



Council of the
European Union

Brussels, 8 July 2022
(OR. en)

11105/22

Interinstitutional Files:
2013/0186(COD)
2020/0264(COD)

LIMITE

AVIATION 158
CODEC 1104

WORKING DOCUMENT

From: General Secretariat of the Council

To: Delegations

No. Cion doc.: 10840/21 + ADD1, 10841/21 + COR1

Subject: Amended proposal for a Regulation of the European Parliament and the Council on the implementation of the Single European Sky (recast)
Proposal for a Regulation of the European Parliament and 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
– Non-paper by the Presidency

In view of the Working Party on Aviation of 14 July 2022, delegations will find, in annex a nonpaper by the Presidency in order to steer the discussions.

11105/22 IB/mm 1

TREE.2.A LIMITE **EN**

1. INTRODUCTION

1. Negotiations between the Council and the Parliament started under the Slovenian Presidency on 13 July 2021. Since then several technical meetings have been held on the national supervisory authorities, certification for the provision of services and the network management. A second trilogue was organised on the network management on 22 November 2021, without an agreement at the political level. Under the French Presidency, technical meetings focused on some aspects of the performance scheme and the governance of the Performance Review Body.
2. Formal positions between the two institutions remain far apart. However, the European Parliament and the French Presidency made efforts to look for compromises. The purpose of this note is to take stock of the discussions and outline the main points where a compromise needs to be found upfront, in order to identify potential flexibilities to overcome points of divergence.
3. Other important aspects, such as the opening of some air navigation services to market conditions and the charging scheme including and the possible establishment of a common unit rate and of a modulation of charges for air navigation services at Union level, have not been addressed so far in the technical discussions and, therefore are not dealt with in this note.

2. INDEPENDENCE OF THE NATIONAL SUPERVISORY AUTHORITIES

4. According to the Council general approach¹, national supervisory authorities should be required to be functionally independent from air navigation services providers (and not legally independent). Moreover, Member States have the flexibility to organise economic oversight and safety oversight functions in the same administrative entity. In addition, during the technical discussions, the Slovenian Presidency proposed to specify a delimited set of requirements for the recruitment of national supervisory authorities' staff and conflict of interests obligations.

¹ See ST 9490/21, 3 June 2021.

5. The European Parliament, on the other hand, is insisting that national supervisory authorities are separate legal entities from the service providers, with own budget appropriations. Similarly to the Council, the EP foresees the possibility that the NSA is set up as part of another national regulatory authority, including as part of the competition authority. With respect to the merging of economic oversight and safety oversight functions, the European Parliament made a compromise proposal for a possibility to merge national supervisory authorities and national competent authorities if independence requirements can be met and subject to the approval of the Commission. Moreover, the European Parliament insists on more stringent independence requirements. This includes that strategic staff must be appointed by a Member States authority that does not directly exert ownership rights over the air navigation service provider; in addition, staff should not be seconded from air navigation service providers and conflict of interest measures should be in place for past and future employment.

3. **CERTIFICATION OF AIR NAVIGATION SERVICE PROVIDERS²**

6. According to the Council general approach, the provision of air navigation services within the EU should be conditional on the holding of a unique certificate, including requirements on financial robustness, liability and insurance cover, as it is the case under the existing legislation. During the technical discussions, the Slovenian Presidency proposed to spell out that the issuance of the certificate is conditional on the positive opinion of the national supervisory authority with respect to the fulfilment of EU requirements on financial robustness as well as liability and insurance coverage by the air navigation service provider; in addition, the national supervisory authority would be liable for the opinion provided. The European Parliament insists on treating independently the economic part and the safety part of a unique certificate with distinctive responsibility and process for application, approval, suspension and revocation. Moreover, the European Parliament insists that the Commission should be empowered to adopt delegated acts to amend the list of conditions to which a certificate may be subject to.

² According to the Council General approach, Member States are also granted a new possibility to decide to exempt from all, or part of, the SES Regulation (not only from certification) the military air navigation providers providing services to civil traffic.

4. **PERFORMANCE SCHEME**

7. According to the Council general approach, EU wide performance targets should be defined for en-route air navigation services only. National supervisory authorities should be responsible for verifying the allocation of common costs between en-route and terminal air navigation services on the basis of criteria defined at national level (general principles existing in current Union legislation are removed). National supervisory authorities should draft the performance plans and Member States should submit these to the Commission for approval, as is the case in existing legislation. Performance plans should cover both en-route and terminal air navigation services. The Commission should verify the consistency of the performance plans with EU wide performance targets taking into account local circumstances and adopt its decisions relating to the compliance of the performance plans through examination procedure. According to the Council General Approach, in case the divergence from the Union-wide targets can be justified by information provided in the plan, or by safety considerations, the local performance targets must be considered consistent. The Performance Review Body (PRB) should maintain an advisory role to the Commission and not be within the structures of EASA.
8. During the technical discussions, the French Presidency proposed that the Commission should review the national criteria to allocate common costs to en-route and terminal air navigation services and, after consulting the national supervisory authorities and the stakeholders, issue a decision adopted under examination procedure, establishing general principles to be applied by the national supervisory authorities when defining national criteria. Moreover, the French Presidency proposed that a separate performance plan be submitted for terminal air navigation services in the case where the air navigation service provider is designated only for terminal air navigation services and not for en-route air navigation services. In addition, the French Presidency proposed that local circumstances should be a criterion for the assessment of performance plans that would be defined in an implementing act.

9. On the other hand, the European Parliament's position is that the Commission should adopt EU-wide targets for both for en-route and terminal air navigation services through advisory procedure. In addition, the Commission should approve the classification of en-route and terminal air navigation services notified by each Member States and the national supervisory authorities should assess the allocation of costs between en route and terminal air navigation services on the basis of that classification and of a methodology defined by the Commission through advisory procedure. The air navigation service providers should draft and submit distinct performance plans for en-route and terminal air navigation services. The performance plans for terminal air navigation services should be submitted to the national supervisory authorities for assessment and approval whereas the performance plans for en-route air navigation services should be submitted to the national supervisory authorities and the PRB. Once the performance plans have been evaluated by the national supervisory authorities, the PRB should assess and approve the performance plans for en-route air navigation services.

5. FUNCTIONAL AIRSPACES BLOCKS

10. The Council's general approach re-instated functional airspace blocks on a voluntary basis, without the list of criteria that those functional airspace blocks need to fulfil, which exists in current legislation. During the technical meetings, the French Presidency proposed to introduce the possibility to submit joint performance plans, under certain conditions and, consequently that, for en-route services, joint operational performance targets (capacity, climate/environment) would then be mandatory, while cost-efficiency performance targets would remain separated for each charging zone. If a compromise were found on this possibility, then the Council could accept to remove reference to Functional Airspace Blocks from the SES 2+ Recast proposal.
11. The European Parliament remains sceptical on the added-value of such joint performance plans.

6. INSTITUTIONAL SET UP FOR THE PERFORMANCE REVIEW

12. Without prejudice to the location of the PRB, the French Presidency also explored the possibility to transfer a decision-making power to the PRB with respect to the assessment of performance plans under two conditions:

13. First, the EU-wide targets, the criteria to assess consistency of the local targets with the EU-wide performance targets and to support alert mechanisms, and general principles and requirements for the incentive schemes should be adopted by the Commission through examination procedure with the no-opinion clause.
14. Second, the national supervisory authorities should be duly represented in the regulatory board and the board of appeal of the PRB and the opinion of the regulatory board should be binding on the Director for the Performance Review who adopts the decision. In this respect, the French Presidency proposed two options for the compositions of the regulatory board and of the board of appeal. Under the first option, the regulatory board is composed of 27 representatives of the Member States national supervisory authorities and the board of appeal consists of 2 representatives of the Member States national supervisory authorities for each of the five comparator groups defined on the basis of Decision (EU) 2021/891. Under the second option, the regulatory board is composed of 3 representatives of the Member States national supervisory authorities for each of the 5 comparator groups defined on the basis of Decision (EU) 2021/891 and the board of appeal consists of 12 representatives of Member States national supervisory authorities not represented in the regulatory board.
15. With respect to the governance of the PRB, the European Parliament proposed that 9 Member States national supervisory authorities are represented in the regulatory board and that the board of appeal consists of 6 members selected from current or former senior national supervisory authorities' staff, competition authorities or other Union or national institutions with relevant experience in the aviation sector. With respect to the location of the PRB, the European Parliament indicated openness to set up a new Union Agency, completely distinct from the EASA.

7. THE COMPETENCES AND POWERS OF THE NETWORK MANAGER

16. The Council general approach strengthened the network perspective with the addition of new network functions as well as extended and clearly delineated roles and tasks for the network manager while respecting the sovereign powers of Member States. The main outstanding issues after the trilogue of 22 November 2021 are the following:

17. Delegations consider that a reference to the sovereign rights of Member States over their airspace and to the responsibilities of Member States with regard to public order, public security and defence in Article 26(1) is particularly relevant given that the network functions are carried out jointly by the operational stakeholders with the support of the Network Manager, in particular, in relation to the design, management and optimisation of airspace structures. The European Parliament considers that a reference to Article 1(2), the wording of which is the same as in the legislation currently in force, is sufficient since it applies to the whole Regulation.
18. Delegations wish to ensure the continuity of air traffic management activities and the return of their investments in EUROCONTROL infrastructure. The European Parliament does not contest that Eurocontrol may remain also in the future the appointed Network Manager, but considers that such appointment should not be laid down directly in the Regulation, in particular because EUROCONTROL is an intergovernmental body and it therefore opposes the explicit mention of EUROCONTROL in Article 27. In addition, the European Parliament insists on the definition of requirements for the functional and hierarchical separation of the Network Manager from other functions that its hosting organisation may be carrying.
19. Delegations consider that the network operations plan (NOP) is an evolving plan, updated regularly, and that not all its elements are binding whereas the European Parliament considers that the Network Manager should have the power to adopt, through cooperative decision making, measures to implement the network functions and that the NOP should be made binding on operational stakeholders. The Slovenian Presidency proposed to refer more specifically to actions determined through cooperative decision-making that operational stakeholders shall implement, in particular their commitments set out in the Network Operations Plan, as already defined in the secondary legislation. However, the rapporteur insisted that the remedial actions taken by the network management board established under secondary legislation should also be qualified as binding.
20. Delegations consider that network functions are an essential part of the basic act and cannot be changed by delegated act. On the other hand, the European Parliament considers that the list of network functions should not be exhaustive and that the Commission should be empowered to add new network functions by delegated act.

21. Delegations consider it important to have a clear delimitation of competences between the operational stakeholders and the Network Manager with regard to the implementation of network functions. On the operational level, properly defined cooperative decision making process plays a pivotal role in these arrangements. Furthermore, according to the Meroni case law, the tasks delegated to a third party must be clearly defined and delimited and an exhaustive list of tasks is legally the most secure way to achieve this delimitation. On the other hand, the European Parliament considers that the tasks of the Network Manager are sufficiently delimited as their scope relate to the implementation of the network functions. Due to their detailed nature and need for flexibility, the European Parliament considers that they should therefore not be exhaustively defined in the basic act but rather in an implementing act, as is the case in the current legislation.

8. **CONCLUSION AND WAY FORWARD**

22. The Czech Presidency is proposing to discuss a common vision of what can be achieved by the adoption of the proposed package. We need to identify what is really problematic in the current system and needs to be revised. Furthermore on the more positive note, we need to have common understanding of what we want to improve in the current system and how during both short and medium-terms.
23. In parallel, the Czech Presidency will aim to organise technical meetings with the European Parliament on chapters and parts not previously discussed, notably on chapter V, charging scheme and liberalization of provision of air navigation services.
24. The Czech Presidency will continue to work on the various options for Member States representation in the PRB, including on the principle of rotation of Member States.
25. During the discussions, the Czech Presidency will take into account several important interlinkages, such as role and governance of the PRB, or role and independence of NSAs.
26. As a principle, the Czech Presidency wants to focus mainly on removing obstacles to development of capacity and finding ways to positive motivation for creating capacity of the system whilst being recognizant of the interdependencies between performance areas.

27. Similarly, positive incentives may be introduced into the charging scheme to promote ANSPs to provide higher capacity than declared in the Performance plan in case the network deems it necessary.
 28. Furthermore, the Czech Presidency will aim to not increase administrative burden for the Member States.
 29. In preparation of the upcoming technical meetings, delegations are invited to define their position and indicate any flexibilities for each of the issues identified in paragraphs 4 to 21, as well as on the way forward proposed by the Czech Presidency.
-