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REPORT

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Subject: Amended proposal for a Regulation on the implementation of the Single European Sky
Proposal for a Regulation amending Regulation (EU) 2018/1139 as regards the capacity of the European Union Aviation Safety Agency to act as Performance Review Body of the Single European Sky
– Preparation for the trilogue

I. INTRODUCTION

1. On 22 September 2020, the Commission submitted to the European Parliament and to the Council the amended¹ proposal for a Regulation of the European Parliament and of the Council on the implementation of the Single European Sky (“SES 2 + recast”), as well as the proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) 2018/1139 as regards the capacity of the European Union Aviation Safety Agency to act as Performance Review Body of the Single European Sky (“proposal amending EASA Basic Regulation”).

¹ The Commission had adopted an initial recast proposal for the implementation of the Single European Sky in 2013. The European Parliament, during its 7th parliamentary term, designated the Committee on Transport and Tourism (TRAN) as the responsible committee on the proposal on the Single European Sky and appointed Mr Marian-Jean Marinescu (EPP, RO) as the Rapporteur. On 12 March 2014, the EP adopted its first reading position. The Council reached a general approach in December 2014. However, discussions on the file stalled afterwards. In December 2019, the Council invited the Commission to reconsider its legislative proposal.

2. The SES 2 + recast aims to improve the overall efficiency of the way in which airspace over the EU and its Member States is organised and managed through a reform of the industry providing air navigation services, allowing the safe, regular and sustainable operation of air transport services, optimising use of airspace and capacity, contributing to aviation sustainability and facilitating the free movement of goods, persons and services in the EU.
3. Following the adoption of the SES 2 + recast, Mr Marinescu (EPP, RO) was confirmed as rapporteur for the file again during the 9th parliamentary term. The TRAN Committee adopted on 17 June 2021 its mandate for the negotiations with the Council.
4. Mr Bogusław Liberadzki (SD, PL) was appointed as the rapporteur for the proposal amending the EASA Basic Regulation during the European Parliament's 9th term. The European Parliament granted a mandate to negotiate the proposal amending the EASA Basic Regulation at the plenary on 7 July 2021.
5. The Council (TTE, Transport), on 3 June 2021, reached a general approach under the Portuguese Presidency.²

II. UPDATE ON THE NEGOTIATIONS WITH THE EUROPEAN PARLIAMENT

6. The first and second trilogues, organised under the Slovenian Presidency respectively in July and November 2021, served to compare positions and allowed to provisionally agree on a number of issues on Chapter IV (Network Management). Also building up on the intensive work of the Czech Presidency, the Swedish Presidency reached, during a third trilogue on 10 May 2023, a first provisional political agreement on Chapter IV. Finally, the Slovenian, French, Czech and Swedish Presidencies explored multiple options for compromises on Chapters II, on National Supervisory Authorities and III, on Service Provision, and on the Performance Review Body (PRB).

² Doc. 9490/21 + COR1-5 and 9616/21

7. On 5 July 2023, the Spanish Presidency submitted a questionnaire to delegations to explore possible options for compromises on Chapter III. The Spanish Presidency has continued the discussions on Chapters II, III and the PRB in the Aviation Working Party on 6 July, 13 July, 6 September, 14 September, 26 September, 5 October, 12 October, 19 October, 31 October, 9 November, 23 November, 30 November, 7 December and 11 December 2023 and held technical meetings with the European Parliament on 20 September, 24 and 25 October and 6 and 7 November 2023. The Aviation Working Party was debriefed of the last technical meetings on 9 November 2023.
8. On 15 November 2023, COREPER did not agree on a revised mandate on the National Supervisory Authorities (Chapter II – Articles 3 to 5) and on the provision of air navigation services (Chapter III – Articles 6 to 9 as well as the related provisions in the Proposal for a regulation amending EASA Basic Regulation).
9. At the TTE Council of 4 December 2023, several ministers supported a rapid conclusion of the negotiations on the file.
10. A trilogue is scheduled on 19 December 2023 (Council premises). The objective of that trilogue is to reach a provisional agreement on the National Supervisory Authorities (Chapter II – Articles 3 to 5), on the provision of air navigation services (Chapter III – Articles 6 to 9 as well as the related provisions in the Proposal for a regulation amending EASA Basic Regulation), on the performance scheme (Chapter III – Articles 10 to 18) and on the Performance Review Body (Chapter III – Article 9b).
11. Acronyms used below are explained in the annex to this note.

III. ELEMENTS TENTATIVELY AGREED AT TECHNICAL LEVEL

12. The lines containing compromise texts tentatively agreed at technical level, as a result of extensive technical discussions, are marked in **yellow** in the table in the Addenda (16432/23 ADD1-3). The rapporteur and the Presidency tentatively agreed on several key issues:

- *National supervisory authority (NSA)*

13. Whereas the European Parliament had introduced, in its resolution, several additional requirements on the NSA staff, provisions on staff requirements are now limited, in line with the Council General Approach, to principles on clear and transparent recruitment processes as

well as rules on conflict of interest, to ensure the independence and the specific qualification of the staff. In addition, the text makes clear that these provisions are to be managed entirely at national level and do not interfere with national legislations regarding the recruitment of public servants (*lines 75 and 79*). It should also be noted that the recital in line 79, concerning rules for conflict of interests, is not in itself legally binding and is primarily meant for the time of active duty and immediately following the duty period in the National Supervisory Authority.

14. The flexibility for Member States to establish the NSA and the National Competent Authority (NCA) defined under Regulation (EU) 2018/1139 (“EASA Basic regulation”) as part of the same administration is clearly reflected in the text, in line with the Council General Approach (*line 74*). In line with the statements by several Member States at the TTE on 4 December 2023, the Presidency suggests adding in the text that the NSA and the NCA are functionally separated. By contrast, the Presidency suggests a limited concession to the Rapporteur, namely that the decisions related to the tasks of the NSA are taken independently from other tasks conferred to the joint body NSA/NCA and that the NSA is legally represented for matters related to its tasks.
15. The Rapporteur could also accept the tasks of the NSAs in line with the Council General Approach (*lines 96 to 100*). However, following comments from some delegations in COREPER on 15 November 2023, the Presidency will propose to amend line 97a to cater for the cases where a Member State decides to assign the verification of the fulfilment of national security and defence requirements to another authority.³

- *Independence of the NSAs from any air navigation service providers (ANSPs)*

16. The European Parliament insisted, in its resolution, on the legal separation between the NSA and the supervised entity, that is the ANSP. The Rapporteur could accept the proposal of the Presidency, under *line 72*, to use the wording on the same issue used in the General Approach agreed by the Council under the Italian Presidency in 2014. This wording provides for the flexibility requested by some Member States, as it states that the independence of NSAs from ANSPs is ensured in organisational, hierarchical and decision-making terms **either through legal or functional separation**. In addition, the ANSPs have no decision-making power over

³ According to the Council General Approach line 97a), the NSA is the only authority meant to “verify the compliance with, and the fulfilment of national security and defence requirements by the service providers referred to in Article 7(1a)b) and Article 8(4d);”.

the allocation of the budget of the NSAs. The Member States that do not implement a legal separation between the NSA and the ANSP are required to inform the Commission of the measures taken to ensure the independence of the NSA.

17. As requested by the Council, the text explicitly indicates that these conditions do not prevent NSAs to be part of the same national ministry or administration as the ANSPs, as long as the NSA do not seek nor take instructions from a hierarchical level of that administration having authority over the ANSPs, as far as NSA's tasks are concerned.
- ***Designation of providers of air traffic services (ATSPs) and meteorological services (MET)***
18. Whereas the Commission proposal had removed the possibility for the Member States to designate Meteorological services (MET) providers on an exclusive basis, possible under the legislation currently in force, this possibility is now re-instated in the text, in line with the Council General Approach. The fact that MET services are currently covered by Regulation (EU) 2019/317 is also reflected (*line 152*).
19. The Presidency is suggesting a limited concession to the Rapporteur with respect to the **designation of ATSPs** (*line 145*). Under the legislation currently in force⁴ and in line with the General Approach, Member States shall define, in all cases, rights and obligations to be met by the designated ATSP. The Presidency suggests clarifying in a recital that those rights and obligations are defined to complement, where relevant and to the extent necessary, the obligations stemming from EASA Basic Regulation and SES 2 + recast which are to be complied with in all cases. The Presidency proposes that Member States assess the rights and obligations included in the designation of ATSPs periodically or whenever they identify relevant changes to the service provision, without prejudice to business continuity and reassurance for investors. Since the designation is a prerogative of Member States under the Chicago Convention, in any case, such an assessment does neither imply a compulsory revision of the designation nor prevent Member States to designate the same ATSP, as stated in the new recital. It is up to the designating State to decide to what extent they define the rights and obligations specified in the designation and to decide whether those rights and obligations are no longer adequate to the existing context (and, consequently, whether a change in the designation is deemed necessary), in accordance with national laws.

⁴ Article 8(3) of Regulation (EC) No 550/2004.

- ***Liberalisation of air navigation services***

20. Whereas the European Parliament had introduced an obligation for designated air traffic service providers to procure CNS, AIS, or ADS services under market conditions in all cases, the text proposed by the Presidency maintains such procurement only as a possibility, in line with the Council General Approach (*line 154*).
21. Whereas the European Parliament had introduced an obligation for airport operators to procure air traffic services for terminal services under market conditions in all cases, the text now makes such procurement subject to Member States' decision, in line with Council General Approach (*line 156*).
22. In both cases, the possibility remains for the designated air traffic service providers to provide the services themselves, or to procure the services without a call for tender if such a possibility is allowed by the designating Member State.

- ***Roles of the NSA and of the PRB in the Performance Scheme***

23. Whereas the European Parliament supported a regulatory Performance Review Body (PRB) and a limitation of the regulatory role of NSAs in the Performance Scheme, the Rapporteur now accepts the premise that **the PRB has only an advisory role to the Commission**, in line with Council General Approach, **and that the role of the NSA is no longer limited for the assessment of the costs, for the preparation of a single Performance plan for all air navigation services, for the monitoring and for the adoption of corrective measures**, as now reflected throughout the text, in line with the Council General Approach (*lines 233a, 238, 239, 241 to 243, 248 to 250, 258 to 290*).
24. In its proposal, the Commission delegated executive powers to the EASA acting as PRB. As a result, to comply with the *Meroni* case law,⁵ the powers delegated had to be clearly defined and delimited. Given that the Rapporteur can now concede to an advisory role for the PRB, there is no longer a need to detail in the basic act the tasks and the procedures for the PRB involvement in the performance scheme to comply with the *Meroni* case law and these details can be adopted in secondary legislation. Consequently, the Rapporteur and the Presidency tentatively agreed on the deletion of several provisions included in the Commission proposal (*lines 214, 214a, 214b, 220 to 226, 229a to 233, 239, 245, 246 and 252*).

⁵ Judgment of 13 June 1958, *Meroni v. High Authority*, 9/56 - as specified by the Short Selling Case - judgment of 22 March 2014, *United Kingdom v European Parliament and Council*, C-270/12

- *Performance scheme*

25. Several parameters of the performance scheme have been tentatively agreed by the Rapporteur and the Presidency, in line with the General Approach (*lines 181 to 192, 194, 196, 197, 202, 203, 206*). In particular, the Rapporteur could accept that safety indicators are taken into consideration by the Commission when adopting the Union-wide performance targets, in line with the General Approach (*line 205*).
26. Moreover, the Rapporteur and the Presidency tentatively agreed on possible durations for the reference period (*line 179*) and on the text of Article 16 regarding the Network Performance Plan (*lines 394 to 301*), in line with the General Approach.
27. In its resolution, the European Parliament supported that performance plans are made publicly available without any consideration to sensitive information. The Council General Approach, on the other hand, restricted the publication of performance plans to protect confidential information. The Rapporteur and the Presidency tentatively agreed on a publication of commercially sensitive information in an aggregated format in line with the legislation currently in force (*lines 227 and 247*)⁶. The Presidency requests the flexibility to use this wording for the provision in *line 250* as well. This strikes a balance between the transparency of information and the protection of confidential information. The protection of sensitive information regarding national security and defence requirements is guaranteed in all cases by Article 44.

IV. MAIN OPEN ISSUES

28. The lines with main outstanding points on which a tentative agreement could not be reached at technical level are highlighted in **red** in the table in the Addenda. The differences between Council and Parliament positions are highlighted in **blue**.

- *Certification of air navigation service providers*

29. Whereas the European Parliament supported a separate economic certificate for ANSPs issued by the NSA, the Rapporteur now agrees on the issuance of a single certificate for air navigation service providers, in line with Council General Approach, including both safety and economic essential requirements which are now all listed in Annex VIII of Regulation

⁶ In particular, Recital 48 and Article 38 of Regulation (EU) 2019/317.

2018/1139, (lines 133 and 149, and proposal to amend EASA Basic Regulation, see 16432/23 ADD1).

30. The Rapporteur insists that the NSA is the only and exclusive authority responsible to the oversight of economic requirements and, therefore, the only authority responsible to take decisions, regarding the fulfilment of those requirements in the certification process, that should be binding for the NCA. By contrast, the Presidency proposes that the NSA is responsible for an "assessment" of the fulfilment of the economic requirements provided to the NCA and that the NCA relies on that assessment for its decision on certification (*line 103*). In addition, in case of non-compliance, the NSA makes only a recommendation to the NCA (*line 103*). The NCA thus remains ultimately responsible for the certification in line with EASA Basic Regulation. This solution allows flexibility for Member States to decide to what extent economic requirements are supervised by each authority and, therefore does neither prevent the NCA to supervise the economic requirements nor the NSA and the NCA to be part of a joint body, as indicated in point 14 above and clarified in a new recital. This is reflected in the text of the proposal amending EASA Basic Regulation.⁷

- ***Provision of air navigation services by the military***

31. The Presidency proposes to add as a condition that the military provides services primarily to aircraft movements other than general air traffic, reflecting the current Regulation (EC) 550/2004⁸, and refer to Article 41, which covers the cases where a provider is subject to a declaration, as well as Article 2(3) and 2(5) of EASA Basic Regulation, to define in which case and under which conditions the military can provide air navigation services in all or part of the airspace under their responsibility without certification (*lines 129, 133, 162*), in line with the Council General Approach in *lines 133 and 162*. The Presidency believes that it can find an agreement with the Parliament on this basis, since the last compromise proposals of the Rapporteur are now closer to the Presidency text.

⁷ The powers delegated to the Commission under Article 47(2) of Regulation (EU) 2018/1139 are limited to amendments of Annex VIII and, if applicable, Annex VII, where necessary for reasons of technical, operational or scientific developments or safety evidence related to the ATM/ANS, in order and to the extent required to achieve the objectives of Regulation (EU) 2018/1139.

⁸ Article 7(5) of Regulation (EC) 550/2004.

32. As regards the designation of military air navigation service providers, the Presidency notes that Article 30 of the SES 2 + proposal reflects the legislation currently in force⁹ and allows Member States to designate military providers in certain airspaces if they wish to do so.
33. As regards the possibility for Member States to exempt the military from all or any other parts of the SES2+ Regulation introduced by the Council General Approach, the Presidency notes that this goes well beyond the legislation currently in force and would allow Member States to exempt the military from important parts of the SES 2+ legislation essential to the management of EU airspace and currently applicable to the military, such as flexible use of airspace¹⁰ defined by the International Civil Aviation Organization and defined in article 33 in Chapter V of SES2+ recast. Therefore, the Presidency suggests mirroring, in SES 2+ recast, the possibility for MS to include the military providing services to general aviation into the Performance Scheme or the Charging scheme, currently defined in the secondary legislation¹¹ (*line 213*).
34. In any case, military operations and training will not be covered by the SES 2+ Regulation (see Article 1(2)) and additional safeguards on Member States' sovereignty over their airspace have been included in Chapter IV on Network Management and in Article 44.
- ***Conditions that cannot be required from the ATSP for its designation***
35. The Rapporteur refuses to limit the application of this provision to only when those conditions entail an unjustified restriction of the freedom to provide services or the freedom of establishment, as provided by the Council General Approach, or to limit the application of this provisions to cross-border services, in line with current Regulation (EC) 550/2004 (*line 144*).
36. Air traffic services are, in principle, subject to Treaty provisions on freedom to provide services and freedom of establishment. Therefore, deleting Article 7(2) would amount to reintroducing a restriction compared to the legislation currently in force which would be very difficult to justify. However, the wording included in the Council's General Approach is subject to interpretation and might lead to legal uncertainty compared to the wording under the current legislation (*line 144*).

⁹ Article 11 of the Regulation 550/2004.

¹⁰ Regulation (EC) No 2150/2005.

¹¹ Article 27(7) of Commission Implementing Regulation 2019/317.

37. The Presidency asks, as part of its revised mandate for negotiation, to have the flexibility to either maintain the Council's General Approach or to limit the application of this provision to cross-border services in line with the legislation currently in force¹² (line 140).

- ***Rules on procurement and Treaty provisions on competition***

38. The Rapporteur accepts the proposal by the Presidency to include, in a new recital, the principle that procurements should enable effective participation of competing providers and also accepts the text proposed by the Presidency, clarifying the role of the NSAs in the approval of technical requirements on service quality included in the tender specifications in the case of procurement of terminal air traffic services (lines 158 and 166).

39. However, the Rapporteur insists to include a reference to Directives on Procurement and Treaty provisions on Competition in Article 8 whereas the Presidency proposes that the Treaty rules and applicable Union law are referred to in recital 20. The view of the Council Legal Service is that a reference to Directives on Procurement and Treaty provisions on Competition in Article 8 is not essential since these rules will apply to services provided under market conditions, regardless of a cross reference in Article 8. In this regard, the Presidency considers that the Council could show some flexibility.

- ***Common Information Services (CIS)***

40. Under Article 9, lines 167 to 175, the Rapporteur accepts the requirements on common information services providers, in line with the Council General Approach, but cannot accept the Council's text regarding the regulation of the price of such services. The Rapporteur considers that there will be no competition between individual operators providing Common Information Service irrespective of the U-space architecture adopted by the Member State (single CISP or distributed CIS) and, therefore, the principles for regulating the prices for those services should be applicable in any case. The Presidency proposes as a compromise to limit the regulation of the price of CIS to the cases where those services are provided by a single CISP designated by the Member State on an exclusive basis in respect of all or some of the U-space airspaces under their responsibility, in coherence with current U-Space regulation. Thus, the Presidency takes into account all cases where CIS are provided on an exclusive basis which better reflects the competition between individual operators to provide their services. In addition, the Presidency asks for the flexibility to accept the text proposed by

¹² Article 8(2) of Regulation 550/2004.

the Rapporteur in line 172 and to make the assessment of the price by the NSA publicly available in line 171.

- ***Union-wide targets***

41. In its resolution, the European Parliament introduced a specific key performance area for climate with a quantitative objective of 10% reduction in CO₂ emissions. Given that CO₂ emissions are already subject to a performance target under the Environment Key Performance area under the legislation currently in force, the Presidency proposes a joint key performance area for climate and environment (*line 200*), together with a recital clarifying that a methodology should be developed to take into account elements to reduce emissions and air pollutants, in particular those attributable to ANSPs. The Rapporteur could accept this proposal provided that the recital clarifies that one objective of the joint Key Performance area is the reduction of CO₂ emissions (*line 180*), without specifying any specific value for that objective. The Presidency suggests accepting this request.
42. In its resolution, the European Parliament supported binding Union wide targets for all air navigation services, including Terminal air navigation services, as possible under the legislation currently in force even if they are not explicitly mentioned. In light of the disparities between airports in the EU, the Council General Approach did not maintain Union wide targets for Terminal air navigation services. The Rapporteur could accept indicative performance targets for Terminal air navigation services if these are defined in all key performance areas. The Presidency suggests that the Commission adopts **indicative performance values for the key performance areas of cost-efficiency and capacity only**, defined for Terminal air navigation services for groups of comparable terminal areas in the Union, as a reference that may be used when setting the national targets for those services, although this is backsliding compared to the legislation currently in force¹³ (*line 180*).

- ***Local circumstances***

43. The Rapporteur is totally opposed to taking into account local circumstances when setting the Union-wide performance targets (*lines 198, 204a and 218*), in line with the legislation currently in place¹⁴. However, the Presidency proposes to consider local circumstances when setting the Union wide targets, since they are known in advance to the start of the reference

¹³ Article 11 of Regulation 549/2004.

¹⁴ Article 14(1) of Regulation 2019/317.

period. In addition, the Presidency suggests **considering local circumstances in the implementation of Union wide targets at national level**, namely in the development of performance plans (*line 218*), and in the assessment of the consistency of national performance targets for *en route* air navigation services with the Union-wide performance targets (*line 235*).

- ***Deviation from targets***

44. The Rapporteur could accept that interdependencies between key performance areas (*lines 204, 218 and 235*) are considered at various steps of the performance review, in line with the General Approach. However, the Rapporteur rejects the possibility for the Commission to allow a deviation from Union-wide performance targets in other Performance areas to achieve Performance targets in the Environment Performance area, as defined in the Council General Approach (*line 236*). The Presidency proposes to maintain such a possibility for the Commission without specifying the prioritisation of any specific key performance area in the basic act, so that the overall performance scheme can be adapted to the priorities of the network in each reference period (*line 236*).
45. The Rapporteur could also accept the principle that only elements attributable to air navigation service providers are considered in the context of incentive schemes in case of deviation of performance (*line 193*). Nevertheless, the Presidency will insist on including in the corresponding recital, as an interpretative element for the operative provision, that the financial disincentives should not impair the financial strength of the air navigation service provider. As a small concession and in order to ensure the symmetry of the incentive schemes, the Presidency also proposes that the recital clarifies that unforeseeable and significant events outside air navigation service providers' control are taken into account for both financial incentives and disincentives.
46. Lastly, the Rapporteur cannot accept that corrective measures take into account safety considerations, measures adopted to improve the overall functioning of the network or unforeseeable and significant events outside the air traffic service provider's control (*line 253*). The Presidency requests the flexibility to clarify those points in a recital.

- ***Joint performance plans***

47. The Rapporteur wishes to condition the submission of joint performance plans for all air navigation services by several Member States to an improvement of joint performance, cross-

border initiatives, and joint targets in all key performance areas. The Presidency suggests reflecting those conditions in a recital (*line 213a*).

- ***Allocation of costs***

48. In its resolution, the European Parliament supported that the Commission establishes a classification of costs between *en route* and terminal air navigation services and that the PRB assesses the allocation of costs in accordance with this classification and a methodology. The Rapporteur and the Presidency tentatively agree on the deletion of the provisions related to classification (*lines 207 to 211*) and the suppression of a role for the PRB in assessing the allocation of costs (*lines 231 to 233*). Instead, the NSAs shall assess the allocation of the costs of air navigation service providers.
49. However, whereas the Presidency considers that such an assessment should be based on general principles defined by the Commission, the Rapporteur still insists on reflecting the status quo and to request the NSAs to develop a methodology, based on principles adopted by the Commission, to guide the air navigation service providers in the allocation of their costs (*lines 195, 228*).

- ***Revision of Union wide targets and performance plans***

50. The Rapporteur and the Presidency tentatively agreed on the provisions regarding the revisions of Union wide targets and performance plans (*lines 304 to 309*). Nevertheless, following the request from some delegations, the Presidency will insist on an obligation for the Commission to revise Union-wide targets in case of significantly changed circumstances (*line 303*). In addition, the Presidency will insist on maintaining the provisions related to the possibility for Member States to revise Performance plans under certain conditions (*lines 308 and 310*).

- ***Implementing and delegated acts***

51. Except in one instance (*line 243*), the Rapporteur maintains that the Comitology should be exercised in accordance with the advisory procedure whereas the Council General Approach insists on the examination procedure. The Presidency request the flexibility to use the advisory procedure with respect to the adoption of three types of implementing decisions, when the Commission approves the performance plans (*lines 237, 240 and 243*), in order to reflect the status quo. Another option, to be discussed regarding in Article 37 at the last

trilogue, would be to use the examination procedure without the no-opinion clause, that is the Commission can adopt its decision if the Committee does not deliver its opinion.

52. The Presidency takes note of the opposition of delegations to any additional delegated act in SES 2+ recast. As regards chapters II and III as well as the related provisions in the proposal amending EASA Basic regulation, the Presidency notes that the Rapporteur insists on only one additional empowerment: for the Commission to adopt delegated acts regarding requirements for traffic management of unmanned and manned aircraft operations. The Presidency will insist on the deletion of this empowerment. Moreover, the Presidency notes that the powers delegated to the Commission under Article 47(2) of EASA Basic Regulation are limited to amendments of the essential requirements listed in Annex VIII and, if applicable, Annex VII, where necessary for reasons of technical, operational or scientific developments or safety evidence related to the ATM/ANS, in order and to the extent required to achieve the objectives of EASA Basic Regulation. In any case, the empowerment of the Commission to adopt delegated acts (Article 36) has not been discussed in detail during the technical meetings and will be addressed at the last trilogue.

- *Tasks and governance of the Performance Review Body*

53. A PRB with regulatory powers was one of the major asks of the European Parliament. As already mentioned, the Rapporteur can now concede to an advisory role for the PRB provided that the PRB is an entity established permanently with staff with the required expertise for its tasks. The Presidency proposes to agree with those conditions, since they seem reasonable in light of the important concession from the Rapporteur and in light of SES 2 + objectives. The Commission will remain the regulator, in line with the Council General Approach.
54. Working on this assumption and after discussion in the working party on aviation, the Presidency proposes the compromise text set out in ST 16432/23 ADD3 and summarised hereafter.
55. The text in 16432/23 ADD 3 includes, in its PART I, provisions that may be included in the SES 2 + recast, regardless of the establishment of the PRB. The PART II includes provisions in case a PRB is to be established as a stand-alone agency or to be part of an existing EU agency. Consequently, the corresponding provisions will have to be included i) in the SES2+ Regulation, or ii) in an amendment to the legal act establishing an existing Agency, in the case the PRB is established in that existing Agency.

56. Since the PRB would have a purely advisory role, certain provisions in the SES2+ recast shall be deleted, such as the possibility for the PRB to take over the NSA supervisory tasks (*lines 80 to 90*). In addition, some details on PRB internal functioning, included in the Proposal for a regulation amending EASA Basic Regulation, are no longer necessary. Nevertheless, depending on the establishment as a stand-alone Agency or in an existing Agency, a certain level of additional details may be necessary and can be specified at a later stage.
57. The role of the PRB would be to assist the Commission, and the NSAs on request, for the implementation of the performance and charging schemes.
58. The PRB would be composed of a Board for Performance Review, a Director for Performance Review, and an NSA Cooperation Board. The NSA Cooperation Board would allow the representation of Member States in the PRB and replace the current NSA Coordination Platform (NCP) to reinforce and to make permanent the network for NSA coordination while avoiding duplication of structures and additional administrative burden for NSAs. The Director for Performance Review would be responsible for the overall functioning and the execution of tasks assigned to the PRB and would be selected by the Commission and the Board for Performance Review and appointed by the Board for Performance Review following a public call for expression of interests, after consultation of the NSA Cooperation Board. The Board for Performance Review would provide opinions, and where appropriate, comments on and amendments to the proposals of the Director for Performance Review for draft opinions, recommendations, reports and guidance material. The 5 members of the Board for Performance Review would be appointed by the Commission, following a public call for expression of interest, upon approval by Member States.
59. The PRB annual activity report will be sent to the Commission, the European Parliament, the Council and the Court of Auditors in accordance with standard reporting rules for EU Agencies.

V. PRESIDENCY SUGGESTIONS ON ESTABLISHMENT AND FINANCING OF THE PRB

60. The options presented below are subject to examination of, and agreement on concrete text proposals. To this end, the Presidency and the incoming Presidency will revert to delegations in due time.

1. Establishment of the PRB

61. The Rapporteur expressed its flexibility to place the PRB in any existing EU body or as a new standalone Agency. The Presidency seeks flexibility from the delegations to negotiate with the Parliament based on the following options:

Option 1.A: To establish the PRB as a stand-alone EU Agency.

62. The Presidency notes that this option would ensure the greatest level of independence of the PRB since the standalone agency would have legal personality.

63. However, this option could also be the costliest, given the need to create a completely new structure separated from any other EU body. To minimise the costs and benefit from the infrastructure and administrative support of another organisation, the hosting of the standalone agency by an international organisation, such as Eurocontrol, could be envisaged and achieved by the conclusion of a specific agreement with that international organisation to that effect, similar to the one already in place between Eurocontrol and the SESAR Joint Undertaking. In addition, staff from Eurocontrol could be seconded to the new Agency if needed.

64. In such case, SES 2+ recast must include provisions ensuring that internal decision-making process of the PRB is entirely autonomous and independent from the said organisation's governance and decision-making structures so that there is no dependence on non-EU States for the PRB functioning. In addition, provisions might need to be introduced so that the PRB is respecting EU rules including on data protection.

65. It should also be noted that the Commission may consider that the establishment of such an Agency in the SES 2+ recast would significantly alter its initial proposal.

Option 1.B: To establish the PRB in an existing EU Agency

66. This option presents the advantage of mutualising the administrative resources of an existing Agency and therefore is less costly. The Presidency recognises that EASA would be the Agency where the tasks of the PRB would be better placed, since it is the only EU Agency dealing specifically with aviation. However, due to the concerns expressed by several Member States in relation to the establishment within EASA, the Presidency also highlights that some other Agencies could be considered under this option, such as the European Railway Agency.

67. However, it should also be highlighted that, in the case of an establishment in an Agency different than EASA, a new proposal from the Commission would be needed to amend the legal basis establishing that existing Agency.

2. Funding of the PRB

68. As regards the funding of the PRB, the Presidency sees two possibilities:

Option 2.A: Additional charges on Airspace users

69. The PRB set up and operational costs could be financed from fees paid by air navigation service providers. Those fees would be included in the air navigation service providers cost bases and eligible to be recovered through air navigation charges under Article 20 of SES 2 + recast, similarly to the costs stemming from Eurocontrol's International Convention. The mechanism to collect charges is already in place under SES legislation currently in force and managed by the Central Route Charges Office (CRCO) in Eurocontrol.

70. In order to limit administrative burden for air navigation service providers, a variant similar to the administrative unit rate for CRCO could be put in place if its legal feasibility is confirmed. Under such a variant, the collection of fees could be organised via an administrative unit rate, similar to the one existing today, and directly charged by CRCO and transferred to the PRB, without being included in the cost base of Member States.

71. In both cases, the cost would in fact be passed on to airspace users via route charges. It can be estimated that the corresponding increase of the charges would only be marginal. Using 2019 figures and dividing the total cost of the PRB (6 million Euros) by the total number of service units in Europe (139 million), this would represent an increase in the unit cost of 0.04 Euros. The targeted unit cost for 2019 being 50.65 Euros, such an increase would be of 0.07%.¹⁵

Option 2.B: EU budget

72. This option would present the advantage of a permanent and stable source of funding for the PRB. However, it would have to be coordinated within the budgetary authority of the Union full respect of the Financial Regulation and the Multiannual Financial Framework.

¹⁵ Source : Staff Working Document of the Commission ST 11020/20.

VI. CONCLUSION

73. The Permanent Representatives Committee is invited to:

- examine the open political issues summarised under part IV above, indicate flexibility/preference concerning the suggested compromise texts presented;
 - share their views or signal possible flexibility on the Presidency suggestions regarding the establishment and financing of the PRB summarised under part V above;
 - agree to the revised mandate for the forthcoming trilogue, including the technical points agreed at technical level, as set out in the Addenda ST 16432/23 ADD1-ADD3 (four-column tables);
 - examine the Addenda ST 16432/23 ADD4, which includes the essential elements of the remaining issues, in order to establish a dialog with the Parliament regarding the future work on the file.
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GLOSSARY

NSA: National supervisory authority (*national economic regulator*)

NCA: National competent authority under Regulation 2018/1139 (*national safety regulator*)

Air Navigation Service (ANS) = Air Traffic Service (ATS) + Communication, navigation and surveillance services (CNS) + Aeronautical information services (AIS) + Air traffic data services (ADS) + Meteorological services (MET)

Air Traffic Service (ATS) = En-route ATS + Terminal ATS

CIS: Common Information Services (*for unmanned aircrafts*)

ANSP: Air Navigation Service Providers

ATSP: Air Traffic Service Providers

CISP: Common Information Services Providers

PRB: Performance Review Body

