



Council of the
European Union

Brussels, 23 February 2021
(OR. en)

6402/21

Interinstitutional File:
2021/0040(NLE)

AVIATION 41
ICAO 15
RELEX 136

PROPOSAL

From:	Secretary-General of the European Commission, signed by Ms Martine DEPREZ, Director
date of receipt:	22 February 2021
To:	Mr Jeppe TRANHOLM-MIKKELSEN, Secretary-General of the Council of the European Union
No. Cion doc.:	COM(2021) 74 final
Subject:	Proposal for a COUNCIL DECISION on the position to be taken on behalf of the European Union in the International Civil Aviation Organization as regards notification of differences to Annex 6, Part II, to the Convention on International Civil Aviation

Delegations will find attached document COM(2021) 74 final.

Encl.: COM(2021) 74 final



Brussels, 22.2.2021
COM(2021) 74 final

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Proposal for a

COUNCIL DECISION

on the position to be taken on behalf of the European Union in the International Civil Aviation Organization as regards notification of differences to Annex 6, Part II, 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 the Amendment 37 to Annex 6 – *Operation of Aircraft*, Part II – *International General Aviation – Aeroplanes* in the area of terms for authorisations, acceptance and approvals to the Convention on International Civil Aviation adopted by the ICAO Council in its 219th session and published by ICAO State Letter AN 11/6.3.21-20/31.

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 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.

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 adopted acts during the 219th session of the Council of the International Civil Aviation Organization and their relationship with the existing Union rules

During its 219th session, the ICAO Council has adopted several Amendments to numerous Annexes to the Chicago Convention, among them, Amendment 37 to Annex 6, Part II. The ICAO State Letter AN 11/6.3.21-20/31 is informing the ICAO Contracting States about the adoption of the Amendment, requests the States in particular in line with their obligations under Article 38 of the Chicago Convention to notify ICAO of any differences that may arise.

A proposal for a Council Decision¹ partly addressed a position to be taken on behalf of the European Union in ICAO as regards notification of differences to, among others, Annex 6, Part II to the Chicago Convention, stemming from Amendment 37. As a result of further examination of possible differences pertaining to the SARPs as compared to the EU *acquis* undertaken by the European Union Aviation Safety Agency, a need to notify a further difference brought by Amendment 37 arose in the area of harmonisation of terms for authorisations, acceptance and approvals (AAA).

2.3.1. Amendment 37 to Annex 6 – Operation of Aircraft, Part II – International General Aviation – Aeroplanes

2.3.1.1. Harmonisation of terms for authorisations, acceptance and approvals (AAA)

The terms authorisation, acceptance and approval are not consistently used throughout the provisions of Annex 6. Often the level of authorisation required is not clear from the current text of the Annex.

Standardised language has been enforced for all provisions requiring a specific approval, in order to achieve consistency and clarity. The guidance in the attachments to each part of Annex 6 has been amended to clarify which items are subject to a specific approval as distinct from other levels of authorisation. The definition of a “specific approval” and a change to the definition of “operations specifications” to make reference to this new definition are also included in this Amendment.

Regulation (EU) No 965/2012² does not contain the definitions of ‘*operations specifications*’ and ‘*specific approvals*’. However, the terms are used with the same meaning.

Amendment 37 introduced the requirement of a specific approval of the electronic flight bags (EFB) when used in general aviation operations. This will constitute a difference to the EU legislation as Regulation (EU) No 965/2012 does not require non-commercial operators with complex motor-powered aircraft (NCC) and non-commercial operators with other-than-complex motor-powered aircraft (NCO) to have a specific approval when using Type B EFB applications. The corresponding changes in SARPs 2.4.17 will be assessed during EASA’s rulemaking task RMT.0392 Regular Update of the Air Operations Rules.

The other changes introduced do not modify the level of implementation of those standards, as they are already covered by the EU rules.

Member States shall file a difference to SARP 2.4.17 on specific approval for EFB.

¹ Commission Proposal COM(2020) 649, for a Council Decision, the adoption is pending at the Council

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 (OJ L 296, 25.10.2012, p. 1).

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

3.1. Differences to be notified

The 219th ICAO Council session held from 2 to 20 March 2020 adopted, a number of Amendments to various Annexes of the Chicago Convention, in the areas of safety, environment and air navigation. Among those adopted Amendments was Amendment 37 to Annex 6, Part II.

Amendment 37 to Annex 6, Part II falls within areas covered by Union law and hence under exclusive external Union competence. The Annex to the proposal for a Council Decision shows in detail the difference to be notified to ICAO.

In this context, having regard to relevant Union legislation, the position to be taken on the Union's behalf is to notify the differences in accordance with Article 38 of the Chicago Convention as set out in this proposal for a Council Decision.

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 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.

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.

Differences to be notified in reply to ICAO State Letter AN 11/6.3.21-20/31 have an incidence on the legal effects deployed by the standards established under the Chicago Convention.

Those legal effects fall within an area covered by Union rules, namely Regulation (EU) 2018/1139⁵ and Regulation (EU) No 965/2012⁶. This entails that, in accordance with Article 3(2) of the TFEU, the Union has exclusive external competence in this matter.

The adopted 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 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 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).

⁶ 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).

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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 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 the Chicago Convention.
- (4) 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 ICAO of the differences between its own practice and that established by the international standard.
- (5) During its 219th session, held from 2 to 20 March 2020, the ICAO Council adopted several amendments to numerous Annexes to the Chicago Convention in the areas of safety, environment and air navigation, which included Amendment 37 to Annex 6, Part II. ICAO State Letter AN 11/6.3.21-20/31 informing the ICAO Contracting States about the adoption of Amendment 37 to Annex 6, Part II, to the Chicago Convention, requests the States, pursuant to their obligations under Article 38 of the Chicago Convention, to notify ICAO of any differences that may arise.

- (6) Amendment 37 to Annex 6, Part II, to the Chicago Convention, adopted by the ICAO Council falls within areas covered by Union law and is therefore under exclusive external Union competence. That amendment falls within the area covered by Regulation (EU) 965/2012¹.
- (7) In this case, Amendment 37 leads to a divergence from Regulation (EU) No 965/2012. That Regulation does not contain the definitions of ‘operations specifications’ and ‘specific approvals’. However, the terms are used with the same meaning. Furthermore, amendment 37 introduced the requirement of a specific approval of the electronic flight bags (EFB) when used in general aviation operations, which will constitute a difference to Regulation (EU) No 965/2012.
- (8) As a result, Article 38 of the Chicago Convention would require the notification of differences by the Union Member States in reply to ICAO State Letter AN11/6.3.21-20/31 in the area of harmonisation of terms for authorisations, acceptance and approvals (AAA), that is, the notification of differences with new SARPs stemming from Amendment 37 adopted at the 219th session of the ICAO Council with respect to Annex 6, Part II, to the Chicago Convention.
- (9) The differences to be notified in reply to ICAO State Letter AN 11/6.3.21-20/31 have an incidence on the legal effects deployed by the standards established under the Chicago Convention.
- (10) It is therefore appropriate to establish the position to be taken on the Union's behalf in response to ICAO State Letter AN 11/6.3.21-20/31, as the adoption of Amendment 37 to Annex 6, Part II, to the Chicago Convention, issued by ICAO will be capable of decisively influencing the content of Union law, namely Commission Regulation (EU) No 965/2012². The Union's position is to be expressed by the Member States of the Union,

HAS ADOPTED THIS DECISION:

Article 1

The position to be taken on the Union’s behalf in reply to State Letter AN 11/6.3.21-20/31 to the adoption of Amendment 37 to Annex 6, Part II, issued by the International Civil Aviation Organization (ICAO), is set out in the Annex to this Decision.

Article 2

The position referred to in Article 1 shall be expressed by all the Member States of the Union.

¹ 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).

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 (OJ L 296, 25.10.2012, p. 1).

Article 3

This Decision is addressed to the Member States.

Done at Brussels,

*For the Council
The President*