behalf of the Union in the International Civil Aviation Organization ('ICAO') when that body is called upon to adopt decisions having legal effects is set out in Annex I.

That position shall be assessed and, where appropriate, revised by the Council upon a proposal from the Commission, notably to reflect the outcome of the 40th Assembly of the ICAO.

Article 2

The detailed specification of the position to be adopted on behalf of the Union in the sessions of the Council of the ICAO shall be conducted in accordance with Annex II.

Article 3

The position to be adopted on behalf of the Union 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 4

This Decision applies without prejudice to Decision (EU) 2016/915.

⁴ Council Decision (EU) 2016/915 of 30 May 2016 on the position to be taken on behalf of the European Union with regard to the international instrument to be drawn up within the ICAO bodies and intended to lead to the implementation from 2020 of a single global market-based measure for international aviation emissions; OJ L 153, 10.6.2016, p. 32–34.

Article 5

This Decision is addressed to the Member States.

Done at Brussels,

*For the Council
The President*