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PROPOSAL

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Subject:	Proposal for a COUNCIL DECISION on the position to be taken on behalf of the European Union in the International Civil Aviation Organization, in respect of the First Edition of the International Standards and Recommended Practices on Environmental Protection - Carbon Offsetting and Reduction Scheme for International Aviation

Delegations will find attached document COM(2018) 723 final/2.

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2018/0372 (NLE)

Proposal for a

COUNCIL DECISION

on the position to be taken on behalf of the European Union in the International Civil Aviation Organization, in respect of the First Edition of the International Standards and Recommended Practices on Environmental Protection - Carbon Offsetting and Reduction Scheme for International Aviation

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 reply to ICAO State letter 2018/78 in connection with the Adoption of the First Edition of Annex 16, Volume IV.

2. CONTEXT OF THE PROPOSAL

2.1. The Chicago Convention and the Paris Agreement

The Chicago convention ('the Agreement') aims to regulate international air transport. The Agreement entered into force on 4 April 1947 and formed the International Civil Aviation Organisation.

The Paris Agreement was adopted by the Conference of the Parties to the United Nations Framework Convention on Climate Change in December 2015, whose objective is to limit global temperature increase well below 2°C compared to pre-industrial levels, and to pursue efforts to limit temperature increase to 1,5°C. All sectors of the economy should contribute to achieving these emission reductions, including international aviation.

All EU Member States are parties to the Agreement.

2.2. The ICAO

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.

2.3. The act of the ICAO

The First Edition of the International Standards and Recommended Practices, Environmental Protection — Carbon Offsetting and Reduction Scheme for International Aviation (CORSIA) (Annex 16, Volume IV to the Convention on International Civil Aviation) was adopted by the Council at the tenth meeting of its 214th Session on 27 June 2018. The First Edition of Annex 16, Volume IV contains Standards and Recommended Practices (SARPs) forming part of the Carbon Offsetting and Reduction Scheme for International Aviation (CORSIA).

On 20 July 2018, ICAO sent out a State Letter AN 1/17.14 – 18/78 requesting ICAO Member States to a) notify any disapproval before 22 October 2018; b) notify any differences and expected date for compliance before 1 December 2018 with regard to the adoption of First Edition of Annex 16, Volume IV.

In line with Article 90 of the Chicago Convention, unless a majority of ICAO States reject CORSIA SARPs, they shall become effective three months after the deadline to reject. The monitoring, reporting and verification (MRV) requirements related to CO₂ emissions from international flights under the First Edition of Annex 16, Volume IV will apply from 1 January 2019. The CO₂ offsetting requirements under the First Edition of Annex 16, Volume IV will apply from 1 January 2021. The rules contained in the CORSIA are liable to become binding in accordance with and within the limits set out in the Convention. They are also liable to become binding upon the Union and its Member States under existing international air transport agreements.

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

The Union and its Member States are a strong supporter of ICAO's efforts to put a global market-based measure for international aviation globally into effect to contribute to tackling climate change. This is shown by the European Parliament and Council amending the EU Emissions Trading System (EU ETS) three times in order to facilitate progress in ICAO on its global market-based measure, as well as by the substantial financial and expert contributions which the Union and its Member States¹ have made to the ICAO Secretariat over the past 6 years to help ICAO succeed.

The CORSIA SARPs, which translate the most welcome intention to stabilise aviation emissions at 2020 levels, constitute an essential step forward to reach the objectives of the Paris Agreement and keep global warming well below 2°C.

The Union and its Member States are amongst the first to adopt legislative provisions for the purposes of implementing ICAO's global market-based measure, while other States are also expected to undertake such domestic implementation.

As emerges from Articles 28b and 28c of Directive 2003/87/EC, the Union is prepared to follow up on the adoption of the relevant ICAO instruments (here: CORSIA), whose adoption had been anticipated.

Article 28c of Directive 2003/87/EC requires from the Commission to adopt provisions for the appropriate monitoring, reporting and verification of emissions for the purpose of implementing the ICAO's global market-based measure on all routes covered by it. An act based on this provision is currently being developed.

Moreover, the Commission is preparing an implementing Regulation on the monitoring and reporting of greenhouse gas emissions, and a further implementing Regulation on the verification of greenhouse gas emission reports and tonne-kilometre reports and the accreditation of verifiers.

Article 28b of the Directive concerns amendments to the EU ETS by the European Parliament and the Council through the ordinary legislative procedure. The 2017 revisions to the EU ETS Directive [Regulation (EU) 2017/2392] require the Commission to consider ways for the relevant instrument (here: CORSIA) to be implemented in the EU through a revision of the Directive, consistent with the EU 2030 climate objectives. To that end, within one year of the adoption by ICAO of the relevant legal instruments and before these become operational, the Commission shall present a report to the European Parliament and the Council in which it assesses, inter alia, the ambition and environmental integrity of the ICAO instrument. Where appropriate, the report shall be accompanied by a legislative proposal.

For the time being, certain differences continue to exist between the Union rules, notably Directive 2003/87/EC, and the First Edition of Annex 16, Volume IV. However, the time limit within which possible differences have to be notified according to ICAO State Letter AN 1/17.14 – 18/78 is too short for any adaptations to be adopted by the Union within that limit. Therefore, in order for ICAO to take fully account of the current Union legislation as well as work initiated in the area of Monitoring, Reporting and Verification, it is proposed that Member States send a reply to the State Letter AN 1/17.14-18/78 through which they would notify existing differences, by reference to the current EU legislation, as well as describe the on-going adaptations of EU legislation and the existing provisions regarding the future revision of Directive 2003/87/EC. The subject matter of the envisaged act concerns an

¹ This includes financial support of over €15 million for EU capacity building projects in developing countries, the time of Commission, EASA, and EUROCONTROL staff involved ICAO work, intensive involvement of government and industry experts and the secondment of staff to the ICAO Secretariat.

area for which the Union has exclusive external competence by virtue of the last limb of Article 3(2) TFEU because the envisaged act is liable to affect EU Emission Trading Scheme rules and scope.

It is therefore necessary to adopt, as soon as possible and well ahead of the deadline of 1 December set by the ICAO State letter, the Union position for Member States to submit the necessary notification of the existing differences. It is necessary to adopt an EU position to ensure consistency with existing EU law.

4. CONSISTENCY WITH OTHER UNION POLICIES

The proposed Decision is consistent with and complements other policies of the Union, notably energy, environmental and transport policies². A global clean energy transition will require changes in business and investment behaviour and incentives across the entire policy spectrum.

5. LEGAL BASIS

5.1. Procedural legal basis

5.1.1. 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.

5.1.2. Application to the present case

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

The act which the Member States are called upon to adopt constitutes an act having legal effects. The envisaged act is capable of decisively influencing the content of EU legislation, notably Directive 2003/87/EC of the European Parliament and of the Council⁵. 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.

5.2. Substantive legal basis

In accordance with Article 192(1) and 191 TFEU, the European Union shall contribute to the pursuit, *inter alia*, of the following objectives: preserving, protecting and improving the

² COM(2016) 110 final

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.

⁵ Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a system for greenhouse gas emission allowance trading within the Union and amending Council Directive 96/61/EC (OJ L 275, 25.10.2003, p. 32).

quality of the environment; promoting measures at international level to deal with regional or worldwide environmental problems, and in particular combating climate change.

5.2.1. 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.

5.2.2. Application to the present case

The main objective and content of the envisaged act relate to climate policy, in the context of international aviation.

Therefore, the substantive legal basis of the proposed decision is Article 192(1) TFEU.

5.3. Conclusion

The legal basis of the proposed decision should be Article 192(1) TFEU, in conjunction with Article 218(9) TFEU.

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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 192(1), in conjunction with Article 218(9) thereof,

Having regard to the proposal from the European Commission,

Whereas:

- (1) The Chicago Convention on International Civil Aviation ('the Convention') aiming to regulate international air transport, entered into force on 4 April 1947. It established the International Civil Aviation Organization (ICAO).
- (2) The Member States of the Union are Contracting States of that Convention and members of the ICAO, while the Union has observer status in certain ICAO bodies.
- (3) Pursuant to Article 54 of the Convention, the ICAO Council may adopt International Standards and Recommended Practices.
- (4) The 21st Conference of the Parties to the United Nations Framework Convention on Climate Change was successfully concluded in December 2015 by the adoption of

the Paris Agreement whose objective is to limit global temperature increase well below 2°C compared to pre-industrial levels, and to pursue efforts to limit temperature increase to 1,5°C. All sectors of the economy should contribute to achieving these emission reductions, including international aviation.

- (5) The 39th ICAO General Assembly in 2016 decided to develop a global market-based mechanism to limit greenhouse gas emissions from international aviation at their 2020 levels.⁶ The Union position in that regard was established by Council Decision (EU) 2016/915⁷.
- (6) The ICAO Council, at the tenth meeting of its 214th session on 27 June 2018, adopted the First Edition of Volume IV of Annex 16 to the Convention: the International Standards and Recommended Practices on Environmental Protection - Carbon Offsetting and Reduction Scheme for International Aviation (“CORSIA”).
- (7) The rules contained in the CORSIA are liable to become binding in accordance with and within the limits set out in the Convention. They are also liable to become binding upon the Union and its Member States under existing international air transport agreements.
- (8) In accordance with Article 90 of the Convention, unless a majority of the Contracting States disapprove the CORSIA, it will become effective three months after the deadline to disapprove.
- (9) Article 38 of the Convention covers departures from international standards and procedures. In accordance with its terms, any Contracting 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 international standard or procedure after amendment of the latter, or which deems it necessary to adopt regulations or practices differing in any particular respect from those established by an international standard, needs to give immediate notification to the ICAO of the differences between its own practice and that established by the international standard.
- (10) On 20 July 2018, ICAO sent out a State Letter, with reference AN 1/17.14 – 18/78, requesting the Contracting States to, first, notify any disapproval of any part of the CORSIA before 22 October 2018; and second, notify any differences between their national practices and the CORSIA and the expected date for compliance before 1 December 2018.
- (11) The CORSIA is to become applicable to an aeroplane operator producing annual CO₂ emissions greater than 10 000 tonnes from international flights conducted by aeroplanes with a maximum certificated take-off mass greater than 5 700 kg, with the exception of humanitarian, medical and firefighting flights.
- (12) Monitoring, Reporting and Verification (MRV) requirements set out in the CORSIA are to become applicable as from 1 January 2019.
- (13) From 1 January 2021 to 31 December 2035, the offsetting requirements of the CORSIA are to become applicable to an aeroplane operator conducting international

⁶ https://www.icao.int/environmental-protection/Documents/Resolution_A39_3.pdf

⁷ Council Decision (EU) 2016/915 of 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).

flights (as defined in Part II, Chapter 1, point 1.1.2, and Part II, Chapter 2, point 2.1) between Contracting States referred to in the forthcoming ICAO document entitled “CORSIA States for Chapter 3 State Pairs”.

- (14) It is appropriate to establish the position to be taken on the Union's behalf in reply to the ICAO State Letter AN 1/17.14 – 18/78. This is because the CORSIA will be capable of decisively influencing the content of Union law, notably Directive 2003/87/EC of the European Parliament and of the Council⁸.
- (15) Given the progress the CORSIA would allow to achieve at the international level, no disapproval should be notified under Article 90 of the Convention.
- (16) The Union fully supports the efforts undertaken within ICAO in order to make CORSIA operational as soon as possible. In accordance with Directive 2003/87/EC, the Commission is in the process of translating CORSIA MRV into EU acts with expected entry into force by January 2019. Moreover, the Commission is to present a report to the European Parliament and the Council which considers ways for those instruments to be implemented in Union law. The time limit within which possible differences have to be notified according to ICAO State Letter AN 1/17.14 – 18/78 is too short for any adaptations to the CORSIA to be adopted by the Union within that limit. Therefore, in order for ICAO to take fully account of the current legal situation at Union level as well as work initiated in the area of Monitoring, Reporting and Verification, Member States should, in reply to State Letter AN 1/17.14-18/78, notify differences as set out in the annex to this Decision.
- (17) Article 28b (2) and (3) of Directive 2003/87/EC covers the follow-up to be reserved to the outcome of the work at ICAO level. It is appropriate to inform the ICAO about the terms of those provisions.
- (18) The Union's position is to be expressed by the Member States of the Union that are members of the ICAO,

HAS ADOPTED THIS DECISION:

Article 1

The position to be taken on the Union's behalf in reply to the State Letter issued on 20 July 2018 by the International Civil Aviation Organization with reference AN 1/17.14 – 18/78, is set out in the Annex.

Article 2

The position referred to in Article 1 shall be expressed by the Member States of the Union that are members of the International Civil Aviation Organization.

Article 3

This Decision is addressed to the Member States.

⁸ Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a system for greenhouse gas emission allowance trading within the Union and amending Council Directive 96/61/EC (OJ L 275, 25.10.2003, p. 32).

Done at Brussels,

*For the Council
The President*