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PROPOSAL

From:	Secretary-General of the European Commission, signed by Mr Jordi AYET PUIGARNAU, Director
date of receipt:	15 October 2019
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 taken on behalf of the European Union within the enlarged Commission of Eurocontrol, regarding principles for establishing the cost-base for en route charges and the calculation of the unit rate and conditions of application of the route charges system and conditions of payment

Delegations will find attached document COM(2019) 466 final.

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2019/0233 (NLE)

Proposal for a

COUNCIL DECISION

on the position to be taken on behalf of the European Union within the enlarged Commission of Eurocontrol, regarding principles for establishing the cost-base for en route charges and the calculation of the unit rate and conditions of application of the route charges system and conditions of payment

(Text with EEA relevance)

EXPLANATORY MEMORANDUM

1. SUBJECT MATTER OF THE PROPOSAL

This proposal concerns the decision establishing the position to be taken on the Union's behalf before the session of the enlarged Commission of Eurocontrol on 28 November 2019 in connection with the envisaged adoption of the update to the Conditions of Application of the Route Charges System ("Conditions of Application") and the update to the Principles for establishing the cost-base for en route charges and the calculation of the unit rates ("the Principles"), both later on referred to as "the envisaged acts".

2. CONTEXT OF THE PROPOSAL

2.1. The Multilateral Agreement relating to Route Charges

The Multilateral Agreement relating to Route Charges ('the Agreement')[1] aims to establish a joint system of en-route charges. In accordance with Article 1 of the Agreement, the Contracting States agreed to adopt a common policy in respect of charges for en route air navigation facilities and services, hereinafter called "route charges", in the airspace of the Flight Information Regions falling within their competence. They accordingly agreed to create a joint system for the establishment and collection of route charges and to use for this purpose the services of Eurocontrol. In accordance with Article 3 of the Agreement, it is the enlarged Commission of Eurocontrol that undertakes the establishment of the joint system of route charges.

The Agreement entered into force in 1986.

All Member States are parties to the Agreement[2].

2.2. The enlarged Commission of Eurocontrol

In accordance with Article 3(2) of the Agreement, the enlarged Commission of Eurocontrol:

(1) establishes the principles governing the assessment of the costs for calculating en route charges;

(2) establishes the formula to be applied in calculating the route charges;

(3) approves, for each charging period, the rate at which the costs are to be recovered;

(4) determines the unit of account in which the route charges are expressed;

(5) determines the conditions of application of the system, including the conditions of payment, as well as the unit rates and tariffs and the period during which they are to apply;

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1 https://www.eurocontrol.int/sites/default/files/article/attachments/multilateral-agreement-relating-to-route-charges.pdf

2 In addition to the Member States of the EU, Albania, Armenia, Bosnia and Herzegovina, Georgia, Republic of Moldova, Montenegro, Monaco, Norway, North Macedonia, Switzerland, Turkey and Ukraine are parties to the Agreement and have ratified it.

(6) determines the principles governing exemption from the route charges.

Member States of Eurocontrol and Contracting States that are not Member States of Eurocontrol have each one vote. In accordance with Article 6(1)(a) of the Agreement, the enlarged Commission decides by unanimity on matters relating to the assessment of costs for the calculation of en route charges (Article 3.2 (a) of the Agreement) and the Conditions of Application (Article 3.2 (e) of the Agreement) and those decisions are binding on all Contracting States. Failing a unanimous decision, the enlarged Commission takes a decision by a two-thirds majority of the votes cast; any Contracting State which is unable for overriding national considerations to apply that decision shall submit to the enlarged Commission an explanatory statement of the reasons therefor (Article 6(1)(a) of the Agreement).

2.3. The envisaged acts of the enlarged Commission

By written procedure, but no later than during its 113th session on 20 and 21 November 2019, the enlarged Committee is to adopt decisionsregarding the envisaged acts.

The purpose of the envisaged acts is to ensure continued consistency with EU rules on the Single European Sky performance and charging scheme, in particular with Regulation (EU) No 2019/317 of 11 February 2019[3] which will apply from the third reference period (2020-2024), starting on 1 January 2020.

The draft Principles continue to provide for two possible methods for the calculation of the costs and unit rates, either the full cost recovery method or the determined cost method. The proposed amendments include the statement that: “The Contracting States that apply the rules adopted by the European Union on the Single European Sky performance and charging scheme are considered to comply with the rules adopted by EUROCONTROL on these matters”. The envisaged acts do not address the following issues, details of which are provided for in EU legislation:

(1) The conditions in which the determined costs and service units may be revised in view of the possible revision of the performance plan ;

(2) The obligation to deduct the public funds obtained by air navigation service providers from the determined costs (a requirement under Union law but not a common EUROCONTROL policy);

(3) The use of route charge revenues to finance common projects;

(4) The parameters and values of the traffic risk sharing mechanism;

(5) The timing and modalities of some carryovers, for instance the adjustments for the traffic risk sharing mechanism and for the cost risk mechanism;

(6) The details of the incentives for air navigation service providers;

(7) The set of conditions relating to performance that are required to establish and apply a simplified charging scheme.

[3] Commission Implementing Regulation (EU) No 2019/317 of 11 February 2019 laying down a performance and charging scheme in the single European sky and repealing Implementing Regulations (EU) No 390/2013 and (EU) No 391/2013, OJ L 56, 25.2.2019, p. 1

The draft Principles align to Article 22(4) of Regulation (EU) 2019/317, where air navigation service providers incur costs from leasing fixed assets, those costs shall not be included in the cost of capital.

The proposed amendments to the Conditions of Application concern Article 5 (distance factor), Article 6 (weight factor) and Article 8 (exemptions) of the draft Conditions of Application, in particular concerning the calculation of the maximum take-off weight per individual aircraft. The latter proposal would replace the current calculation based on average maximum take-off weigh per aircraft type per airspace user, with effect on 1 January 2020.

In addition, the Central Route Charges Office (CRCO) of Eurocontrol proposes two amendments to the Conditions of Application. The first one is the introduction of a new clause regarding bank charges in relation to the payment of the bills by airspace users. The second one relates to the sequence of allocation of payments to bills where airspace users communicate no instruction to the CRCO.

The list of en route charging zones in Annex 1 to the Conditions of Application includes the following updates: editorial amendments to the descriptions of the charging zones Bulgaria and Romania, new name of North Macedonia and a new description of the charging zone Ukraine.

The said amendments reinforce the application of the 'user pays' principles which form part of the Union transport infrastructure charging policy.

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

The envisaged acts ensure continued consistency with EU rules on the Single European Sky performance and charging scheme and the Union should support them. It is proposed that the Member States acting jointly on behalf of the Union accept the proposed amendments to the envisaged acts. .

The envisaged acts will become binding on Contracting States in accordance with Article 6(1)(a) of the Agreement, which provides: "decisions on the matters referred to in Article 3.2 (a) to (f) and (h) shall require a unanimous vote of all Contracting States and shall be binding on all Contracting States; failing a unanimous decision, the enlarged Commission shall take a decision by a two-thirds majority of the votes cast; any Contracting State which is unable for overriding national considerations to apply that decision shall submit to the enlarged Commission an explanatory statement of the reasons therefore".

The subject matter of the envisaged acts is largely covered by Union legislation, specifically with Regulation (EU) No 2019/317. Those acts may therefore affect common rules or alter their scope. As a result, the Union has exclusive external competence by virtue of the last limb of Article 3(2) TFEU.

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[4].

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*'[5].

4.1.2. Application to the present case

The enlarged Commission is a body set up by the Agreement and the acts that the enlarged Commission is called upon to adopt constitute acts having legal effects. The envisaged acts will be binding under international law on the Contracting States in accordance with Article 6(1)(a) of the Agreement.

The envisaged acts do 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 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 Transport (Title VI of the TFEU).

Therefore, the substantive legal basis of the proposed decision is Article 100(2) TFEU.

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

[5] 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.

4.3. Conclusion

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

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(Text with EEA relevance)

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 Multilateral Agreement relating to Route Charges ('the Agreement') [6] entered into force in 1. January 1986.

(2) Pursuant to Article 3(2) of the Agreement, the enlarged Commission adopts principles governing the assessment of costs for the calculation of air navigation charges and the conditions of application and payment of such charges.

(3) The enlarged Committee, before or during its 113th session on 20 and 21 November 2019, is to adopt by written procedure decisions on an update to the Principles for establishing the cost-base for en route charges and the calculation of the unit rates and on an update to the Conditions of Application of the Route Charges System and Conditions of Payment ('the decisions').

(4) It is appropriate to establish the position to be taken on the Union's behalf in the enlarged Commission of Eurocontrol, as the subject matter of those decisions is largely covered by Union legislation, namely Commission Implementing Regulation (EU) 2019/317[7]. Those acts may therefore affect common rules or alter their scope and the Union has exclusive external competence by virtue of Article 3(2) of Treaty on the Functioning of the European Union

[6] https://www.eurocontrol.int/sites/default/files/article/attachments/multilateral-agreement-relating-to-route-charges.pdf

[7] Commission Implementing Regulation (EU) 2019/317 of 11 February 2019 laying down a performance and charging scheme in the single European sky and repealing Implementing Regulations (EU) No 390/2013 and (EU) No 391/2013 (OJ L 56, 25.2.2019, p. 1).

(5) The purpose of the decisions is to ensure continued consistency with Union rules on transport, in particular Regulation (EC) No 549/2004 of the European Parliament and of the Council[8]and Implementing Regulation (EU) 2019/317. It is, therefore, appropriate to support the adoption of those decisions.

(6) The Union's position is to be expressed by the Member States of the Union that are members of the enlarged Commission of Eurocontrol, acting jointly,

HAS ADOPTED THIS DECISION:

Article 1

The position to be taken on the Union's behalf in the written procedure before or during the session of the enlarged Commission of Eurocontrol to be held on 28 November 2019 shall be the following:

(a) to support the updated Principles for establishing the cost-base for en route charges[9];

(b) to support the updated Conditions of Application of the Route Charges System and Conditions of Payment[10].

Article 2

The position referred to in Article 1 shall be expressed by the Member States of the Union that are members of the enlarged Commission of Eurocontrol, acting jointly.

Article 3

This Decision is addressed to the Member States.

Done at Brussels,

For the Council
The President

[8] 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, 31.3.2004, p.1)

[9] https://ext.eurocontrol.int/ftp/?t=93085cefad506a898b74bf51ae9f2ec6 Eurocontrol Document No 19.60.01

[10] https://ext.eurocontrol.int/ftp/?t=5db7f9ad4dda0c0a7803388ca46b101e Eurocontrol Document No 19.60.02-1