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From: General Secretariat of the Council  
To: Delegations  
Subject: SES 2+ package  
– Discussion on general principles of Chapters II and III

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In view of the Working Party on Aviation of 24 October 2022, delegations will find in Annex I a non-paper by the Presidency together with a compromise proposal by the rapporteurs on Chapters II, III and the Performance Review Body in Annex II in order to steer the discussions.

**NON-PAPER OF THE PRESIDENCY***SES2+ Technical meeting of 25 October 2022**Discussions on the performance scheme and PRB governance - a possible way forward***I. INTRODUCTION**

1. In preparation of the technical meeting of 25 October, the rapporteurs suggested to present a comprehensive compromise proposal on Chapter II, Chapter III and on the Performance Review Body. In particular, they intend to focus on (i) the PRB governance, (ii) the role of the PRB in the performance scheme, (iii) the level of independence required for NSAs, and the (iv) role of NSAs in the performance scheme.

**II. THE COMPROMISE PACKAGE OF THE EUROPEAN PARLIAMENT**

2. The EP's compromise proposal in the Annex II<sup>1</sup> should be considered as a package, with the various elements of the roles, governance and main building blocks of the performance scheme interacting together.
3. It is suggested that delegations consider whether the EP's proposals could constitute overall an acceptable compromise package, with the following main elements:
  - A Regulatory PRB with several (but not all) NSAs represented in the Regulatory Board and the Appeal Board, with rotation of NSAs from various groups ensuring a geographical balance.
  - A single performance plan, drafted by the ATSPs, covering *en route* and terminal services, with the PRB assessing and approving the *en route* part and the NSAs assessing and approving the terminal part.
  - NSAs having the responsibility to first assess and endorse the part regarding *en route* services, before the Member State sends it to the PRB.
  - NSAs having the responsibility to assess and approve the terminal part.
  - Local circumstances to be taken into account in the assessment of the consistency with Union-wide targets.

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<sup>1</sup> received on 19 October 2022.

### III. SUGGESTED WAY FORWARD

4. In the Presidency's view, if such scenario would in general terms be supported by delegations, there could be further negotiations on details and language. This would include for instance the exact number of NSAs represented in each Board of the PRB, and on how to build the groups of Member States which would be the basis for the NSAs rotation in the (various) Boards.
5. Alternatively, should the EP's package not be sufficiently supported by delegations, the Presidency would work towards an "alternative compromise package" (a counterproposal) to be discussed at the technical level, and which would possibly be also discussed at a political trilogue.

In such scenario, it is suggested to work on the basis of an Advisory PRB, leaving it to the Commission to take decisions on *en route* and terminal services.

6. Furthermore, in order to take into account the EP's position, there would need to be additional elements, also considered together in a package. Such elements could be in particular:
  - Stronger independence for the NSAs
  - Legal separation of the ATSPs from the NSAs
  - A permanent set up for the PRB in EASA (or another new entity), consisting of experts designated by the Commission (NB: as currently)
  - Union-wide targets for *en route* services
  - Single performance plan assessed by the Commission
  - Local circumstances to be taken into account in the assessment of the consistency with Union-wide targets.
7. Delegations are invited to provide their views regarding the Parliament's compromise package in the Annex.

**SES2+ Chapters II and III and EASA - PRB  
EP Compromise proposals**

This Working document is including EP old and new proposals for compromises in Chapter II and III. The provisions are taking into account also some proposals and questions advanced by French and Czech Presidencies.

Please note that hereinafter proposals should be considered as a package.  
May be discussed details not principles.

**EASA BR****Governance of Performance Review Body**

- PRB set up as an independent function in EASA, or in a new and separate Entity
- PRB running costs covered through fees & charges. PRB set up costs covered through Union funding
- 1 Director
- PRB Regulatory Board composed of 1 Commission + 7-9 experts (M), designated by NSAs, on a rotating basis; the experts would come from, and be designated by, various Member States groups. An expert cannot vote on the performance plan of its designating NSA. Voting rule: simple majority, 1 vote per member.
- MS Groups (to be decided) could be: comparator groups, ICAO groups, Geographical groups West / Central / East, or other criteria
- Appeal Board composed by 7-9 members, or [27-M] – An NSA cannot be at the same time in the Regulatory Board and in the Appeal Board. An NSA cannot vote on the performance plan of its state. Voting rule: simple majority, 1 vote per member.
- PRB shall approve the performance plan for *en route* air navigation services and monitor the implementation of the performance plan for *en route* air navigation services and of reaching the Union-wide performance targets.

**RECAST SES2+****Chapter II****NSA (Articles 3-5)**

- NSAs may be under the same roof as the CAA/safety authority
- NSAs must be independent from the ANSP, in terms of their organisation, functioning, legal structure and decision-making
- Member States shall establish requirements and procedures ensuring that staff is recruited under clear and transparent processes and that national supervisory authorities have a sufficient number of qualified staff.
- Requirements that staff shall act independently, in particular by avoiding conflicts of interest between air navigation service provision and the execution of their tasks, including requirements that persons in charge of strategic decisions must do declarations of commitments and interests.
- NSA shall assess and approve the draft performance plans for terminal air navigation services
- NSA shall assess and endorse the draft performance plan for *en route* air navigation services ( submitted by MS to PRB for assessing and approval)

## Chapter III

### Certification and designation (Articles 6-9)

- One certificate, approved by both NCA and NSA (to be included also corresponding CONS proposals in EASA BR)
- Air navigation service providers may avail themselves of the services of other service providers
- Member States shall ensure the provision of air traffic services on an exclusive basis within specific airspace blocks in respect of the airspace under their responsibility.
- The duration of a contract shall be equal with the duration of two reference periods with the possibility to be renewed. Requirement that the Member State reviews the conditions of designation (rights and obligations of the ATSP) at the end of each reference period with possibility to end a designation in case of persisting underperformance.
- Air traffic service providers may decide to procure air navigation services under market conditions.
- Member States shall allow airport operators or a group of airport operators to procure air traffic services for aerodrome control and/or air traffic services for approach control.
- Requirements for fair and transparent procurement processes, compliance with Union law and on regular reopening of competition. In particular, requirements that services provided on the market are placed in a separate business entity, under NSA oversight. NSA can potentially request remedial measures to ensure compliance with competition law.

### Performance scheme – Governance (Articles 10-12)

- Reference period: 3-5 years
- Union-wide targets for *en route* services adopted through examination procedure without the no-opinion clause.
- For terminal services, targets which take account of differences in the provision of those services, for example through performance benchmarks for groups of airports.
- Target on the environment to be changed into a target on “*climate*” and a target on “environment”
- Climate Union-wide performance target must contribute up to 10% of CO2 emissions savings as part of climate neutrality goal.
- Non-discriminatory incentive schemes including both positive and negative ones. Incentives should be proportionate to deviation from the targets, and should take into account the impact on the network. Recital on evaluation of financial incentives which should be based on effects attributable to the ANSP. Incentives and risk sharing mechanisms could result in financial surpluses or losses for the ATSPs.

### Performance scheme – Target setting process (Articles 13-14)

- ATSP drafts performance plan
- Single performance plan including two separate chapters for *en route* and for terminal ANS (when ANSP provides both *en route* and terminal ANS). This plan shall be assessed and approved by PRB after NSA assessed and endorsed it.
- NSAs assess and endorse the *en route* draft plan; MSs are submitting the plan to the PRB for assessing and approval. PRB assesses and approves the plan.
- NSAs assess and approve the *terminal* draft plan;
- Local circumstances shall be taken into account in the assessment of consistency of targets.
- Implementing rules for methodology on allocation of costs + NSA to determine criteria to apply those rules locally
- Final loop of the assessment: the regulator sets the targets. The ATSP must consult with the NSA on the measures to achieve those targets before submitting the final plan.
- No FABs
- A MSs group having relations in accordance with Article 7a (Relation between service providers) may table a single performance plan only if there are additional criteria to be fulfilled, in particular a considerable degree of operational and interoperability integration, joint procurement and a common unit rate for *en route* air navigation services.

### Performance scheme – Monitoring (Articles 14a-15)

- PRB monitors both *en route* and terminal performance, on the basis of NSA reports.
- ATSP to provide data, including on costs & revenues.
- PRB, after consultation of NSA, requests corrective measures in case of underperformance. The corrective measures may include, where necessary and based on objective criteria, a requirement addressed to a Member State to delegate service provision. That requirement should be implemented upon agreement of the MS concerned. Implementing rules to define such objective criteria.
- No mention of external factors/safety consideration.
- No fines/penalties which are requested by EP initial position– NSA remain responsible for fines/penalties as today.

### Performance scheme – Network Performance Plan (Art 16)

- Network Performance Plan drawn up by Network Manager, with targets on climate, environment, capacity, cost efficiency. PRB opinion, COM adoption.

### Performance scheme – Revision of targets during a reference period (Art 17)

- COM may revise Union-wide targets in case of significantly changed circumstances & revision is necessary. ATSP would then adopt new plans. This would entail transitional provisions but no suspension of the performance system.
- ATSP may request permission to PRB to revise targets if alert thresholds are reached or in case of unforeseeable circumstances
- PRB authorises only if necessary and proportionate and where consistency with Union-wide targets is maintained
- No reference to suspension of reference period/performance system, even in a recital

### Performance scheme – Implementation (Art 18)

### Charging scheme (Articles 19-25)

- Common unit rate proposed through IR (examination) after the opinion of the **PRB**, taking into account inputs from the Network Manager.
- Mandatory modulation of charges harmonised at EU level subject to analysis confirming revenue neutrality for ATSPs

## Main Compromises - withdraw of EP proposals and acceptance of CONS proposals

- NSAs involved in the Regulatory Board and in the Appeal Board of the PRB.
- NSAs may be under the same roof as the CAA/safety authority.
- Rules on modalities of recruitment for NSA staff no longer in an IA but required at national level directly.
- One certificate for ANSPs, covering both safety and economic aspects.
- No addition of key performance areas through DA
- ANSP designation without competitive tendering procedure.
- No mandatory procurement of CNS, AIS, ADS or MET.
- Single performance plan covering both *en route* and terminal ANS.
- More involvement of NSAs on allocation of costs
- NSAs first endorses the *en route* plan before it is submitted to the PRB. For the final loop of the target setting, the ATSP must consult with the NSA on the measures to achieve the targets set by the regulator before submitting the final plan.
- Possibility to submit a single performance plan by a group of MS, if additional criteria are fulfilled.
- Request for delegation of service provision in case of persisting underperformance addressed to the MS, and delegation only with MS agreement.
- No fines/penalties which were requested by EP initial position– NSA remain responsible for fines/penalties as today.